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# *The* **NORTH CAROLINA REGISTER**

IN THIS ISSUE . . . . .

## **EXECUTIVE ORDERS**

## **PROPOSED RULES**

Environment, Health, and Natural Resources  
Foresters, Registration for  
Human Resources  
Insurance  
Transportation

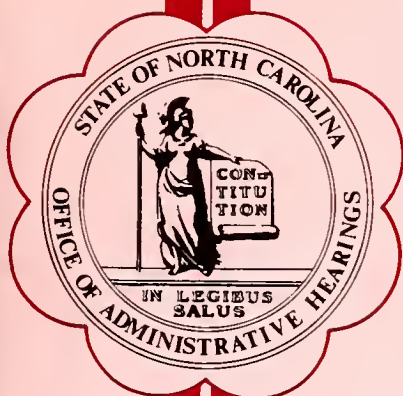
## **RRC OBJECTIONS**

## **RULES INVALIDATED BY JUDICIAL DECISION**

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**ISSUE DATE:** July 15, 1993

**Volume 8 • Issue 8 • Pages 641 - 708**



# INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

## NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the North Carolina Register should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

## ADOPTION AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

## TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

## NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or less, plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

## CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, page number and date. 1:1 NCR 101-201, April 1, 1986 refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of Administrative Hearings, ATTN: Rules Division, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, (919) 733-2678.

# ***NORTH CAROLINA REGISTER***



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**NORTH CAROLINA REGISTER**  
**Publication Schedule**  
*(January 1993 - December 1993)*

Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing	Earliest Date for Adoption by Agency	Last Day to Submit to RRC	*Earliest Effective Date
*****	*****	*****	*****	*****	*****	*****
01/04/93	12/09/92	12/16/92	01/19/93	02/03/93	02/20/93	04/01/93
01/15/93	12/22/92	12/31/92	01/30/93	02/14/93	02/20/93	04/01/93
02/01/93	01/08/93	01/15/93	02/16/93	03/03/93	03/20/93	05/03/93
02/15/93	01/25/93	02/01/93	03/02/93	03/17/93	03/20/93	05/03/93
03/01/93	02/08/93	02/15/93	03/16/93	03/31/93	04/20/93	06/01/93
03/15/93	02/22/93	03/01/93	03/30/93	04/14/93	04/20/93	06/01/93
04/01/93	03/11/93	03/18/93	04/16/93	05/01/93	05/20/93	07/01/93
04/15/93	03/24/93	03/31/93	04/30/93	05/15/93	05/20/93	07/01/93
05/03/93	04/12/93	04/19/93	05/18/93	06/02/93	06/20/93	08/02/93
05/14/93	04/23/93	04/30/93	05/29/93	06/13/93	06/20/93	08/02/93
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10/15/93	09/24/93	10/01/93	10/30/93	11/14/93	11/20/93	01/04/94
11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
12/01/93	11/05/93	11/15/93	12/16/93	12/31/93	01/20/94	03/01/94
12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94

\* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.



**EXECUTIVE ORDER NUMBER 17  
NORTH CAROLINA EMERGENCY  
RESPONSE COMMISSION**

WHEREAS, the Emergency Planning and Community Right-to-know Act of 1986 enacted by the United States Congress, requires the Governor of each state to appoint a State Emergency Response Commission.

NOW THEREFORE, by the authority vested in me as Governor by the Constitution and laws of North Carolina, **IT IS ORDERED:**

**Section 1. Creation.**

There is created the North Carolina Emergency Response Commission, hereinafter referred to as the "Commission." The Commission shall consist of not less than eleven members and shall be composed of at least the following persons:

Director, Division of Emergency Management, Department of Crime Control and Public Safety, who shall serve as Chairperson.

Coordinator, State Highway Patrol Hazardous Materials, Department of Crime Control and Public Safety;

Safety Director, Department of Agriculture;

Supervisor, Facilities Assessment Unit, Division of Environmental Management, Department of Environment, Health and Natural Resources;

Director, Solid Waste Management Division, Department of Environment, Health and Natural Resources;

Director, Radiation Protection Division, Department of Environment, Health and Natural Resources;

Director, Office of Waste Reduction (Pollution Prevention Program), Department Environment, Health and Natural Resources;

Director, Emergency Planning, Division of Highways, Department of Transportation;

Chief, Transportation Inspection, Division of Motor Vehicles (Enforcement Section), Department of Transportation;

Manager, Training/Standards Program, Fire and Rescue Services Division, Department of Insurance;

Chief, Emergency Medical Services, Division of Facility Services, Department of Human Resources; and

Six at-large members from local government and private industry with technical expertise in the emergency response field may be appointed by the Governor and serve for terms of two (2) years at the pleasure of the Governor.

**Section 2. Duties.**

The Commission is designated as the State Emergency Response Commission as described in the Act and shall perform all duties required of it under the Act, including, but not limited to, the following:

(a) Appoint local emergency planning committees described under Section 301(c) of the Act and supervise and coordinate the activities of such committees.

(b) Establish procedures for reviewing and processing requests from the public for information under Section 324 of the Act.

(c) Designate emergency planning districts to facilitate preparation and implementation of emergency plans as required under Section 301(b) of the Act.

(d) After public notice and opportunity for comment, designate additional facilities that may be subject to the Act under Section 302 of the Act.

(e) Notify the Administrator of the Environmental Protection Agency of facilities subject to the requirements of Section 302 of the Act.

(f) Review the emergency plans submitted by local emergency planning committees and make recommendations to the committees on revisions of the plans that may be necessary to ensure coordination of such plans with emergency response plans of other emergency planning districts.

**Section 3. Administration.**

(a) The Department of Crime Control and Public Safety shall provide administrative support and

staff as may be required.

(b) Members of the Commission shall serve without compensation but may receive reimbursement, contingent on the availability of funds, for travel and subsistence expenses in accordance with state guidelines and procedures.

#### **Section 4. Effect on other Executive Orders.**

The following Executive Orders of the Martin Administration are hereby rescinded: Numbers 43, 48, 50, and 165. All other portions of Executive Orders inconsistent herewith are also rescinded.

This Executive Order shall be effective immediately.

Done in the Capitol City of Raleigh, North Carolina, this the 16th day of June, 1993.

### **EXECUTIVE ORDER NUMBER 18 EMERGENCY MANAGEMENT PROGRAM**

WHEREAS, the natural phenomena such as hurricanes, floods, tornadoes, severe winter weather, droughts, earthquakes, and man-made disasters such as explosions or major electric power failures are an ever-present danger; and

WHEREAS, potential enemies of the United States now possess the capability of launching attacks and unprecedented destruction upon this State and nation, from land, sea and air; and

WHEREAS, it is the duty of the Department of Crime Control and Public Safety to provide emergency services to protect the public against natural and man-made disasters; and

WHEREAS, it is the duty of the Department of Crime Control and Public Safety to ensure the preparation, coordination, and readiness of emergency management and military plans and effective conduct of emergency operations by all participating agencies in order to sustain life and prevent, minimize, or remedy injury to persons and damage to property resulting from disasters caused by enemy attack or other hostile actions or from disasters due to natural or man-made causes; and

WHEREAS, the Emergency Management Act of 1977, as amended, N.C.G.S. 166A-1, et seq., the

North Carolina Emergency War Powers Act, N.C.G.S. 147-33.1, et seq., and Article 36A of Chapter 14 of the General Statutes confer upon the Governor comprehensive powers to be exercised in providing for the common defense and protection of the lives and property of the people of this State against both man-made and natural disasters; and

WHEREAS, the effective exercise of these emergency powers requires extensive initial planning, continued revision and exercising of plans, assignment of emergency management functions prior to the occurrence of an emergency, the training of personnel in order to ensure a smooth, effective application of governmental functions to emergency operations, and the quick response of all necessary State resources; and

WHEREAS, these emergency management functions are intended to be and can be accomplished most effectively through those established activities of state and local government whose normal functions relate to those emergency services which would be needed;

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the laws and the Constitution of North Carolina, **IT IS ORDERED:**

#### **Section 1. Coordination of Services.**

In the event the Governor, in the exercise of his constitutional and statutory responsibilities, shall deem it necessary to utilize the service of more than one subunit of state government to provide protection to the people from natural or man-made disasters or emergencies, including, but not limited to, wars, insurrections, riots, civil disturbances, or accidents, the Secretary of Crime Control and Public Safety, under the direction of the Governor, shall serve as the chief coordinating officer for the State between the respective subunits so utilized, as provided in N.C.G.S. 143B-476.

#### **Section 2. Response to Emergency.**

Whenever the Secretary of Crime Control and Public Safety exercises the authority provided in Section 1, he shall be authorized to utilize and allocate all available state resources as are reasonably necessary to cope with the emergency or disaster. His authority includes the direction of personnel and functions of state agencies for the purpose of performing or facilitating the initial response to the disaster or emergency. Following the initial response, the Secretary, in consultation

with the heads of the state agencies which have, or appear to have, responsibility for dealing with the emergency or disaster, shall designate one or more lead agencies to be responsible for subsequent phases of the response to the emergency or disaster. Pending an opportunity to consult with the head of such agencies, the Secretary may make interim lead agency designations.

### **Section 3. Reporting.**

Every department of state government is required to report to the Secretary of Crime Control and Public Safety, by the fastest means practicable, all natural or man-made disasters or emergencies, which appear likely to require the utilization of the services of more than one subunit of State government.

### **Section 4. Delegation of Authority.**

The Secretary of Crime Control and Public Safety is hereby authorized to delegate the authority to utilize and allocate all available state resources as may be necessary to carry out the intent of this order.

### **Section 5. Publication of Emergency Plans.**

An explanation of the emergency management functions assigned to each state department, division, subdivision, or agency is contained in the state plans developed and published by the Division of Emergency Management of the North Carolina Department of Crime Control and Public Safety. The provisions of these documents, including attached annexes and any future revisions, are specifically incorporated herein by reference.

### **Section 6. Supporting Plans.**

The heads of the departments of state government and other agencies designated in the state emergency plans are granted the authority, and charged with the responsibility, to develop supporting plans and procedures. Upon orders of the Governor, Secretary of Crime Control and Public Safety, or his designee, these personnel shall execute the emergency management functions assigned to them in the emergency plans.

### **Section 7. Revision of Plans.**

The Secretary of Crime Control and Public Safety is hereby authorized to update and periodically revise or cause to be revised the state emergency plans and supporting plans to ensure that they will be current and consistent with the functions, duties, and capabilities of a given

department or agency.

### **Section 8. Liaisons.**

The head of each department, agency, commission or office of state government that is charged with emergency management responsibilities shall designate personnel to perform liaison functions with all other components of state government on matters pertaining to emergency management activities.

### **Section 9. Procedures.**

The heads of state government departments assigned emergency management functions shall prepare procedures to procure from governmental and private sources all materials, manpower, equipment, supplies, and services necessary to carry out these assigned functions. Each agency of state government shall cooperate with all other agencies of state government to assure the availability of resources in an emergency.

### **Section 10. Effect on Other Executive Orders.**

Executive Order Number 73 of the Martin Administration is hereby rescinded.

This Order shall become effective immediately.

Done in the Capital City of Raleigh, North Carolina, this the 16th day of June, 1993.



**TITLE 10 - DEPARTMENT  
OF HUMAN RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Medical Care Commission intends to adopt rules cited as 10 NCAC 3C .2031 - .2032, 3H .1161 - .1162; amend rules cited as 10 NCAC 3C .2021, 3H .0108, .0315, .0317 and .1151.*

*The proposed effective date of this action is December 1, 1993.*

*The public hearing will be conducted at 9:30 a.m. on September 10, 1993 at Room 201, Council Building, 701 Barbour Drive, Raleigh, NC 27603.*

***Reason for Proposed Action:***

**10 NCAC 3C .2021, .2031-.2032, 10 NCAC 3H .1151, .1161-.1162** - *To establish rules for inpatient rehabilitation beds operated by acute care hospitals and nursing facilities.*

**10 NCAC 3H .0108, .0315, .0317** - *To clarify definitions related to patient abuse and neglect and describe procedures for reporting and investigating incidents of abuse or neglect.*

**Comment Procedures:** *All written comments must be submitted to Jackie Sheppard, APA Coordinator, PO Box 29530, Raleigh, NC 27626-0530 up to and including August 16, 1993. Written comments submitted after the deadline will not be considered by the Commission.*

**CHAPTER 3 - FACILITY SERVICES**

**SUBCHAPTER 3C - LICENSING  
OF HOSPITALS**

**SECTION .2000 - SPECIALLY  
DESIGNATED UNITS**

**.2021 PHYSICIAN REQS FOR  
INPATIENT REHABILITATION  
FACILITIES OR UNITS**

(a) In a rehabilitation facility or unit a physician shall participate in the provision and management of rehabilitation services and in the provision of medical services.

(b) In a rehabilitation facility or unit a rehabilitation physician shall be responsible for a patient's

interdisciplinary treatment plan. Each patient's interdisciplinary treatment plan shall be developed and implemented under the supervision of a rehabilitation physician.

(c) The rehabilitation physician shall participate in the preliminary assessment within 48 hours of admission, prepare a plan of care and direct the necessary frequency of contact based on the medical and rehabilitation needs of the patient. The frequency shall be appropriate to justify the need for comprehensive inpatient rehabilitation care.

(ed) An inpatient rehabilitation facility or unit's contract or agreements with a rehabilitation physician shall require that the rehabilitation physician shall participate in individual case conferences or care planning sessions and shall review and sign discharge summaries and records. When patients are to be discharged to another health care facility, the discharging facility shall assure that the patient has been provided with a discharge plan which incorporates post discharge continuity of care and services. When patients are to be discharged to a residential setting, the facility shall assure that the patient has been provided with a discharge plan that incorporates the utilization of community resources when available and when included in the patient's plan of care.

(ed) The intensity of physician medical services and the frequency of regular contacts for medical care for the patient shall be determined by the patient's pathophysiologic needs.

(ef) Where the attending physician of a patient in an inpatient rehabilitation facility or unit orders medical consultations for the patient, such consultations shall be provided by qualified physicians within 48 hours of the physician's order. In order to achieve this result, the contracts or agreements between inpatient rehabilitation facilities or units and medical consultants shall require that such consultants render the requested medical consultation within 48 hours.

(fg) An inpatient rehabilitation facility or unit shall have a written procedure for setting the qualifications of the physicians rendering physical rehabilitation services in the facility or unit.

*Statutory Authority G.S. 131E-79; 143B-165.*

**.2031 ADDITIONAL REQUIREMENTS  
FOR TRAUMATIC BRAIN  
INJURY PATIENTS**

Inpatient rehabilitation facilities providing services to persons with traumatic brain injuries shall meet the requirements in this Rule in addition to



those identified in this Section.

- (1) Direct-care nursing personnel staffing ratios established in Rule .2027 of this Section shall not be applied to nursing services for traumatic brain injury patients in the inpatient, rehabilitation facility or unit. The minimum nursing hours per traumatic brain injury patient in the unit shall be 6.5 nursing hours per patient day. At no time shall direct care nursing staff be less than two full-time equivalents, one of which shall be a registered nurse.
- (2) The inpatient rehabilitation facility or unit shall employ or provide by contractual agreements physical, occupational or speech therapists in order to provide a minimum of 4.5 hours of specific or combined rehabilitation therapy services per traumatic brain injury patient day.
- (3) The facility shall provide special facility or equipment needs for patients with traumatic brain injury, including a quiet room for therapy, specially designed wheelchairs, standing tables and computers with cognitive retraining software.
- (4) The medical director of an inpatient traumatic brain injury program shall have two years management in a brain injury program, one of which may be in a clinical fellowship program and board eligibility or certification in the medical specialty of the physician's training.
- (5) The facility shall provide the consulting services of a neuropsychologist.
- (6) The facility shall provide continuing education in the care and treatment of brain injury patients for all staff.
- (7) The facility shall document specific staff training and education in the care and treatment of brain injury.
- (8) The size of the brain injury program shall be adequate to support a comprehensive, dedicated ongoing brain injury program.

*Statutory Authority G.S. 131E-79; 143B-165.*

## **.2032 ADDITIONAL REQUIREMENTS FOR SPINAL CORD INJURY PATIENTS**

Inpatient rehabilitation facilities providing services to persons with spinal cord injuries shall meet the requirements in this Rule in addition to those identified in this Section.

- (1) Direct-care nursing personnel staffing

ratios established in Rule .2027 of this Section shall not be applied to nursing services for spinal cord injury patients in the inpatient, rehabilitation facility or unit. The minimum nursing hours per spinal cord injury patient in the unit shall be 6.0 nursing hours per patient day. At no time shall direct care nursing staff be less than two full-time equivalents, one of which shall be a registered nurse.

- (2) The inpatient rehabilitation facility or unit shall employ or provide by contractual agreements physical, occupational or speech therapists in order to provide a minimum of 4.0 hours of specific or combined rehabilitation therapy services per spinal cord injury patient day.
- (3) The facility shall provide special facility or special equipment needs of patients with spinal cord injury, including specially designed wheelchairs, tilt tables and standing tables.
- (4) The medical director of an inpatient spinal cord injury program shall have either two years experience in the medical care of persons with spinal cord injuries or six month's minimum in a spinal cord injury fellowship.
- (5) The facility shall provide continuing education in the care and treatment of spinal cord injury patients for all staff.
- (6) The facility shall provide specific staff training and education in the care and treatment of spinal cord injury.
- (7) The size of the spinal cord injury program shall be adequate to support a comprehensive, dedicated ongoing spinal cord injury program.

*Statutory Authority G.S. 131E-79; 143B-165.*

## **SUBCHAPTER 3H - RULES FOR THE LICENSING OF NURSING HOMES**

### **SECTION .0100 - GENERAL INFORMATION**

#### **.0108 DEFINITIONS**

The following definitions will apply throughout this Subchapter:

- (1) "Abuse" means the infliction of physical pain, injury, mental anguish or unreasonable confinement which may cause or result in temporary or permanent mental

or physical injury, pain, harm, or death. Abuse includes, but is not limited to, the following:

- (a) Verbal abuse - any use of oral, written or gestured language which a reasonable person would view as disparaging and derogatory terms to a patient regardless of his or her age, ability to comprehend or disability;
- (b) Sexual abuse - sexual harassment, sexual coercion or sexual assault of a patient;
- (c) Physical abuse - hitting, slapping, kicking or corporal punishment of a patient;
- (d) Mental abuse - language or treatment which would be viewed by a reasonable person as involving humiliation, harassment, threats of punishment or deprivation of a patient;
- (e) Unreasonable confinement - the separation of a patient from other persons, or from his or her room, against the patient's will or the will of the patient's legal representative. Unreasonable confinement does not include emergency or short-term monitored separation used as therapeutic intervention to reduce agitation until a plan of care is developed to meet the patient's needs.
- (+2) "Accident" means an unplanned or unwanted event resulting in the injury or wounding, no matter how slight, of a patient or other individual.
- (23) "Adequate" means, when applied to various services, that the services are at least satisfactory in meeting a referred to need when measured against contemporary professional standards of practice.
- (34) "Administrator" means the person who has authority for and is responsible for the overall operation of a facility.
- (45) "Appropriate" means right for the specified use or purpose, suitable or proper when used as an adjective. When used as a transitive verb it means to set aside for some specified exclusive use.
- (56) "Brain injury long term care" is defined as an interdisciplinary, intensive maintenance program for patients who have incurred brain damage caused by external physical trauma and who have completed a primary course of rehabilitative treatment and have reached a point of no gain

or progress for more than three consecutive months. Services are provided through a medically supervised interdisciplinary process and are directed toward maintaining the individual at the optimal level of physical, cognitive and behavioral functions.

- (67) "Capacity" means the maximum number of patient or resident beds for which the facility is licensed to maintain at any given time.
- (78) "Combination facility" means a combination home as defined in G.S. 131E-101.
- (89) "Convalescent care" means care given for the purpose of assisting the patient or resident to regain health or strength.
- (910) "Department" means the North Carolina Department of Human Resources.
- (+011) "Director of Nursing" means the nurse who has authority and direct responsibility for all nursing services and nursing care.
- (+12) "Drug" means substances:
  - (a) recognized in the official United States Pharmacopoeia, official National Formulary, or any supplement to any of them;
  - (b) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;
  - (c) intended to affect the structure or any function of the body of man or other animals, i.e., substances other than food; and
  - (d) intended for use as a component of any article specified in (a), (b), or (c) of this Subparagraph.
- (+213) "Duly licensed" means holding a current and valid license as required under the General Statutes of North Carolina.
- (+314) "Existing facility" means a facility currently licensed or a proposed facility, proposed addition to a licensed facility or proposed remodeled licensed facility that will be built according to plans and specifications which have been approved by the Department through the preliminary working drawings state prior to the effective date of this Rule.
- (+415) "Exit conference" means the conference held at the end of a survey, or investigation between the Department's representatives and the facility administration representative.
- (16) "Finding" means a determination by the



State that an allegation of patient abuse or neglect, or misappropriation of patient property has been substantiated.

- (4517) "HIV Unit" means designated areas dedicated to patients or residents known to have Human Immunodeficiency Virus disease.
- (4618) "Incident" means an unplanned or unwanted event which has not caused a wound or injury to any individual but which has the potential for such should the event be repeated.
- (4719) "Interdisciplinary" means an integrated process involving a representative from each discipline of the health care team.
- (4820) "Licensed practical nurse" means a nurse who is duly licensed as a practical nurse under G.S. 90, Article 9A.
- (4921) "Licensee" means the person, firm, partnership, association, corporation or organization to whom a license has been issued.
- (2022) "Medication" means drug as defined in (11) of this Rule.
- (23) "Misappropriation of property" means the intentional exploitation, or wrongful taking or use of a patient's belongings or money whether temporary or permanent.
- (24) "Neglect" means a failure through a lack of attention, carelessness, or omission, to provide timely and consistent services, treatment or care to a patient which are necessary to obtain or maintain the patient's health, safety or comfort.
- (2425) "New facility" means a proposed facility, a proposed addition to an existing facility or a proposed remodeled portion of an existing facility that is constructed according to plans and specifications approved by the Department subsequent to the effective date of this Rule. If determined by the Department that more than half of an existing facility is remodeled, the entire existing facility shall be considered a new facility.
- (2226) "Nurse Aide" means any individual providing nursing or nursing-related services to patients in a facility who is not a licensed health professional, a qualified dietitian, or someone who volunteers to provide such services without pay, and listed in a nurse aide registry approved by the Department.
- (2327) "Nurse Aide Trainee" means an individual who has not completed an

approved nurse aide training course and competency evaluation and is demonstrating knowledge, while performing tasks for which they have been found proficient by an instructor. These tasks shall be performed under the direct supervision of a registered nurse. The term does not apply to volunteers.

- (2428) "Nursing Facility" means that portion of a nursing home certified under Title XIX of the Social Security Act (Medicaid) as in compliance with federal program standards for nursing facilities. It is often used as synonymous with the term "nursing home" which is the usual prerequisite level of state licensure for nursing facility (NF) certification and Medicare skilled nursing facility (SNF) certification.
- (2529) "Nurse in charge" means the nurse to whom duties for a specified number of patients and staff for a specified period of time have been delegated, such as for Unit A on the 7-3 or 3-11 shift.
- (2630) "On duty" means personnel who are awake, dressed, responsive to patient needs and physically present in the facility performing assigned duties.
- (2731) "Operator" means the owner of the nursing home business.
- (2832) "Patient" means any person admitted for nursing care.
- (2933) "Person" means an individual, trust, estate, partnership or corporation including associations, joint-stock companies and insurance companies.
- (3034) "Proposal" means a Negative Action Proposal containing documentation of findings that may ultimately be classified as violations and penalized accordingly.
- (3135) "Provisional License" means an amended license recognizing significantly less than full compliance with the licensure rules.
- (3236) "Physician" means a person licensed under G.S. Chapter 90, Article 1 to practice medicine in North Carolina.
- (3337) "Qualified Activities Director" means a person who has the authority and responsibility for the direction of all therapeutic activities in the nursing facility and who meets the qualifications set forth under 10 NCAC 3H .1204.
- (3438) "Qualified Dietitian" means a person who meets the standards and qualification established by the Commission on



Dietetic Registration of the American Dietetic Association included in "Standards of Practice" seven dollars and twenty-five cents (\$7.25) or "Code of Ethics for the Profession of Dietetics" two dollars and fifteen cents (\$2.15), American Dietetic Association, 216 W. Jackson Blvd., Chicago, IL 60606-6995.

- (3539) "Qualified Pharmacist" means a person who is licensed to practice pharmacy in North Carolina and who meets the qualifications set forth under 10 NCAC 3H .0903.
- (3640) "Qualified Social Services Director" means a person who has the authority and responsibility for the provision of social services in the nursing home and who meets the qualification set forth under 10 NCAC 3H .1306.
- (3741) "Registered Nurse" means a nurse who is duly licensed as a registered nurse under G.S. 90, Article 9A.
- (3842) "Resident" means any person admitted for care to a domiciliary home part of a combination home as defined in G.S. 131E-101.
- (3943) "Sitter" means an individual employed to provide companionship and social interaction to a particular patient, usually on a private duty basis.
- (4044) "Supervisor-in-Charge (domiciliary home)" means any employee to whom supervisory duties for the domiciliary home portion of a combination home have been delegated by either the Administrator or Director of Nursing.
- (4145) "Surveyor" means an authorized representative of the Department who inspects nursing facilities and combination facilities to determine compliance with rules as set forth in G.S. 131E-117 and applicable state and federal laws, rules and regulations.
- (4246) "Ventilator dependence" is defined as physiological dependency by a patient on the use of a ventilator for more than eight hours a day.
- (4347) "Violation" means a finding which directly relates to a patient's health, safety or welfare or which creates a substantial risk that death or serious physical harm will occur and is determined to be an infraction of the regulations, standards and requirements set forth in G.S. 131E-117 or applicable

state and federal laws, rules and regulations.

*Statutory Authority G.S. 131E-104; 42 U.S.C. 1396r(a).*

## SECTION .0300 - GENERAL STANDARDS OF ADMINISTRATION

### .0315 NURSING HOME PATIENT RIGHTS

(a) Written policies and procedures shall be developed and enforced to implement requirements in G.S. 131E-115 et seq. (Nursing Home Patients' Bill of Rights) concerning the rights of patients ~~and residents~~. The Administrator shall make these policies and procedures known to the staff, patients ~~and residents~~, and families of patients ~~and residents~~ and shall ensure their availability to the public by placing them in a conspicuous place.

(b) In matters of patient abuse, neglect or misappropriation the definitions shall have the meaning defined in Rule .0108 of this Subchapter for abuse, neglect and exploitation respectively as contained in the North Carolina Protection of the Abused, Neglected or Exploited Disabled Adult Act, G.S. 108A-99 et seq.

*Statutory Authority G.S. 131E-104; 131E-111; 131E-124; 131E-129; 42 U.S.C. 1396r(e)(2)(B).*

### .0317 REPORTING AND INVESTIGATING ABUSE, NEGLECT OR MISAPPROPRIATION

(a) The facility shall take proper measures to prevent patient abuse, patient neglect, or misappropriation of patient property, including but not limited to orientation and instruction of facility staff on patients' rights, and the requesting of references for all prospective employees.

(b) The Administrator shall assure that the Department is notified of ~~those accidents resulting in death, burns, fractured bones, severe cuts or bruises, hospitalization and all alleged incidents or accidents~~ which appear to be related to patient abuse, ~~or~~ neglect or misappropriation of patient property.

(c) The incident report shall be printed or typed and postmarked within 48 hours of the accident or incident. The report shall be conducted as specified in 42 CFR subsection 483.13 and shall consist of a simple statement of the patient's or resident's full name; room number; date and time of the incident or accident; type of injury, abuse, neglect or misappropriation of property; names of

persons involved; and immediate action taken by the facility.

(d) The facility shall thoroughly investigate and document according to 42 CFR subsection 483.13, which is incorporated by reference, including subsequent amendments, all alleged incidents of patient abuse, patient neglect, or misappropriation of patient property and shall take whatever steps are necessary to prevent further incidents of abuse, neglect or misappropriation of property while the investigation is in progress.

(e) The facility shall make available for inspection by the Department any information related to any alleged incident of patient abuse, patient neglect, or misappropriation of patient property including but not limited to medical records; incident reports; facility investigation; statements by victims, witnesses and alleged perpetrators; performance evaluations, in-service education, verification of listing on Nurse Aide Registry, prior disciplinary actions, employment references, and orientation documentation of staff witnesses and alleged perpetrators; facility policies; and any information related to the alleged incident.

*Authority G.S. 131E-104; 131E-111; 143B-165; 42 U.S.C. 1395; 42 U.S.C. 1396; 42 C.F.R. 483.*

## SECTION .1100 - SPECIALLY DESIGNATED UNITS

### .1151 PHYSICIAN REQUIREMENTS/ INPATIENT REHABILITATION FACILITIES OR UNITS

(a) In a rehabilitation facility or unit a physician shall participate in the provision and management of rehabilitation services and in the provision of medical services.

(b) In a rehabilitation facility or unit a rehabilitation physician shall be responsible for a patient's interdisciplinary treatment plan. Each patient's interdisciplinary treatment plan shall be developed and implemented under the supervision of a rehabilitation physician.

(c) The rehabilitation physician shall participate in the preliminary assessment within 48 hours of admission, prepare a plan of care and direct the necessary frequency of contact based on the medical and rehabilitation needs of the patient. The frequency shall be appropriate to justify the need for comprehensive inpatient rehabilitation care.

(ed) An inpatient rehabilitation facility or unit's contract or agreements with a rehabilitation

physician shall require that the rehabilitation physician shall participate in individual case conferences or care planning sessions and shall review and sign discharge summaries and records. When patients are to be discharged to another health care facility, the discharging facility shall assure that the patient has been provided with a discharge plan which incorporates post discharge continuity of care and services. When patients are to be discharged to a residential setting, the facility shall assure that the patient has been provided with a discharge plan that incorporates the utilization of community resources when available and when included in the patient's plan of care.

(ed) The intensity of physician medical services and the frequency of regular contacts for medical care for the patient shall be determined by the patient's pathophysiologic needs.

(fe) Where the attending physician of a patient in an inpatient rehabilitation facility or unit orders medical consultations for the patient, such consultations shall be provided by qualified physicians within 48 hours of the physician's order. In order to achieve this result, the contracts or agreements between inpatient rehabilitation facilities or units and medical consultants shall require that such consultants render the requested medical consultation within 48 hours.

(gf) An inpatient rehabilitation facility or unit shall have a written procedure for setting the qualifications of the physicians rendering physical rehabilitation services in the facility or unit.

*Statutory Authority G.S. 131E-104.*

### .1161 ADDITIONAL REQUIREMENTS FOR TRAUMATIC BRAIN INJURY PATIENTS

Inpatient rehabilitation facilities providing services to persons with traumatic brain injuries shall meet the requirements in this Rule in addition to those identified in this Section.

(1) Direct-care nursing personnel staffing ratios established in Rule .1157 of this Section shall not be applied to nursing services for traumatic brain injury patients in the inpatient, rehabilitation facility or unit. The minimum nursing hours per traumatic brain injury patient in the unit shall be 6.5 nursing hours per patient day. At no time shall direct care nursing staff be less than two full-time equivalents, one of which shall be a registered nurse.

(2) The inpatient rehabilitation facility or unit



shall employ or provide by contractual agreements physical, occupational or speech therapists in order to provide a minimum of 4.5 hours of specific or combined rehabilitation therapy services per traumatic brain injury patient day.

- (3) The facility shall provide special facility or equipment needs for patients with traumatic brain injury, including a quiet room for therapy, specially designed wheelchairs, standing tables and computers with cognitive retraining software.
- (4) The medical director of an inpatient traumatic brain injury program shall have two years management in a brain injury program, one of which may be in a clinical fellowship program and board eligibility or certification in the medical specialty of the physician's training.
- (5) The facility shall provide the consulting services of a neuropsychologist.
- (6) The facility shall provide continuing education in the care and treatment of brain injury patients for all staff.
- (7) The facility shall document specific staff training and education in the care and treatment of brain injury.
- (8) The size of the brain injury program shall be adequate to support a comprehensive, dedicated ongoing brain injury program.

Statutory Authority G.S. 131E-104.

#### **.1162 ADDITIONAL REQUIREMENTS FOR SPINAL CORD INJURY PATIENTS**

Inpatient rehabilitation facilities providing services to persons with spinal cord injuries shall meet the requirements in this Rule in addition to those identified in this Section.

- (1) Direct-care nursing personnel staffing ratios established in Rule .1157 of this Section shall not be applied to nursing services for spinal cord injury patients in the inpatient, rehabilitation facility or unit. The minimum nursing hours per spinal cord injury patient in the unit shall be 6.0 nursing hours per patient day. At no time shall direct care nursing staff be less than two full-time equivalents, one of which shall be a registered nurse.
- (2) The inpatient rehabilitation facility or unit shall employ or provide by contractual agreements physical, occupational or

speech therapists in order to provide a minimum of 4.0 hours of specific or combined rehabilitation therapy services per spinal cord injury patient day.

- (3) The facility shall provide special facility or special equipment needs of patients with spinal cord injury, including specially designed wheelchairs, tilt tables and standing tables.
- (4) The medical director of an inpatient spinal cord injury program shall have either two years experience in the medical care of persons with spinal cord injuries or six month's minimum in a spinal cord injury fellowship.
- (5) The facility shall provide continuing education in the care and treatment of spinal cord injury patients for all staff.
- (6) The facility shall provide specific staff training and education in the care and treatment of spinal cord injury.
- (7) The size of the spinal cord injury program shall be adequate to support a comprehensive, dedicated ongoing spinal cord injury program.

Statutory Authority G.S. 131E-104.

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*Notice* is hereby given in accordance with G.S. 150B-21.2 that the Division of Services for the Deaf and Hard of Hearing intends to amend rules cited as 10 NCAC 23E .0302 and .0304 - 0309.

*The* proposed effective date of this action is October 1, 1993.

*The* public hearing will be conducted at 6:00 p.m. on August 19, 1993 at the Anderson Building, Dix Campus, Conference Room, 1st Floor, 695A Palmer Drive, Raleigh, NC 27626 .

*Reason for Proposed Action:* Expand existing testing system to incorporate testing of interpreters in educational settings.

*Comment Procedures:* Any interested person may present his/her comments at the hearing for a maximum of 10 minutes or by submitting a written



statement. Any person wishing to make a presentation at the hearing should contact: Louise Spry, DSD/HH 695A Palmer Drive, Raleigh, NC, 27626, (919) 733-5199 by August 19, 1993. The hearing record will remain open for written comments until August 19, 1993. Written comments must be sent to the address above and must state the proposed rule or rules to which the comments are addressed. Fiscal information is also available upon request from the same address.

## CHAPTER 23 - SERVICES FOR THE DEAF AND THE HARD OF HEARING

### SUBCHAPTER 23E - SERVICES AVAILABLE

#### SECTION .0300 - NORTH CAROLINA INTERPRETER CLASSIFICATION SYSTEM

##### .0302 DEFINITIONS

For the purpose of Rules ~~.0504~~ .0301 through ~~.0510~~ .0310 of this Section the following terms shall have the meanings indicated:

- (1) "Classifications" means one of the four levels of skill based on the total score given by the evaluators on the classification test.
- (2) "Classification Team" means a group of three evaluators designated to review an NCICS candidate's videotaped performance scoring the performance in accordance with the training received as an evaluator in the NCICS process in which they are participating.
- (2) (3) "Critical Situations" means any interpreting assignment which has the potential for altering the quality of someone's life either physically, emotionally or financially.
- (4) "Community-based Test" means the tract of the NCICS, NCICS-C, which tests the competency of interpreters working in community-based settings such as medical, legal and mental health situations.
- (5) "D.P.I." means the Department of Public Instruction.
- (6) "D.E.C." means the D.P.I.'s Division of Exceptional Children.
- (3) (7) "Division" means the North Carolina Division of Services for the Deaf and the Hard of Hearing.
- (4) (8) "Division Director" means the Direc-

tor of the North Carolina Division of Services for the Deaf and the Hard of Hearing.

- (9) "Educational-based Test" means the tract of the NCICS, NCICS-E, which tests the competency of interpreters working in educational settings such as elementary, secondary and post-secondary schools.
- (5) (10) "Evaluators" are persons who have received formal instruction regarding the NCICS ~~process~~ processes from the Division regarding terminology and scoring in an effort to attain the highest level of validity, reliability and consistency possible.
- (6) (11) "Interpreter Training" means activities recognized by the Division which are oriented toward the enhancement of interpreting practice, values, skills and knowledge such as continuing education courses, workshops, seminars, conferences, lectures, and post-secondary courses.
- (7) (12) "N.C.I.C.S." means the North Carolina Interpreter Classification System.
- (8) (13) "N.R.I.D." means the National Registry of Interpreters for the Deaf.
- (9) (14) "Sign Language Interpreter" means a person who performs services for the public in the capacity of an interpreter or transliterator between one or more hearing persons and one or more deaf persons using American Sign Language or manually coded English.
- (15) "NCICS-C Standards of Ethical Behavior" are behavioral guidelines for interpreters working primarily in community based settings established by the Texas Commission for the Deaf and adopted by reference under the provisions of G.S. 150B-14(c) to protect the rights of the consumers both hearing and hearing-impaired and the interpreters.
- (16) "NCICS-E Standards of Ethical Behavior" are behavioral guidelines for interpreters working primarily in educational settings developed by the Division and DPI established to protect the rights of the consumers both hearing and hearing-impaired and the interpreters.
- (10) (17) "State Coordinator" means a person employed by the Division of Services for the Deaf and the Hard of Hearing whose responsibility is to administer and oversee all aspects of the classification process.

- (18) "Transliterators" means a person who performs services for the public in the capacity of a transliterator between one or more hearing persons and one or more deaf persons using a form of manually coded English.

Statutory Authority G.S. 8B-1(3); 8B-6; 143B-216.33; 150B-14(c).

#### **.0304 APPLICATION**

The following shall be the ~~process for application process~~ process for classification to be classified:

- (1) Application forms and the dates of classification sessions shall be available at any office of the Division.
- (2) Applications shall be completed and sent to the state office of the Division at least 30 days prior to the scheduled classification session. Applicants shall be selected for each classification session in the order that the applications were received. Applicants who cannot be included in any given classification session shall be placed on priority for the next session.
- (3) Each applicant shall return a signed copy of the applicable, NCICS-C and/or NCICS-E, Standards of Ethical Behavior and a statement agreeing to maintain the confidentiality of the testing materials.

Statutory Authority G.S. 8B-1(3); 8B-6; 143B-216.33.

#### **.0305 CLASSIFICATION TEAM AND EVALUATORS**

The criteria for the classification team and the classification team members shall be:

- (1) The classification team shall be composed of at least three trained evaluators. At least one evaluator shall be hearing and one shall be hearing-impaired.
- (2) Service terms of active evaluators shall be a maximum of two years with a mandatory one-year break between service periods. Retraining by the Division after the one-year break shall be required for continued participation on the classification team.
- (3) All hearing evaluators shall hold a current Class A classification for participation in the NCICS-C process or a current Class Advanced from the NCICS-E from the Division or current

certification from the N.R.I.D. and all shall have successfully completed the evaluator training offered by the Division.

Statutory Authority G.S. 8B-1(3); 8B-6; 143B-216.33.

#### **.0306 CLASSIFICATION**

(a) The classification process shall be as follows:

- (1) The Division shall conduct at least three classification sessions per year.
- (2) All testing for the classification process shall be videotaped. Videotapes shall be maintained within the Division for a period of not less than two years.
- (3) A written test covering the Standards of Ethical Behavior shall be administered prior to the skills portion of the N.C.I.C.S. process. An 80 percent passing score shall be required in order to proceed to the skills portion of the process. The Standards of Ethical Behavior consist of the following behavioral guidelines:

##### (A) NCICS-C:

- (a) (i) Interpreter/transliterators shall keep all assignment-related information strictly confidential;
- (b) (ii) Interpreter/transliterators shall render the message faithfully, always conveying the content and spirit of the speaker, using language most readily understood by the person or persons whom they serve;
- (c) (iii) Interpreter/transliterators shall not counsel, advise or interject personal opinions;
- (d) (iv) Interpreter/transliterators shall accept assignments using discretion with regard to skills, setting and the consumers involved;
- (e) (v) Interpreter/transliterators shall request compensation for services in a professional and judicious manner;
- (f) (vi) Interpreter/transliterators shall maintain high professional standards and shall be expected to function in a manner appropriate to the situation while keeping in mind styles and colors which would enhance the effectiveness

- of the interpreting;
- (g) (vii) Interpreter/transliterators shall strive to further knowledge and skills through participation in workshops, seminars, professional meetings, interaction with professional colleagues and reading of current literature in the field.

(B) NCICS-E:

- (i) Interpreters/Transliterators may discuss assignment related information only with teachers and their supervisors who are directly responsible for the educational program of hearing-impaired children for whom the interpreterinterprets/transliterates.
- (ii) Interpreters/Transliterators shall render the message faithfully, always conveying the content and spirit of the speaker, using language and modality (CUED SPEECH, ORAL, SIGN LANGUAGE) most readily understood by the student(s) whom they serve.
- (iii) Under the direction of the subject area teacher and as dictated by the individualized education program, the interpreter/transliterators may tutor hearing-impaired students and assist them to better comprehend the presented material. For nonacademic issues, the interpreter/transliterators should direct students to the appropriate professional.
- (iv) Interpreters/Transliterators in the educational setting shall accept only the employment for which they are qualified based on their certification level and consumers involved and should request compensation commensurate with that level.
- (v) Interpreters/Transliterators shall function in a manner appropriate to the situation.
- (vi) Interpreters/Transliterators shall accept assigned responsibility and authority for their role as members of the educational team. They will abide by and enforce

federal, state, school district and individual school regulations.

- (vii) Interpreters/Transliterators shall strive to further professional knowledge and skills through participation in workshops, professionals meetings, interaction with professional colleagues and reading of current literature in the field.

- (viii) Interpreters/Transliterators are encouraged to support the profession by striving to maintain or improve related skills, knowledge and application of those skills.

- (4) Classifications shall be based on the points awarded by evaluators during the classification process. Classifications levels shall be as follows:

(A) NCICS-C:

- (a) (i) "Trainee Class Trainee" is a two year temporary classification indicating the interpreter/transliterators exhibited only the minimal entry level skills necessary for becoming classified achieving 61-70 percent of the total possible points. This interpreter shall only be assigned to non-critical, slow-paced situations in which there would be the ability to stop the speaker for clarification. This interpreter shall not under any circumstances accept or be placed in any assignment which could be considered critical. This person shall be sent on assignments with an interpreter holding a Class A or N.R.I.D. certification whenever possible.
- (b) (ii) "Class C" means an interpreter/transliterators with intermediate skills scoring 71-80 percent of the total possible points. This interpreter has demonstrated competency in all areas of interpreting and transliterating; however, it shall not be assumed that a Class C interpreter is capable of handling any and all situations. Critical medical and legal assignments shall be performed by Class A or



N.R.I.D. certified interpreters who have training and experience in these critical areas.

- (e) (iii) "Class B" is an interpreter/transliterators with comprehensive skills scoring 81-90 percent of the total possible points. This interpreter has demonstrated a high level of competency in all areas of interpreting and transliterating and has shown the ability to accurately convey most of the subtleties of emotion, in addition to concepts.
- (f) (iv) "Class A" is an interpreter/transliterators with advanced skills scoring the highest possible 91-100 percent of the total possible points. This interpreter has demonstrated the highest level of competency in all areas of interpreting and transliterating and has shown the ability to accurately convey all aspects of the spoken or signed message including nuances of emotion, content and intricate concepts. Class A interpreters with proven expertise or training shall be used in critical situations. This interpreter is qualified for G.S. 8B-6 assignments.

(B) NCICS-E:

- (i) "Class Novice" is a two year temporary classification indicating the interpreter/transliterators exhibited only the minimal entry level skills necessary for becoming classified achieving 61-70 percent of the total possible points. This interpreter shall only be assigned to slow paced, small group or individual situations in which there is an opportunity to preview the material and/or stop the speaker for clarification. This interpreter shall not under any circumstances accept or be placed in any assignment which could be considered critical (e.g., counseling sessions, achievement or psychological testing, medical emergencies.) Every effort should be made to provide this person with a mentor who holds an "A"

classification from the NCICS-C, "Advanced" classification from the NCICS-E, or certification from the National Registry of Interpreters for the Deaf.

- (ii) "Class Beginner" is an interpreter/transliterators with intermediate skills, scoring 71-80 percent of the total possible points. This interpreter has demonstrated proficiency in interpreting and transliterating; however, it shall not be assumed that a "Beginner" Classified interpreter is capable of handling any and all situations. Caution should be applied when considering highly technical material and critical out-of-class situations such as counseling sessions or psychological testing situations. An interpreter/transliterators with this level should be able to competently handle situations in which there is an opportunity to stop the student or professional for clarification or repetition.
- (iii) "Class Intermediate" is an interpreter with comprehensive skills scoring 81-90 percent of the total possible points. This interpreter has demonstrated a high level of competency in most areas of interpreting and transliterating and has shown the ability to accurately convey most of the subtleties of emotion, in addition to concepts. This interpreter is qualified to handle most classroom situations with prior experience and some counseling and testing situation. An interpreter with this level should be able to effectively handle difficult, faster-paced communication where there may or may not be an opportunity to stop for clarification or repetition.
- (iv) "Class Advanced" is an interpreter/transliterators with advanced skills scoring the highest possible 91-100 percent of the total possible points. This interpreter has demonstrated the

highest level of competency in all areas of interpreting and transliterating and has shown the ability to accurately convey all aspects of the spoken or signed message including nuances of emotion, content and intricate concepts. An "Advanced" Classification is recommended for interpreting in counseling sessions, medical emergencies and psychological testing situation. An interpreter with this level can proficiently handle a full range of complex communication situations occurring in an educational environment.

- (5) All candidates shall receive written notification of their results within ~~30~~ 45 calendar days of the date of their classification session.
- (6) Candidates who do not exhibit skills at the minimum Class Trainee or Novice Class level may reapply for classification 60 calendar days after receipt of the results of their previous classification session.

(b) ~~(7)~~ All candidates receiving classification from the N.C.I.C.S. shall have the option of having their names, phone numbers and addresses or their names only printed in the North Carolina Interpreter Directory. This Directory shall provide a reference for all consumers of interpreters. It shall also be a reference for all agencies who must meet the requirements of hiring only qualified interpreters as set forth in G.S. 8B-6.

(c) ~~(8)~~ Interpreters who hold national certification from the N.R.I.D., ~~or~~ Class A, or Class Advanced level from the N.C.I.C.S. with proven experience in the respective area they are being called to interpret are qualified interpreters for the purpose of meeting requirements of G.S. 8B-6.

Statutory Authority G.S. 8B-1(3); 8B-6; 143B-216.33.

### .0307 REVIEW AND APPEAL OF CLASSIFICATION DECISIONS

(a) There shall be two bases upon which individuals may request a review of their classification: evaluator conduct and classification scoring.

- (1) ~~(b)~~ Evaluator Conduct. Evaluators are expected to conduct evaluations in a

professional manner which will include but is not limited to:

- ~~(1A)~~ refraining from discussion of the candidate before, during and after the classification process;
- ~~(2B)~~ maintaining alertness and attentiveness during the classification process;
- ~~(3C)~~ refraining from the display of any behavior which would negatively or positively influence the candidate; and
- ~~(4D)~~ maintaining confidentiality of all testing materials.

- (2) Classification Scoring. Results of NCICS candidate's performance are disputed due to dissatisfaction with the results awarded by the classification team.

(eb) Requests for Informal Reviews. Applicants who are dissatisfied with their classification because of evaluator misconduct or classification scoring may request an informal review of their classification. The request shall be a written request sent to the State Coordinator within 30 calendar days of the applicant's receipt of the classification results. The request shall indicate whether it is based on evaluator misconduct or classification scoring.

- (1) If the request is based on evaluator misconduct, the nature of the evaluator's misconduct shall be specified.

- (2) If the request is related to classification scoring, the applicant shall:

- (A) Request a private viewing of the videotaped performance at the mutual convenience of the NCICS candidate and the NCICS State Coordinator. This meeting must be requested in writing not more than 30 calendar days after the applicant's receipt of classification results. This meeting shall be conducted at the administrative offices of the Division.
- (B) Should the candidate after viewing the videotaped performance remain dissatisfied with the results due to classification scoring, the candidate shall request a review of the videotaped classification by a classification review team.

(ec) Review of Evaluator Conduct. If an applicant has requested an informal review that involves evaluator conduct, the State Coordinator shall conduct an investigation of the alleged misconduct and provide a written response to the

applicant within 45 calendar days of the Division's receipt of the request. The State Coordinator may request one additional 45-calendar-day extension from the Division Director if additional time is needed to conduct the investigation.

(ed) Review of Classification Scoring:

- (1) If an applicant has requested a review of the videotaped classification, the State Coordinator shall appoint a classification review team composed of three members of whom at least one shall be hearing and one hearing-impaired.
- (2) The applicant shall have the right to reject participation of any classification review team member if the applicant can show that there is a conflict of interest or other situation that might impair the objectivity of the team member.
- (3) If the classification level resulting from the review team's classification is the same as that of the original classification team, the original classification level shall be accepted. If a different classification level is selected, the applicant shall be allowed to retest without any waiting period.
- (4) The State Coordinator shall provide the applicant a written response regarding the review team's scoring within ~~60~~ 90 calendar days of the Division's receipt of the request. The State Coordinator may request one ~~30~~ 45-calendar-day extension from the Division Director if additional time is needed to conduct the review.

(fe) Appeals Hearing. An applicant who remains dissatisfied with the results of the informal review may request an appeals hearing according to the procedures in G.S. 150B, Article 3, and 10 NCAC 1B .0200. The request must be submitted within the time specified in G.S. 150B-23(f). The Division Director shall make the final agency decision in the appeal.

*Statutory Authority G.S. 8B-1(3); 8B-6; 143B-216.33; 150B, Article 3.*

### .0308 MAINTENANCE OF CLASSIFICATIONS

(a) All classifications shall be valid for two years and all except that of Trainee and Novice Class may be renewed provided the candidate presents evidence of skill maintenance.

(b) N.R.I.D. certified individuals shall be expected to meet the maintenance requirements in order to continue to be recognized as qualified interpreters until such time the NRID has implemented a maintenance of certification program.

(c) Skill maintenance shall be determined based upon the awarding of points. A total of 40 points shall be required for renewal of classification. A minimum of 10 of these points shall be earned from documented interpreter experience and a minimum of 10 points shall be earned from professional training. The Division shall award points as follows:

- (1) one point for each ten hours of interpreting experience.
- (2) one point for each one hour of training approved by the Division which is oriented toward enhancement of interpreting practice, values and knowledge. ~~Training which shall be recognized by the Division includes~~ may include:
  - (A) continuing education courses,
  - (B) workshops,
  - (C) seminars,
  - (D) conferences,
  - (E) lectures,
  - (F) post secondary courses,
  - (G) interpreter evaluation team participation.

(d) The candidate for reclassification shall submit evidence of skill maintenance to the State Coordinator at least 30 days before expiration of classification.

(e) Forms for documentation of classification maintenance shall be available at any office of the Division.

*Statutory Authority G.S. 8B-1(3); 8B-6; 143B-216.33.*

### .0309 RECIPROCITY

Classification shall be granted without direct evaluation of skills by the following methods:

- (1) Individuals who hold a certification from a certifying body of another state may apply for a temporary classification under the N.C.I.C.S. The State Coordinator shall determine the level of reciprocity for each applicant on a case-by-case basis. The State Coordinator shall determine as accurately as possible the equivalency of the North Carolina interpreter classification to that which the applicant holds and shall award reciprocity one class lower than the



equivalency. Individuals shall make application to take the North Carolina interpreter classification within one year of being granted reciprocity.

- (2) Individuals holding ~~national certification~~ a Certificate of Interpretation and/or a Certification of Transliteration from N.R.I.D. shall be recognized under the N.C.I.C.S. system as having a correlative relationship with the Class A level and/or Class Advanced respectively.

Statutory Authority G.S. 8B-1(3); 8B-6; 143B-216.33.

## TITLE 11 - DEPARTMENT OF INSURANCE

*Notice* is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Insurance intends to amend rule cited as 11 NCAC 16 .0302.

*The proposed effective date of this action is October 1, 1993.*

*Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice):*

*A request for a public hearing must be made in writing, addressed to Ellen K. Sprenkel, N.C. Department of Insurance, P.O. Box 26387, Raleigh, NC 27611. This request must be received within 15 days of this notice.*

*Reason for Proposed Action: To clarify current language.*

*Comment Procedures: Written comments may be sent to Walter James, Actuarial Services, P.O. Box 26387, Raleigh, NC 27611. Anyone having questions may call Walter James at 919-733-3284 or Ellen Sprenkel at 919-733-4529.*

### CHAPTER 16 - ACTUARIAL SERVICES DIVISION

#### SECTION .0300 - SMALL EMPLOYER GROUP HEALTH INSURANCE

#### .0302 RESTRICTIONS ON PREMIUM RATES

(a) Each class of business shall have its own rate manual. The rate manual will be used to:

- (1) Audit the actuarial certification with regards to the relationship of one employer group to the others within a class; and
- (2) Determine compliance with the relationship of one class to the other classes.

(b) The requirement in G.S. 58-50-130(b)(2) that within a class the premium rates charged during a rating period to small employers shall not vary from the index rate by more than 35 percent shall be met as follows:

- (1) The carrier shall calculate for each class of business, using the rate manual for that class, an index rate for each plan of benefits and for each small employer census within that class of business.
- (2) For each small employer within a given class of business, the carrier shall calculate the ratio of the premium rate charged the small employer during the rating period to the index rate for the census, plan of benefits, and class of business of that small employer calculated in Subparagraph (1) of this Paragraph.
- (3) The ratio calculated in Subparagraph (2) of this Paragraph shall be between .65 and 1.35, inclusive.

Other methods may be used if the results, using the method in this Paragraph, meet the requirements of this Rule.

(c) The requirement in G.S. 58-50-130(b)(1) that the index rate for a rating period for any class of business shall not exceed the index rate for any other class of business by more than 25 percent shall be met as follows:

- (1) The carrier shall define a representative census of its business and a representative actuarially equivalent plan of benefits.
- (2) The carrier shall calculate an index rate based upon Subparagraph (1) of this Paragraph for each class of business.
- (3) The carrier shall identify the class of business with the lowest index rate.
- (4) The ratio of the index rate calculated for each class of business in Subparagraph (2) of this Paragraph to the lowest index rate identified in Subparagraph (3) of this Paragraph shall be between 1.00 and 1.25, inclusive.

Any change in the representative census or repre-

sentative actuarially equivalent plan of benefits used in Subparagraphs (1) through (4) of this Paragraph shall be specifically documented and the test must be performed on both the previous and new census or actuarially equivalent plan of benefits at the time of change; and the results of both tests shall be disclosed within the annual actuarial certification filing. Other methods may be used if the results, using the method in this Paragraph, meet the requirements of this Rule.

(d) The acceptability of a proposed rate increase for a small employer for health benefit plans that satisfy Paragraphs (b) and (c) of this Rule, issued on or after January 1, 1992, shall be determined as follows:

- (1) Calculate a new business premium rate for the new rating period using the rate manual, the actual census and plan of benefits for the small employer at the beginning of the new rating period.
- (2) Calculate a new business premium rate for the prior rating period using the rate manual, the actual census and plan of benefits for the small employer at the beginning of the prior rating period.
- (3) Divide Subparagraph (1) of this Paragraph by Subparagraph (2) of this Paragraph and multiply this quotient by the gross premium in effect at the beginning of the prior rating period. This product is the maximum renewal premium for the new rating period associated with G.S. 58-50-130(b)(3)a and G.S. 58-50-130(b)(3)c.
- (4) Subparagraph (3) of this Paragraph may be adjusted by a percentage of the gross premium in force before renewal. This percentage shall not exceed 15 percent per year prorated for the months elapsed between the previous and the new rating dates.
- (5) Multiply Subparagraph (3) of this Paragraph by one plus the percentage in Subparagraph (4) of this Paragraph.

The maximum renewal gross premium is Subparagraph (5) of this Paragraph if Paragraph (b) of this Rule is satisfied. If the resulting maximum renewal gross premium calculated in Subparagraph (5) of this Paragraph does not satisfy Paragraph (b) of this Rule, then the maximum renewal gross premium shall be adjusted until Paragraph (b) of this Rule is satisfied. Other methods may be used if the results, using the method in this Paragraph, meet the requirements of this Rule.

(e) The acceptability of a proposed rate increase

for a small employer for health benefit plans that exceed the limits in Paragraphs (b) and (c) of this Rule and were issued before January 1, 1992, shall be determined as follows:

- (1) Calculate a new business premium rate for the new rating period using the rate manual, the actual census and plan of benefits for the small employer at the beginning of the new rating period.
- (2) Calculate a new business premium rate for the prior rating period using the rate manual, the actual census and plan of benefits for the small employer at the beginning of the prior rating period.
- (3) Divide Subparagraph (1) of this Paragraph by Subparagraph (2) of this Paragraph and multiply this quotient by the gross premium in effect at the beginning of the prior rating period. This product is the maximum renewal premium for the new rating period associated with G.S. 58-50-130(b)(7)a and G.S. 58-50-130(b)(7)b.

The maximum renewal gross premium in Subparagraph (3) of this Paragraph is not subject to Paragraphs (b) and (c) of this Rule during a three-year transition period ending January 1, 1995. After January 1, 1995, the acceptability of a proposed rate increase for a small employer shall be based only on Paragraph (d) of this Rule. Other methods may be used if the results, using the method in this Paragraph, meet the requirements of this Rule.

*Statutory Authority G.S. 58-2-40; 58-50-130(b).*

## TITLE 15A - DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

*Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Environmental Management Commission intends to amend rules cited as 15A NCAC 2B .0305, .0308, .0315 and .0316.*

*The proposed effective date of this action is December 1, 1993.*

*Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): Any person requesting that the Environmental Management Commission conduct a public hearing on any of these proposed amendments must submit a written request to Suzanne Keen,*

*Division of Environmental Management, Water Quality, P.O. Box 29535, Raleigh, NC 27626-0535 by August 1, 1993. The request must specify which rule the hearing is being requested on. Mailed written requests must be postmarked no later than August 1, 1993.*

**Reason for Proposed Action:** *To amend the surface water quality classifications of specific waters across the state to protect their primary recreational uses.*

**Comment Procedures:** *All persons interested in these proposed amendments are encouraged to submit written comments. Comments must be postmarked by August 16, 1993 and submitted to Suzanne Keen, Division of Environmental Management, Water Quality, P.O. Box 29535, Raleigh, NC 27626-0535.*

## CHAPTER 2 - ENVIRONMENTAL MANAGEMENT

### SUBCHAPTER 2B - SURFACE WATER STANDARDS: MONITORING

#### SECTION .0300 - ASSIGNMENT OF STREAM CLASSIFICATIONS

##### .0305 WATAUGA RIVER BASIN

- (a) Places where the schedule may be inspected:
- (1) Clerk of Court:  
Avery County  
Watauga County
  - (2) North Carolina Department of Environment, Health, and Natural Resources:  
Asheville Regional Office  
Interchange Building  
59 Woodfin Place  
Asheville, North Carolina
- (b) Unnamed Streams. Such streams entering the State of Tennessee are classified "C."
- (c) The Watauga River Basin Schedule of Classifications and Water Quality Standards was amended effective:
- (1) August 12, 1979;
  - (2) February 1, 1986;
  - (3) October 1, 1987;
  - (4) August 1, 1989;
  - (5) August 1, 1990;
  - (6) December 1, 1990;
  - (7) April 1, 1992;
  - (8) August 3, 1992;

- (9) February 1, 1993;
- (10) December 1, 1993.

(d) The Schedule of Classifications and Water Quality Standards for the Watauga River Basin was amended effective July 1, 1989 as follows:

- (1) Dutch Creek (Index No. 8-11) was reclassified from Class C-trout to Class B-trout.
- (2) Pond Creek (Index No. 8-20-2) from water supply intake (located just above Tamarack Road) to Beech Creek and all tributary waters were reclassified from Class WS-III to C.

(e) The Schedule of Classifications and Water Quality Standards for the Watauga River Basin was amended effective December 1, 1990 with the reclassification of the Watauga River from the US Highway 321 bridge to the North Carolina/Tennessee state line from Class C to Class B.

(f) The Schedule of Classifications and Water Quality Standards for the Watauga River Basin was amended effective April 1, 1992 with the reclassification of Pond Creek from Classes WS-III and C to Classes WS-III Trout and C Trout.

(g) The Schedule of Classifications and Water Quality Standards for the Watauga River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(h) The Schedule of Classifications and Water Quality Standards for the Watauga River Basin has been amended effective February 1, 1993 with the reclassification of Boone Fork (Index No. 8-7) and all tributary waters from Classes C Tr HQW and C HQW to Classes C Tr ORW and C ORW.

(i) The Schedule of Classifications and Water Quality Standards for the Watauga River Basin has been amended effective December 1, 1993 with the reclassification of the Elk River from Peavine Branch to the North Carolina/Tennessee state line [Index No. 8-22-(3)] from Class C Tr to Class B



Tr.

Statutory Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1).

### .0308 CATAWBA RIVER BASIN

(a) Places where the schedules may be inspected:

- (1) Clerk of Court:
  - Alexander County
  - Avery County
  - Burke County
  - Caldwell County
  - Catawba County
  - Gaston County
  - Iredell County
  - Lincoln County
  - McDowell County
  - Mecklenburg County
  - Union County
  - Watauga County
- (2) North Carolina Department of Environment, Health, and Natural Resources:
  - (A) Mooresville Regional Office
    - 919 North Main Street
    - Mooresville, North Carolina
  - (B) Asheville Regional Office
    - Interchange Building
    - 59 Woodfin Place
    - Asheville, North Carolina

(b) Unnamed Streams. Such streams entering South Carolina are classified "C".

(c) The Catawba River Basin Schedule of Classifications and Water Quality Standards was amended effective:

- (1) March 1, 1977;
- (2) August 12, 1979;
- (3) April 1, 1982;
- (4) January 1, 1985;
- (5) August 1, 1985;
- (6) February 1, 1986;
- (7) March 1, 1989;
- (8) May 1, 1989;
- (9) March 1, 1990;
- (10) August 1, 1990;
- (11) August 3, 1992;
- (12) December 1, 1993.

(d) The Schedule of Classifications and Water Quality Standards for the Catawba River Basin was amended effective March 1, 1989 as follows:

- (1) Wilson Creek (Index No. 11-38-34) and all tributary waters were reclassified from Class B-trout and Class C-trout to Class B-trout ORW and Class C-trout ORW.

(e) The Schedule of Classifications and Water Quality Standards for the Catawba River Basin was amended effective May 1, 1989 as follows:

- (1) Henry Fork [Index Nos. 11-129-1-(1) and 11-129-1-(2)] from source to Laurel Creek, including all tributaries, were reclassified from Class WS-I, C and C trout to Class WS-I ORW, C ORW and C trout ORW, except Ivy Creek and Rock Creek which will remain Class C trout and Class C.
- (2) Jacob Fork [Index Nos. 11-129-2-(1) and 11-129-2-(4)] from source to Camp Creek, including all tributaries, were reclassified from Class WS-III trout and WS-III to WS-III trout ORW and WS-III ORW.

(f) The Schedule of Classifications and Water Quality Standards for the Catawba River Basin was amended effective March 1, 1990 as follows:

- (1) Upper Creek [Index No. 11-35-2-(1)] from source to Timbered Branch including all tributaries except Timbered Branch (Index No. 11-35-2-9) was reclassified from Class C Trout to Class C Trout ORW.
- (2) Steels Creek [Index No. 11-35-2-12(1)] from source to Little Fork and all tributaries was reclassified from Class C Trout to Class C Trout ORW.

(g) The Schedule of Classifications and Water Quality Standards for the Catawba River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(h) The Schedule of Classifications and Water Quality Standards for the Catawba River Basin was amended effective December 1, 1993 as follows:

- (1) Friday Lake [Index No. 11-125.5] from its source to Little Paw Creek was reclassified from Class C to Class B.
- (2) The Linville River [Index No. 12-29-

(1)] from Grandmother Creek to Linville Falls was reclassified from Class C Tr to Class B Tr.

*Statutory Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1).*

**.0315 NEUSE RIVER BASIN**

(a) Places where the schedule may be inspected:

(1) Clerk of Court:

Beaufort County  
Carteret County  
Craven County  
Durham County  
Franklin County  
Granville County  
Greene County  
Johnston County  
Jones County  
Lenoir County  
Nash County  
Orange County  
Pamlico County  
Person County  
Pitt County  
Wake County  
Wayne County  
Wilson County

(2) North Carolina Department of Environment, Health, and Natural Resources:

(A) Raleigh Regional Office  
3800 Barrett Drive

Raleigh, North Carolina

(B) Washington Regional Office  
1424 Carolina Avenue

Washington, North Carolina

(C) Wilmington Regional Office  
127 Cardinal Drive

Wilmington, North Carolina

(b) The Neuse River Basin Schedule of Classification and Water Quality Standards was amended effective:

- (1) March 1, 1977;
- (2) December 13, 1979;
- (3) September 14, 1980;
- (4) August 9, 1981;
- (5) January 1, 1982;
- (6) April 1, 1982;
- (7) December 1, 1983;
- (8) January 1, 1985;
- (9) August 1, 1985;
- (10) February 1, 1986;
- (11) May 1, 1988;
- (12) July 1, 1988;

- (13) October 1, 1988;
- (14) January 1, 1990;
- (15) August 1, 1990;
- (16) December 1, 1990;
- (17) July 1, 1991;
- (18) August 3, 1992;
- (19) December 1, 1993.

(c) The Schedule of Classifications and Water Quality Standards for the Neuse River Basin has been amended effective July 1, 1988 as follows:

- (1) Smith Creek [Index No. 27-23-(1)] from source to the dam at Wake Forest Reservoir has been reclassified from Class WS-III to WS-I.
- (2) Little River [Index No. 27-57-(1)] from source to the N.C. Hwy. 97 Bridge near Zebulon including all tributaries has been reclassified from Class WS-III to WS-I.
- (3) An unnamed tributary to Buffalo Creek just upstream of Robertson's Pond in Wake County from source to Buffalo Creek including Leo's Pond has been reclassified from Class C to B.

(d) The Schedule of Classifications and Water Quality Standards for the Neuse River Basin has been amended effective October 1, 1988 as follows:

- (1) Walnut Creek (Lake Johnson, Lake Raleigh) [Index No. 27-34-(1)]. Lake Johnson and Lake Raleigh have been reclassified from Class WS-III to Class WS-III & B.
- (2) Haw Creek (Camp Charles Lake) (Index No. 27-86-3-7) from the backwaters of Camp Charles Lake to dam at Camp Charles Lake has been reclassified from Class C to Class B.

(e) The Schedule of Classifications and Water Quality Standards for the Neuse River Basin has been amended effective January 1, 1990 as follows:

- (1) Neuse-Southeast Pamlico Sound ORW Area which includes all waters within a line beginning at the southwest tip of Ocracoke Island, and extending north west along the Tar-Pamlico River Basin and Neuse River Basin boundary line to Lat. 35° 06' 30", thence in a southwest direction to Ship Point and all tributaries, were reclassified from Class SA NSW to Class SA NSW ORW.
- (2) Core Sound (Index No. 27-149) from northeastern limit of White Oak River Basin (a line from Hall Point to Drum

Inlet) to Pamlico Sound and all tributaries, except Thorofare, John Day Ditch were reclassified from Class SA NSW to Class SA NSW ORW.

(f) The Schedule of Classifications and Water Quality Standards for the Neuse River Basin was amended effective December 1, 1990 with the reclassification of the following waters as described in (1) through (3) of this Paragraph.

- (1) Northwest Creek from its source to the Neuse River (Index No. 27-105) from Class SC Sw NSW to Class SB Sw NSW;
- (2) Upper Broad Creek [Index No. 27-106-(7)] from Pamlico County SR 1103 at Lees Landing to the Neuse River from Class SC Sw NSW to Class SB Sw NSW; and
- (3) Goose Creek [Index No. 27-107-(11)] from Wood Landing to the Neuse River from Class SC Sw NSW to Class SB Sw NSW.

(g) The Schedule of Classifications and Water Quality Standards for the Neuse River Basin was amended effective July 1, 1991 with the reclassification of the Bay River [Index No. 27-150-(1)] within a line running from Flea Point to the Hammock, east to a line running from Bell Point to Darby Point, including Harper Creek, Tempe Gut, Moore Creek and Newton Creek, and excluding that portion of the Bay River landward of a line running from Poorhouse Point to Darby Point from Classes SC Sw NSW and SC Sw NSW HQW to Class SA NSW.

(h) The Schedule of Classifications and Water Quality Standards for the Neuse River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(i) The Schedule of Classifications and Water Quality Standards for the Neuse River Basin was amended effective December 1, 1993 as follows:

- (1) Lake Crabtree [Index No. 27-33-(1)] was reclassified from Class C NSW to Class B NSW.
- (2) The Eno River from Orange County State Road 1561 to Durham County State Road 1003 [Index No. 27-10-(16)] was reclassified from Class WS-IV NSW to Class WS-IV&B NSW.
- (3) Silver Lake [Index No. 27-43-5] was reclassified from Class WS-III NSW to Class WS-III&B NSW.

*Statutory Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1).*

#### **.0316 TAR-PAMLICO RIVER BASIN**

(a) Places where the schedule may be inspected:

- (1) Clerk of Court:
  - Beaufort County
  - Dare County
  - Edgecombe County
  - Franklin County
  - Granville County
  - Halifax County
  - Hyde County
  - Martin County
  - Nash County
  - Pamlico County
  - Person County
  - Pitt County
  - Vance County
  - Warren County
  - Washington County
  - Wilson County
- (2) North Carolina Department of Environment, Health, and Natural Resources:
  - (A) Raleigh Regional Office
    - 3800 Barrett Drive
    - Raleigh, North Carolina
  - (B) Washington Regional Office
    - 1424 Carolina Avenue
    - Washington, North Carolina

(b) Unnamed Streams. All drainage canals not noted in the schedule are classified "C Sw," except the main drainage canals to Pamlico Sound and its bays which will be classified "SC."

(c) The Tar-Pamlico River Basin Schedule of Classification and Water Quality Standards was amended effective:

- (1) March 1, 1977;
- (2) November 1, 1978;
- (3) June 8, 1980;
- (4) October 1, 1983;
- (5) June 1, 1984;



- (6) August 1, 1985;
- (7) February 1, 1986;
- (8) August 1, 1988;
- (9) January 1, 1990;
- (10) August 1, 1990;
- (11) August 3, 1992;
- (12) December 1, 1993.

(d) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin has been amended effective August 1, 1988 as follows:

- (1) Tar River (Index No. 28-94) from a point 1.2 miles downstream of Broad Run to the upstream side of Tranters Creek from Class C to Class B.

(e) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin has been amended effective January 1, 1990 by the reclassification of Pamlico River and Pamlico Sound [Index No. 29-(27)] which includes all waters within a line beginning at Juniper Bay Point and running due south to Lat. 35° 18' 00", long. 76° 13' 20", thence due west to lat. 35° 18' 00", long 76° 20' 00", thence northwest to Shell Point and including Shell Bay, Swanquarter and Juniper Bays and their tributaries, but excluding the Blowout, Hydeland Canal, Juniper Canal and Quarter Canal were reclassified from Class SA and SC to SA ORW and SC ORW.

(f) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin has been amended effective January 1, 1990 by adding the supplemental classification NSW (Nutrient Sensitive Waters) to all waters in the basin from source to a line across Pamlico River from Roos Point to Persimmon Tree Point.

(g) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

- (h) The Schedule of Classifications and Water

Quality Standards for the Tar-Pamlico River Basin was amended effective December 1, 1993 with the reclassification of Blounts Creek from Herring Run to Blounts Bay [Index No. 29-9-1-(3)] from Class SC NSW to Class SB NSW.

*Statutory Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1).*

\*\*\*\*\*

*Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend rules cited as 15A NCAC 10F .0102 - .0103, .0301.*

*The proposed effective date of this action is October 1, 1993.*

*The public hearing will be conducted at 10:00 a.m. on August 2, 1993 at the Archdale Building, Room 332, 512 N. Salisbury Street, Raleigh, NC 27604-1188.*

#### ***Reason for Proposed Action:***

***15A NCAC 10F .0102 - .0103 - To extend the temporary certificates of number for vessels from 30 days to 60 days.***

***15A NCAC 10F .0301 - To require designated suitable agencies to obtain written permission prior to marking a duly established no-wake zone.***

***Comment Procedures:*** Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from July 15, 1993 to August 14, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 N. Salisbury Street, Raleigh, NC 27604-1188.

## **CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY**

### **SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY**

#### **SECTION .0100 - MOTORBOAT REGISTRATION**

#### **.0102 APPLICATION FOR CERTIFICATE OF NUMBER**

(a) General:

- (1) Except as provided in Subparagraph (2) of this Paragraph, the owner of any motorboat principally used in the State of North Carolina shall, prior to its use, apply for a certificate of number on an official application form provided by the Wildlife Resources Commission.
- (2) Motorboats owned by the United States, a state, or a subdivision thereof are exempt from required numbering, but may be numbered under the provisions of Rule .0104(a)(5) of this Section. Motorboats owned and operated by non-profit rescue squads are required to be numbered, but if they are operated exclusively for rescue purposes, including rescue training, they may be numbered without charge as by a governmental entity as provided by Rule .0104(a)(5) of this Section.
- (3) Pending receipt of a regular certificate of number, a motorboat may be operated for not more than ~~30~~ 60 days under a temporary certificate of number. (See Rule .0103 of this Section)
- (4) Application forms may be obtained by applying to the Wildlife Resources Commission at the address shown in Subparagraph (a)(5) of this Rule, to any boat dealer or boat manufacturer who is qualified as an agent for the purpose of issuing temporary certificates of number [See Rule .0103(d) of this Section], or to any North Carolina certified hunting and fishing license agent.
- (5) The completed application shall be forwarded to: Motorboat Registration Section, Wildlife Resources Commission, Archdale Building, 512 North Salisbury Street, Raleigh, North Carolina 27611.

(b) Individual Owners. The application shall contain the following information:

- (1) name of owner;
- (2) address of owner, including zip code;
- (3) date of birth of owner;
- (4) citizenship of owner;
- (5) state of principal use of vessel;
- (6) present or previous boat number (if any);
- (7) desired period of registration (one or three years);
- (8) use of vessel (pleasure, livery, demonstration, commercial passenger, com-

mercial fishing, other);

- (9) make of vessel (if known);
- (10) year of manufacture or model year (if known);
- (11) manufacturer's hull identification number (if any);
- (12) overall length of vessel;
- (13) type of vessel (open, cabin, house, other);
- (14) hull material (wood, steel, aluminum, fiberglass, plastic, other);
- (15) type of propulsion (inboard, outboard, inboard-outdrive, sail, and engine make if available);
- (16) type of fuel (gasoline, diesel, other);
- (17) certification of ownership;
- (18) signature of owner.

(c) Livery Motorboat Owners. The registration and numbering requirements of this Section shall apply to livery motorboats, except that in any case where the motor is not rented with the vessel, the description of the motor and type of fuel may be omitted from the application.

(d) Dealers and Manufacturers

- (1) The registration and numbering requirements of this Section shall apply to dealers in and manufacturers of motorboats.
- (2) Application for a certificate of number shall be made on the approved application form prescribed in this Regulation. Dealers and manufacturers shall certify that they are dealers or manufacturers, whichever the case may be.
- (3) The application, accompanied by a fee of five dollars and fifty cents (\$5.50), or thirteen dollars (\$13.00) in check or money order as appropriate in accordance with the provisions of Subparagraph (2) of Paragraph (a) of this Rule, shall be forwarded to the address stated in this Rule. [see Subparagraph .0102(a)(5) of this Rule].
- (4) Upon receipt by the Wildlife Resources Commission of a properly completed application and fee, it shall issue to the applicant a dealer's or manufacturer's certificate of number as appropriate, which may be used in connection with the operation of any motorboat in the possession of such dealer or manufacturer, when the boat is being used for demonstrative purposes. Additional dealers' or manufacturers' certificates of number may be obtained

by making application in the same manner as prescribed for the initial certificate with payment of an additional fee of five dollars and fifty cents (\$5.50), or thirteen dollars (\$13.00) in check or money order as appropriate in accordance with the provisions of Subparagraph (2) of Paragraph (a) of this Rule, for each additional certificate.

- (5) Dealers and manufacturers have the option of registering individual motorboats on a permanent basis under the provisions of Paragraph (b) of this Rule.
- (6) A "manufacturer" as the term is used in these regulations is defined as a person, firm, or corporation engaged in the business of manufacturing vessels either upon prior commission or for the purpose of selling them after manufacture. A "dealer" as the term is used in these regulations is defined as a person, firm, or corporation engaged in the business of offering vessels for sale at retail or wholesale from an established location or locations.

*Authority G.S. 75A-3; 75A-5; 75A-7; 75A-19; 33 C.F.R. 174.17.*

### **.0103 TRANSFER OF OWNERSHIP**

(a) Transfer Direct from One Individual Owner to Another Individual Owner

- (1) If the ownership of a registered motorboat is changed during the registration period, the owner shall complete the statement of transfer on the reverse side of the certificate of number, date as of the day of the transaction, sign, and deliver to the new owner.
- (2) The new owner shall apply for a new certificate of number on an official application form. The original number must be retained when a vessel numbered is again registered as a motorboard motorboat.
- (3) For 30 60 days following the transfer of ownership of a registered motorboat during the registration period, the new owner may use the certificate of number of the prior owner as a temporary certificate of number pending receipt of his own certificate;

provided, the certificate is endorsed in accordance with Subparagraph (a)(1) of this Rule. In the event the transfer occurs during the 30 60 days prior to expiration of the registration period, the original certificate will still be honored up to the full period of 30 60 days as a temporary certificate even though it would otherwise have expired. Where transfer of ownership from one individual to another occurs after the expiration of the registration period, the certificate of number may not be used by the new owner.

(b) Transfer of a Previously-Registered Motorboat Through a Dealer

- (1) The owner transferring his motorboat to a dealer during the registration period shall give the certificate of number to the dealer after dating and signing the statement of transfer on the reverse side of the certificate on the day of the transaction.
- (2) When the motorboat is sold by the dealer, he shall date and sign the certificate of number on the reverse side on the day of the transaction and deliver it to the new owner.
- (3) For a period of 30 60 days following the transfer of ownership of a registered motorboat from or through a dealer to a new owner, the new owner may use the certificate of the prior individual owner as a temporary certificate of number pending receipt of his own certificate; provided:
  - (A) The certificate is endorsed in accordance with Subparagraphs (1) and (2) of this Paragraph.
  - (B) The original owner endorsed the certificate to the boat dealer while it was still in force, and
  - (C) The boat dealer's sale and endorsement occurs while the registration certificate is still in force.
- (4) Except as permitted above, a certificate of number may not be used after the expiration of the registration period.

(c) Transfer of an Individually-Registered Motorboat by a Dealer or Manufacturer. Motorboats individually numbered by dealers or manufacturers shall upon transfer of ownership be governed by the provisions of Paragraph (a) of this Rule.

(d) Temporary Certificate of Number



- (1) Upon acquisition of a motorboat not previously numbered or a motorboat the registration of which has expired, the new owner may transmit with his application for the regular certificate of number a request for a temporary certificate of number. The request must state the date the vessel was acquired by the applicant. For a period not exceeding ~~30~~ 60 days following the date of acquisition, the motorboat may be operated on the temporary certificate of number pending receipt of the regular certificate from the Wildlife Resources Commission.
- (2) In order to make temporary certificates of number available locally within the State, boat dealers and manufacturers who conduct business from established locations in North Carolina may be designated agents of the Wildlife Resources Commission for the purpose of issuing temporary certificates of motorboat number. To qualify as an agent for this purpose, such dealer or manufacturer must enter into a written agreement with the Wildlife Resources Commission by which he assumes responsibility for conducting the boat registration agency as a public service and in strict compliance with these regulations. Upon approval and ratification of such agreement by the Executive Director or his designee, the agent will be furnished with a supply of the temporary certificate forms together with forms for use in applying for the regular certificate of motorboat number. The forms for temporary certificate of number are serially numbered and are prepared in triplicate so as to provide an original (Part 1) and two copies (Parts 2 and 3).
- (3) ~~The A~~ A boat registration agency for issuing temporary certificates of motorboat number shall be conducted in accordance with the following requirements and restrictions:
  - (A) The temporary certificates of number shall be issued without charge.
  - (B) There shall be no substitute for the printed form of certificate supplied by the Wildlife Resources Commission. No agent shall issue any other writing purporting to authorize the use of an unregistered motorboat.
  - (C) The certificates shall be issued consecutively in the order in which they are serially numbered, beginning with the lowest number.
  - (D) When the vessel has been acquired from a source other than the agent, a temporary certificate of number shall not be issued unless and until the owner produces a bill of sale or other memorandum of transfer which identifies the vessel and which has been dated, signed and acknowledged by the transferor before a notary public or other officer authorized to take acknowledgements.
  - (E) All information called for on the temporary certificate of number shall be properly entered in the spaces provided, including the date of expiration of the certificate which shall be the ~~30th~~ 60th day following the date of acquisition of the vessel by the owner.
  - (F) The temporary certificate must be signed by the owner. The agent shall deliver to the owner Part 1 of the certificate and a form with which to apply for the regular certificate of number.
  - (G) Within 30 days following the issuance of a temporary certificate of number, the agent shall transmit Part 2 thereof to the Wildlife Resources Commission at the address indicated in Rule .0102(a)(5) of this Section. If a bill of sale or other memorandum of transfer has been required, the original or a copy thereof shall be attached to the ~~commission's~~ Commission's copy of the temporary certificate of number.
  - (H) The agent shall retain Part 3 of the temporary certificate of number for a period of at least one year and shall permit inspection thereof during business hours by any law enforcement officer or authorized personnel of the ~~commission~~ Commission.
  - (I) No agent shall knowingly issue more than one temporary certificate of number for the same vessel during any calendar year.
  - (J) No agent shall assume responsibility

for making application for a regular certificate of motorboat number on behalf of any owner.

(K) Upon termination of ~~an~~ a boat registration agency ~~to issue which issues~~ temporary certificates of motorboat number, all copies (Parts 3) of such certificates theretofore issued and all unused forms for temporary certificates of number then remaining in possession of the terminated agency shall be delivered to the Wildlife Resources Commission or to a ~~commission~~ Commission employee.

(4) ~~An~~ A boat registration agency ~~for issuing which issues~~ temporary certificates of motorboat number, being a mutual and voluntary undertaking, may be terminated at any time, with or without cause, by either party thereto by giving a notice of such termination to the other party.

(5) Every owner of a motorboat who obtains a temporary certificate of number from a local agent as provided by this Section shall, not later than 24 hours thereafter, transmit his application for the regular certificate of motorboat number, together with the appropriate fee, to the Wildlife Resources Commission at the address indicated in Rule .0102(a)(5) of this Section.

(6) In order to be valid, the temporary certificate of boat number must contain the following:

- (A) full name and address of issuing agent;
- (B) full name and address of purchaser, including zip code;
- (C) previous registration number, if any (if none, so state);
- (D) state of principal use of vessel;
- (E) make of vessel;
- (F) length in feet;
- (G) hull material;
- (H) kind of propulsion;
- (I) date of purchase of boat;
- (J) date of application for regular certificate of number;
- (K) expiration date of temporary certificate;
- (L) signature of purchaser.

(7) Temporary certificates of number can

be issued by boat registration agents when certificates of number requiring corrections other than address or name changes are presented for renewal or when the agent finds that an error has been made in validating the certificate of number. ~~Agents issuing temporary certificates of number under this section must comply with 15A NCAC 10G .0204(e)(5).~~

(e) Demonstration and Use of Vessels Held by Dealers

(1) Demonstration of registered motorboats held by dealers for sale may be with the use of the certificate of number endorsed by the original owner so long as the registration is in force. Any dealer or any permittee of a dealer demonstrating a motorboat must utilize a set of dealer's numbers and the corresponding dealer's certificate of number on such vessel after the original certificate of number has expired. The dealer's numbers and certificate of number may, however, be used during demonstrations before the end of the registration period at the option of the dealer. In any event, where a set of dealer's numbers is used upon a previously-numbered vessel, the original numbers must be covered in accordance with Rule .0106(c) of this Section.

(2) Dealers who have bought or otherwise possess motorboats for resale and who wish to operate or lend out such motorboats for more general uses than for demonstration only must have the individual motorboat registrations transferred to their names.

*Authority G.S. 75A-3; 75A-5; 75A-19; 33 C.F.R. 174.21.*

## **SECTION .0300 - LOCAL WATER SAFETY REGULATIONS**

### **.0301 GENERAL PROVISIONS**

(a) Applicability. Except as limited by the subject matter, all of the provisions of this Rule apply to all public waters located within the territorial limits of the counties and municipalities in which special regulations are set forth for specific waters or regulated areas by the succeeding rules.

(b) Definitions. Unless the context requires otherwise, the definitions used in Chapter 75A of the General Statutes of North Carolina apply within these regulations. In addition, the following definitions apply in these regulations:

- (1) Commission. North Carolina Wildlife Resources Commission;
- (2) Executive Director. Executive ~~director~~ Director of the ~~commission~~ Commission;
- (3) No-Wake Speed. Idle speed or a slow speed creating no appreciable wake;
- (4) Uniform System. Uniform Waterway Marking System and the supplementary standards for such system promulgated by the ~~commission~~ Commission.

(c) Marking of Regulated Areas. The Executive Director may designate agencies for placement and maintenance of markers for regulated areas established by rules promulgated pursuant to this Section. The agency designated by the Executive Director may delegate the actual placement and maintenance of such markers to some other agency, corporation, group or individual, so long as the designating agency exercises supervisory authority over such agency, corporation, group or individual. Prior to marking a restricted zone established pursuant to G.S. 75A-15, the designated agency for placement and maintenance of the markers must obtain written approval from the Executive Director by making a written request for permission to mark the area specifically described therein. Enforcement of the restrictions set forth in Rule .0302 et seq. of this Section is dependent upon placement and maintenance of adequate marking of the regulated areas by suitable agencies, as designated in those rules, in accordance with the requirements of the Uniform Waterway Marking System and the supplementary standards for such system promulgated by the Commission. Unless a specific variance is granted, placement and maintenance of the markers must be and remain in accordance with the uniform system. The Executive Director or his representative is instructed to supervise and approve placement and maintenance of individual markers to insure full implementation of the objectives of the uniform system.

(d) Implementation of Uniform Waterway Marking System. Except where done by virtue of the supervening federal authority, it is unlawful for anyone to place, maintain, or to allow to remain in place, any regulatory markers or navigational aids of the sort included in the uniform system in any waters without authorization of the Commission.

The Executive Director is authorized to approve placement of the navigational aids, informational markers, and regulatory markers warning of dangers and not requiring enforcement sanctions, in accordance with both public interest in recreational use and water safety and in accordance with the policies embodied in the uniform system.

(e) Removal of Unauthorized Markers. Markers or navigational aids which do not conform to the specifications of the uniform system or which are placed without lawful authority or permission, where the person responsible for the actual placement cannot be feasibly determined, may be removed by agents of the Commission. Nonconforming markers as to which the person responsible for placement and maintenance is known, may nevertheless be removed by agents of the Commission if such markers are likely to mislead the public or cause a dangerous situation. Where agents of the Commission discover authorized markers which have been improperly placed or are defective through lack of maintenance, such agents may serve written notice upon the person responsible for such improper placement or for the maintenance of the marker concerned. If, within 10 days no action has been taken in accordance with the notice given, such default constitutes a violation of these regulations.

(f) Miscellaneous Restrictions. Except for mooring buoys or markers as to which it is specifically permitted, it is unlawful to tie a vessel to any waterway marker. It is unlawful for any unauthorized person to move, remove, damage, obstruct, paint over, or in any way tamper with any marker lawfully placed in the waters of North Carolina in conformity with these regulations or the uniform system generally.

(g) Supplementary Standards. The standards listed in this Paragraph are supplementary to the Uniform Waterway Marking System and shall be applicable as indicated in the succeeding rules of this Section to the areas of water thereby regulated:

- (1) The perimeter of swimming areas in the water must be marked with float lines which, in conjunction with the shoreline, form a completely enclosed area. The total enclosed area may not exceed 5,000 square feet without special permission from the Executive Director or his authorized representative. In any event, such area may not extend out into the water sufficiently as to restrict travel unduly on any regular navigational channel or



otherwise to obstruct passage of vessels in reasonably using the waters.

- (2) Float lines must have attached floats along their length at intervals of not less than one every 10 feet.
- (3) Floats must be buoyant enough to float at the surface of the water while attached to the float line, but no float may exceed a size of 18 inches as measured across its largest dimension.
- (4) Floats may be solid or hollow and preferably should be of plastic or other light and resilient material not likely to cause injury should one strike a swimmer in the water.
- (5) Floats must be either solid white or solid international orange in color. Float lines may consist of all white floats or of alternating white and orange floats.
- (6) Buoys or floating signs indicating the "boats-keep-out" symbol of the uniform system and in conformity with its standards must be attached to the float lines at such points as necessary to give warning to the vessels approaching the swimming area from various directions.
- (7) Float lines and warning markers must be anchored securely to prevent them from shifting position to any appreciable extent under normal conditions.
- (8) All markers warning of a no-wake speed zone around certain facilities must be buoys or floating signs placed in the water at a distance of not greater than 50 yards from the protected facility. The markers must be sufficient in number and size as to give adequate warning of the restriction to the vessels approaching from various directions.
- (9) The boundaries of mooring areas may be defined by the placement of the speed zone warning markers themselves or by such warning markers plus additional boundary floats or markers that may be approved by the Executive Director or his representative.

*Statutory Authority G.S. 75A-3; 75A-15.*

## TITLE 19A - DEPARTMENT OF TRANSPORTATION

*Notice is hereby given in accordance with G.S.*

*150B-21.2 that the North Carolina Department of Transportation intends to amend rules cited as 19A NCAC 2D .0602, .0607.*

*The proposed effective date of this action is November 1, 1993.*

*Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): A demand for a public hearing must be made in writing and mailed to N.C. Department of Transportation, P.O. Box 25201, Raleigh, NC 27611, Attn: Emily Lee. The demand must be received within 15 days of this Notice.*

### *Reason for Proposed Action:*

*19A NCAC 2D .0602 - States responsibility for injury and damage for oversize permit vehicles.*

*19A NCAC 2D .0607 - Clarifies conditions of oversize/overweight vehicles and adds additional weight and axle information.*

*Comment Procedures: Any interested person may submit written comments on the proposed rules by mailing the comments to: N.C. Department of Transportation, P.O. Box 25201, Raleigh, NC 27611, Attn: Emily Lee, within 30 days after the proposed rule is published or until the date of any public hearing held on the proposed rule, whichever is longer.*

## CHAPTER 2 - DIVISION OF HIGHWAYS

### SUBCHAPTER 2D - HIGHWAY OPERATIONS

#### SECTION .0600 - OVERSIZE-OVERWEIGHT PERMITS

##### **.0602 PERMITS-ISSUANCE AND FEES**

(a) Permits may be issued ~~or~~ for movements of loads which cannot be reasonably divided, dismantled or disassembled, or so loaded to meet legal requirements. Permits are issued on authorized forms with appropriate designation for qualifying moves. To be valid, a permit must be signed by the permittee and carried in the towing unit while permitted load is in transit. A permit issued by the Department is not valid for travel over municipal streets (Defined as streets or highways not maintained by the State of North Carolina). Permitted vehicles will not travel in convoy. The

permittee for any oversize/overweight movement assumes all responsibility for injury to persons or damage to property of any kind and agrees to hold the Department harmless for any claims arising out of his conduct or actions.

Single trip permits may include a return trip to origin if requested at the time of original issuance and the return trip can be made within the validation of such permit. No single trip permit request will be issued for a time period to exceed 30 days. Annual permits (blanket) are valid 12 months from the date of issuance.

City Passenger Buses which exceed the weight limits in G.S. 20-118(f) may be issued permits for operation on the highways of the state in the vicinity of the municipality and to qualify the vehicle for license.

(1) ~~Single trip permits may include a return trip to origin if requested at the time of original issuance and the return trip can be made within the validation of such permit. No single trip permit request will be issued for a time period to exceed 30 days.~~

(2) ~~Annual permits (blanket) are valid 12 months from the date of issuance. They may be issued for:~~

(A) ~~Permitted loads up to 10' wide authorizing travel on all roads;~~

(B) ~~Up to but not to exceed a width of a 12' authorizing travel on North Carolina, Interstate and US highways. Provided, mobile/modular homes not to exceed a width of a 14' unit with an allowable roof overhang not to exceed 12" may also be authorized to travel on designated North Carolina, Interstate and US highways.~~

(3) ~~City Passenger Buses which exceed the weight limits in GS 20-118(f) may be issued permits for operation on the highways of the state in the vicinity of the municipality and to qualify the vehicle for license.~~

(b) A fee will be collected as specified in G.S. 20-119(b). Only cash, certified check, money order or company check will be accepted. No personal checks will be accepted. Permittees with established credit accounts will be billed monthly for permits issued for the previous month. All fees collected are to be processed in accordance with DOT Field Policy Procedure Manual, Chapter 6, Section 22. Provided, the following exemptions of fees shall apply to permits issued:

(1) ~~For house moves;~~

(2) ~~For movement of farm equipment by the farmer for agricultural purposes;~~

(3) ~~To any agency of the United State Government;~~

(4) ~~The State of North Carolina or its agencies, institutions, or municipalities, provided the vehicle/vehicle combination is registered in the name of such government body.~~

Statutory Authority G.S. 20-119; 136-18(5).

**.0607 PERMITS-WEIGHT, DIMENSIONS AND LIMITATIONS**

(a) ~~Width is limited to 15' for all movements except~~ Qualifying vehicle/vehicle combinations are limited to a maximum width of 15' with exceptions for certain construction machinery, buildings, structures, manufacturing machinery for moves authorized by the Central Permit Office or Head of the Maintenance Unit. If blades of ~~bulldozers, graders~~ construction equipment or front end loader buckets cannot be angled to extend no more than 12' across the roadway, they ~~must shall~~ be removed. A blade or bucket or other attachment which has been removed for safety reasons, or if in the best interests to the Department has been removed, may be ~~moved~~ hailed with the equipment without being considered a divisible load. ~~Moves exceeding 12' for a commodity essential to national health, safety or defense may be permitted upon receipt of proof of necessity submitted by the agency directly concerned, however, if considered to be detrimental or unsafe to the other traveling public or if the highway cannot accommodate the move due to width or weight, such move will be denied.~~ Moves exceeding 12' in width may be denied if considered by the issuing agent to be unsafe to the traveling public or if the highway cannot accommodate the move due to width. Loads must be so placed on vehicle/vehicle combination so as to present least over dimension to traffic.

- (1) Single trip - width not to exceed 15' for all movements unless authorized by the Central Permit Office. Exception: "Housemoves" shall be approved by Division and District field offices.
- (2) Annual permits - not to exceed a maximum width of 12' authorizing travel on all highways in North Carolina. Provided: Mobile/modular homes may not exceed a width of a 14' unit with an allowable roof overhang not to exceed a total of 12" may be authorized to travel on designated North Carolina, Interstate and US Highways.

(b) The maximum weight permitted on a designated route is determined by the bridge capacity of bridges to be crossed during movement. Moves exceeding weight limits for highways or bridge structures may be denied if considered by the issuing agent unsafe and may cause damage to such highway or structure. A surety bond may be required to cover the cost of damage to pavement, bridges or other damages incurred during the permitted move.

- (1) The maximum single trip and annual permit weight allowed for vehicle or vehicle combinations not to ~~include~~ including off highway construction equipment without an engineering study is:

Single axle	25,000 lbs.
2 axle tandem	50,000 lbs.
3 or more axle group	60,000 lbs.
3 axle vehicle	60,000 lbs.
4 axle vehicle	75,000 lbs.
5 axle vehicle	94,500 lbs.
6 axle vehicle	103,000 lbs.
6 axle vehicle	108,000 lbs.
7 or more axle vehicle	122,000 lbs.

- (2) The maximum permit weight allowed for off highway construction equipment is:

- (A) Self-propelled scrapers with low pressure tires:

Single axle	37,000 lbs.
2 axle vehicle	55,000 lbs.
3 axle vehicle	70,000 lbs.
4 axle vehicle	90,000 lbs.
Tandem axle	50,000 lbs.

**2 AXLE VEHICLE**

<u>extreme wheelbase less than 10'</u>	<u>65,000 lbs.</u>
<u>10' or greater</u>	<u>70,000 lbs.</u>

**3 AXLE VEHICLE**

<u>single/tandem axle configuration</u>	
<u>extreme wheelbase less than 16'</u>	<u>75,000 lbs.</u>
<u>16' or greater</u>	<u>80,000 lbs.</u>
<u>single/single/single axle configuration</u>	<u>engineering study</u>

**4 AXLE VEHICLE**



<u>extreme wheelbase 28' or greater</u>	<u>90,000 lbs.</u>
<u>single axle</u>	<u>37,000 lbs.</u>

(B) Self-propelled truck cranes with counterweights and boom removed (if practical):

~~3 axles not to exceed 25,000 lbs. per axle maximum gross weight 70,000 lbs.~~

~~4 axles not to exceed 25,000 lbs. per axle maximum gross weight 78,000 lbs.~~

~~5 axles wheel base less than 244 inches:~~

~~front 2 axles 35,000 lbs.~~

~~rear 3 axles 56,500 lbs.~~

~~Gross 91,500 lbs.~~

~~5 axles wheel base more than 244 inches:~~

~~front 2 axles 37,500 lbs.~~

~~rear 3 axles 57,000 lbs.~~

~~Gross 94,500 lbs.~~

~~6 axles wheel base more than 296 inches:~~

~~2 axle tandem 50,000 lbs.~~

~~3 axle group 57,000 lbs.~~

~~Gross 103,000 lbs.~~

~~\*7 axles extreme wheel base of 44 feet:~~

~~2 axle tandem 40,000 lbs.~~

~~3 axle group 57,000 lbs.~~

~~4 axle group 71,000 lbs.~~

~~Gross 122,000 lbs.~~

~~\*Seven axle equipment subject to individual review for approval. Speed restricted to 45 m.p.h.~~

## 2 AXLE VEHICLE

single/single axle configuration

more than 8' 50,000 lbs.

single axle 25,000 lbs.

## 3 AXLE VEHICLE

single/tandem axle configuration

extreme wheelbase greater than 15' 70,000 lbs.

single axle 25,000 lbs.

tandem axle 50,000 lbs.

## 4 AXLE VEHICLE

quad grouping (less than 8' between

any two consecutive axles)

extreme wheelbase greater than 18' 78,000 lbs.

single axle 20,000 lbs.

tandem/tandem

extreme wheelbase greater than 16' but less than 22' 78,000 lbs.

tandem axle 50,000 lbs.

extreme wheelbase 22' or greater 90,000 lbs.

tandem axle 50,000 lbs.

## 5 AXLE VEHICLE

tandem/tri axle configuration

extreme wheelbase greater than 24' but less than 28' 86,000 lbs.

tandem axle 37,500 lbs.

tri axle 60,000 lbs.

extreme wheelbase 28' or greater 94,500 lbs.

tandem axle 37,500 lbs.

tri axle 60,000 lbs.

tandem/tandem/single axle configuration

extreme wheelbase 31' or greater 94,500 lbs.

single axle 15,000 lbs.

tandem axle	50,000 lbs.
<b>6 AXLE VEHICLE</b>	
tri/tri axle configuration	
extreme wheelbase greater than 29' but less than 34'	100,000 lbs.
tri axle	60,000 lbs.
extreme wheelbase 34' or greater	108,000 lbs.
tri axle	60,000 lbs.
tandem/tandem/tandem axle configuration	
extreme wheelbase greater than 37' but less than 39'	100,000 lbs.
tandem axle	50,000 lbs.
(no two consecutive set of tandems to exceed 90,000 lbs.)	
extreme wheelbase 39' or greater	108,000 lbs.
tandem axle	50,000 lbs.
(no two consecutive set of tandems to exceed 90,000 lbs.)	
<b>7 AXLE VEHICLE</b>	engineering study

**ALL VARIATIONS OF AXLE CONFIGURATIONS OTHER THAN THOSE LISTED WILL REQUIRE INDIVIDUAL ENGINEERING STUDY.**

(3) ~~Sealed Ship Containers~~ Vehicles hauling sealed ship containers may qualify for an overweight permit provided:

- (A) Going to or from a designated seaport (to include in state and out of state) and has been or will be transported by marine shipment;
- (B) Licensed for maximum allowable weight allowed in G.S. 20-118;
- (C) Vehicle/vehicle combination has at least five axles;
- (D) To have proper documentation (shippers bill of lading and/or trucking bill of lading) of sealed commodity being transported available for enforcement inspection.

The Department of Transportation shall issue a permit for 80,000 lbs. but not to exceed 94,500 lbs. with up to ten designated routes of permitted travel provided all qualifying requirements have been met.

(c) Overlength permits will be limited as follows:

- (1) Single trip permits are limited to 85' to include towing vehicle. Approval may be given by the Central Permit Office for permitted loads in excess of 85' after review of route of travel. ~~Provided, mobile/modular~~ Mobile/modular homes may be issued permits not to exceed 95'.
- (2) Annual (blanket) permits will not be issued for lengths to exceed 65'. Front overhang may not exceed 3' unless if transported otherwise would create a safety hazard. Provided, mobile/modular home permits may be issued for a length not to exceed 91'.

(d) There are not set limits for permitted height as it is controlled by clearances on designated route. Permit will indicate "Check Height on Structures". The issuance of the permit does not imply nor guarantee the clearance for the permitted load and all vertical clearances ~~should~~ shall be checked by the permittee prior to movement underneath.

(e) ~~Time of The~~ move is to be made between sunrise and sunset Monday through Saturday with no move to be made on Sunday, ~~or approved state holidays~~. Mobile/modular homes are restricted to travel between sunrise and sunset Monday through 12 noon on Saturday. Time restrictions may be determined by the issuing office if in the best interest for safety and/or expedite traffic. No movement of permitted vehicle/vehicle combination after noon on the day preceding the six holidays of New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day and no movement until noon on the day following the holiday. Continuous travel (24 hr/7 day/365 days a year) is ~~would be~~ authorized for any vehicle/vehicle combination up to but not to exceed 94,500 lbs., provided:

- (1) no other over legal dimension of width, height or length is to be included in the permitted move; ~~and~~ Exception: self-propelled equipment may be authorized for continuous travel with properly marked overhang (front and/or rear) not to exceed a total of 10'; and
- (2) the vehicle is licensed for the maximum allowable weight determined by extreme axle measurements. ~~If the holiday falls on Sunday, the following Monday will be considered the holiday. Time restrictions may be determined by the issuing office if in the best interest for safety and/or to expedite traffic. Provided, mobile/modular homes are restricted to travel Monday through 12 noon on Saturday.~~

(f) The speed of permitted moves shall be that which is reasonable and prudent for the load, considering weight and bulk, under conditions existing at the time; however, the maximum speed shall not exceed the posted speed limit. The driver will maintain a safe speed consistent with ~~maintaining proper interval and temporarily the traveling public and avoid creating traffic congestion by periodically~~ relinquishing the traffic way to allow the passage of following vehicles when a build up of traffic occurs. Provided, seven axle self-propelled truck cranes with extreme wheel base of 44 feet shall not exceed a maximum speed of 45 mph.

(g) Additional safety measures ~~will be required~~ are as follows:

- (1) A yellow (or a color of equal effectiveness) banner measuring 7' x 18" bearing the legend "Oversize Load" in 10" black letters ~~will~~ shall be displayed on the towing unit for all loads in excess of 10' wide;
- (2) Red flags measuring 18" square will be displayed on all sides at the widest point of load for all loads in excess of 10' wide but the flags shall be so mounted as to not increase the overall width of the load;
- (3) A flagman may be required for vehicle/vehicle combinations of loads in excess of 12' in width when a speed of 20 ~~miles per hour~~ mph cannot be maintained on level terrain;
- (4) Rear view mirrors and other safety devices on towing units attached for movement of overwidth loads shall be removed or retracted to conform with legal width when unit is not towing/hauling such vehicle or load;
- (5) Flashing amber lights will be used as determined by the issuing permit office.

(h) The object to be transported ~~will~~ shall not be loaded or parked, day or night, on the highway right of way without specific permission from the office issuing the permit.

(i) No move ~~will~~ shall be made when weather conditions render visibility less than 500' for a person or vehicle. Moves ~~will~~ shall not be made when highway is covered with snow or ice or at any time travel conditions are considered unsafe by the Division of Highways, State Highway Patrol or other Law Enforcement Officers having jurisdiction. Movement of a mobile/modular 14' unit with an allowable roof overhang not to exceed 12" ~~will~~ shall be prohibited when wind velocities exceed 25 ~~miles per hour~~ mph in gusts.

(j) All obstructions, including traffic signals, signs, utility lines ~~will~~ shall be removed immediately prior to and replaced immediately after the move at the expense of the mover, provided arrangements for and approval from the owner is obtained. In no event are trees, shrubs, or official signs to be cut, trimmed or removed without personal approval from the district engineer having jurisdiction over the area involved.

(k) ~~Requirement for~~ The requirement of escort vehicles(s) ~~will~~ for permitted loads shall be determined by the issuing office and/or the Central Permit Office.

Authority G.S. 20-119; 136-18(5); Board of Transportation Minutes for February 16, 1977 and November 10, 1978.

## TITLE 21 - OCCUPATIONAL LICENSING BOARD

*Notice is hereby given in accordance with G.S. 150B-21.2 that the N. C. State Board of Registration for Foresters intends to amend rule cited as 21 NCAC 20 .0014 and adopt rules cited as 21 NCAC 20 .0020 - .0022.*

*The proposed effective date of this action is October 1, 1993.*

*The public hearing will be conducted at 10:00 a.m. on August 3, 1993 at 512 N. Salisbury Street, 10th Floor, Archdale Building, Raleigh, NC 27604.*

### *Reason for Proposed Action:*

*21 NCAC 20 .0014 - To clarify the amount to be paid when registered foresters fail to renew their registration.*

*21 NCAC 20 .0020-.0022 - To outline the procedure for consulting foresters to be certified.*

*Comment Procedures: Contact: Derryl L. Walden, Vice Chairman, State Board of Registration for Foresters, P.O. Box 27393, Raleigh, NC 27611, Telephone: (919) 733-2162.*

## CHAPTER 20 - BOARD OF REGISTRATION FOR FORESTERS

### .0014 RE-REGISTRATION



Any registered forester who fails to apply for renewal of the registration following its expiration may be re-registered by paying the annual renewal fee of twenty dollars (\$20.00), plus one dollar (\$1.00) per calendar month from the date of expiration. Total charges for re-registration shall not exceed ~~twenty~~ forty dollars (~~\$20.00~~) (\$40.00). Application for re-registration shall be made by formal letter to the Secretary of the Board.

Statutory Authority G.S. 89B-6; 89B-10.

#### .0020 CERTIFICATION OF CONSULTING FORESTERS

The Board will receive affidavits annually from each registered forester seeking approval to practice as a consulting forester. Each affidavit must be on the proper form supplied by the Board and submitted by June 30 each year. These affidavits will be reviewed by the Secretary-Treasurer, and all that clearly meet the requirements will be approved by the Secretary-Treasurer. Any applications which are questionable or appear not to meet established criteria will be voted on by the Board.

Statutory Authority G.S. 89B-2; 89B-6.

#### .0021 REJECTION OF CONSULTANT AFFIDAVIT

Any applicant whose application to be certified as a consulting forester is rejected by the Board shall be notified of the rejection and the basis for it. The applicant will be encouraged to submit additional justification for further consideration by the Board, if appropriate. Requests for reconsideration of the Board's decision must be made in writing to the Board.

Statutory Authority G.S. 89B-2; 89B-6.

#### .0022 HANDLING OF COMPLAINTS

(a) Complaints received by the Board of improper, illegal, incompetent or otherwise unethical activity or conflict of interest by a registered forester will be followed up by written correspondence to the accused requesting a response to the accusation, or by other means deemed appropriate by the Board. The Board may choose to request the complainant and/or accused registrant to personally appear before the Board.

(b) Following a review of the facts and verification of the violation, the Board will choose appropriate action which may include:

(1) revocation or suspension of the individ-

ual as a registered forester as outlined in Rule .0016 of this Chapter.

(2) revocation of certification as a consulting forester, or

(3) a warning to the registrant to discontinue the inappropriate action.

(c) Complaints alleging violation of G.S. 89B-2 by individuals who are not registered foresters and/or not certified as consulting foresters will be acted on by the Board.

(1) When, in the opinion of the Board, a violation exists, a letter will be sent to the accused outlining the concern and directing that the violation desist. A letter of concurrence with this directive will be requested from the violating party.

(2) When the violation is considered flagrant, or when it continues even after a warning by the Board, the Board may choose to refer the case to the Attorney General recommending legal action against the violator.

Statutory Authority G.S. 89B-2; 89B-6; 150B-3; 150-38.

*The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).*

## ADMINISTRATION

### Department of Administration's Minimum Criteria

<i>1 NCAC 39 .0101 - Purpose</i>	<i>RRC Objection</i>	<i>06/17/93</i>
<i>1 NCAC 39 .0301 - Exceptions to Minimum Criteria</i>	<i>RRC Objection</i>	<i>06/17/93</i>

### Environmental Policy Act

<i>1 NCAC 25 .0213 - Environmental Policy Act Advisory Committee</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>1 NCAC 25 .0401 - Method of Compliance</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>1 NCAC 25 .0506 - Review Process</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>1 NCAC 25 .0603 - Format and Content</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>

### Veterans Affairs

<i>1 NCAC 26C .0005 - Fee</i>	<i>RRC Objection</i>	<i>06/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>06/17/93</i>

## AGRICULTURE

### Plant Industry

<i>2 NCAC 48A .0206 - The Transportation of Bees</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>
<i>2 NCAC 48A .0207 - Requirements for Issuance of Permit</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>

## COMMERCE

### Cemetery Commission

<i>4 NCAC 5B .0103 - Hearings</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>4 NCAC 5D .0101 - Report</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>4 NCAC 5D .0201 - Report</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>4 NCAC 5D .0202 - Delivery</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>

### Community Assistance

<i>4 NCAC 19L .0913 - Grant Closeouts</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>

4 NCAC 19L .1101 - Reporting	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93
4 NCAC 19L .1505 - Preliminary Awards	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93
4 NCAC 19L .1604 - Preliminary Awards	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93

**Savings Institutions Division: Savings Institutions Commission**

4 NCAC 16G .0311 - Required Provisions in Plan of Conversion	RRC Objection	03/18/93
Agency Revised Rule	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	04/15/93

**ENVIRONMENT, HEALTH, AND NATURAL RESOURCES**

**Coastal Management**

15A NCAC 7H .1205 - Specific Conditions	RRC Objection	03/18/93
Rule Returned to Agency		04/15/93

**Environmental Health**

15A NCAC 18A .0911 - Marinas: Docking Facilities: Other Mooring Areas	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 18A .1601 - Definitions	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 18A .1725 - Water Quality	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 18A .2618 - Cleaning of Equipment and Utensils	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93

**Environmental Management**

15A NCAC 2D .0903 - Recordkeeping: Reporting: Monitoring	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 2H .1110 - Implementation	RRC Objection	02/18/93
Agency Responded	Obj. Cont'd	03/18/93
Agency Responded	Obj. Cont'd	05/19/93
Agency Responded	Obj. Cont'd	06/17/93

**Laboratory Services**

15A NCAC 20D .0234 - Criteria & Procedures: Decert./Denial/Downgrading	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	04/15/93

**Radiation Protection**

15A NCAC 11 .0108 - Additional Requirements	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93
15A NCAC 11 .0207 - Issuance of Notice of Registration	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93
15A NCAC 11 .0212 - Modifications: Revocation: Termination of Registrants	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93
15A NCAC 11 .0214 - Training/Educational Requirements for Equipment Svcs	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93



15A NCAC 11 .0337 - Issuance of Specific Licenses	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93
15A NCAC 11 .0507 - Leak Testing and Source Tagging	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93
15A NCAC 11 .1215 - Conditions of License	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93

### **WTP Operators Certification Commission**

15A NCAC 8A .0102 - Creation	RRC Objection	06/17/93
Agency Repealed Rule	Obj. Removed	06/17/93
15A NCAC 8A .0202 - Duties and Requirements	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0102 - Applying for Examination	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0109 - Requirement for Notification of Change in Address	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0201 - Grade I Wastewater Treatment Plant Operator	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0205 - Definitions	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0207 - Grade II Collection System Operator	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0208 - Grade III Collection System Operator	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0209 - Grade IV Collection System Operator	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0210 - Subsurface System Operator	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0211 - Land Application/Residuals Operator	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0212 - Spray Irrigation Operator	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8B .0502 - Refunding of Fees	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93
15A NCAC 8C .0002 - Rating Scale/Classification/Wastewater Trtmt Facilities	RRC Objection	06/17/93
Agency Revised Rule	Obj. Removed	06/17/93

### **HUMAN RESOURCES**

#### **Children's Services**

10 NCAC 41E .0514 - Child Care & Development: Health	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	05/19/93
10 NCAC 41G .0705 - Medical Program	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 41Q .0201 - Personnel	RRC Objection	04/15/93
Agency Responded	Obj. Cont'd	05/19/93
Rule Returned to Agency		06/17/93

#### **Departmental Rules**

10 NCAC 1M .0002 - Complaints	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 1M .0003 - Investigation	RRC Objection	04/15/93

*Agency Revised Rule*

*Obj. Removed 04/15/93*

**Facility Services**

*10 NCAC 3C .2020 - Definitions*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*10 NCAC 3C .2021 - Physician Reqs/Inpatient Rehabilitation Facilities or Units*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*10 NCAC 3C .2030 - Physical Facility Reqs/Inpatient Rehab Facilities or Units*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*10 NCAC 3C .2033 - Deemed Status/Inpatient Rehabilitation Facilities or Units*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*10 NCAC 3H .1150 - Definitions*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*10 NCAC 3H .1151 - Physician Reqs/Inpatient Rehabilitation Facilities or Units*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*10 NCAC 3H .1160 - Physical Facility Reqs/Inpatient Rehab Facilities or Units*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*10 NCAC 3H .1163 - Deemed Status/Inpatient Rehabilitation Facilities or Units*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

**Mental Health: General**

*10 NCAC 14K .0315 - Treatment/Habilitation Planning and Documentation*

*RRC Objection 06/17/93*

*Agency Revised Rule*

*Obj. Removed 06/17/93*

**INSURANCE**

**Actuarial Services**

*11 NCAC 16 .0303 - Annual Filing*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

**Consumer Services**

*11 NCAC 4 .0428 - Enforcement*

*RRC Objection 03/18/93*

*Agency Revised Rule*

*RRC Objection 03/18/93*

*Agency Repealed Rule*

*Obj. Removed 04/15/93*

**Financial Evaluation Division**

*11 NCAC 11B .0607 - Application - Employers*

*RRC Objection 03/18/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*11 NCAC 11B .0610 - Application - Groups*

*RRC Objection 03/18/93*

*Agency Revised Rule*

*Obj. Removed 04/15/93*

*11 NCAC 11H .0001 - Definitions*

*RRC Objection 05/19/93*

*Agency Revised Rule*

*Obj. Removed 05/19/93*

**JUSTICE**

**Private Protective Services**

*12 NCAC 7D .0809 - Authorized Firearms*

*RRC Objection 04/15/93*

*Agency Revised Rule*

*Obj. Removed 05/19/93*

**LICENSING BOARDS AND COMMISSIONS****Electrolysis Examiners**

21 NCAC 19 .0401 - *Infection Control Standards*  
*Agency Revised Rule*

RRC Objection 05/19/93  
Obj. Removed 05/19/93

**Landscape Architects**

21 NCAC 26 .0203 - *General Obligations of Practice: Mandatory Standards*  
*Agency Repealed Rule*

RRC Objection 06/17/93  
Obj. Removed 06/17/93

21 NCAC 26 .0205 - *Forms of Practice*

RRC Objection 06/17/93

21 NCAC 26 .0207 - *Application of Professional Seal*

RRC Objection 06/17/93

21 NCAC 26 .0208 - *Improper Conduct*

RRC Objection 06/17/93

21 NCAC 26 .0209 - *Unprofessional Conduct*

RRC Objection 06/17/93

21 NCAC 26 .0210 - *Dishonest Practice*

RRC Objection 06/17/93

21 NCAC 26 .0211 - *Incompetence*

RRC Objection 06/17/93

21 NCAC 26 .0301 - *Examination*

RRC Objection 06/17/93

**Medical Examiners**

21 NCAC 32B .0315 - *Ten Year Qualification*  
*Agency Revised Rule*

RRC Objection 06/17/93  
Obj. Removed 06/17/93

**Real Estate Commission**

21 NCAC 58A .0110 - *Broker-in-Charge*  
*Agency Revised Rule*

RRC Objection 06/17/93  
Obj. Removed 06/17/93

21 NCAC 58A .0506 - *Salesman to be Supervised by Broker*  
*Agency Revised Rule*

RRC Objection 06/17/93  
Obj. Removed 06/17/93

21 NCAC 58C .0305 - *Course Scheduling*  
*Agency Revised Rule*

RRC Objection 06/17/93  
Obj. Removed 06/17/93

**REVENUE****Ad Valorem Tax Division**

17 NCAC 10 .0506 - *Certification Requirements for County Appraisers*

RRC Objection 06/17/93

17 NCAC 10 .0508 - *Certification Requirements for Private Firm Appraisers*

RRC Objection 06/17/93



***This Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.***

**1 NCAC 5A .0010 - ADMINISTRATIVE PROCEDURES**

Thomas R. West, Administrative Law Judge with the Office of Administrative Hearings, declared two portions of Rule 1 NCAC 5A .0010 void as applied in *Stauffer Information Systems, Petitioner v. The North Carolina Department of Community Colleges and The North Carolina Department of Administration, Respondent and The University of Southern California, Intervenor-Respondent* (92 DOA 0666).

**10 NCAC 3H .0315(b) - NURSING HOME PATIENT OR RESIDENT RIGHTS**

Dolores O. Nesnow, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 10 NCAC 3H .0315(b) void as applied in *Barbara Jones, Petitioner v. North Carolina Department of Human Resources, Division of Facility Services, Licensure Section, Respondent* (92 DHR 1192).

**15A NCAC 3O .0201(a)(1)(A) - STDS FOR SHELLFISH BOTTOM & WATER COLUMN LEASES**

Julian Mann III, Chief Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 3O .0201(a)(1)(A) void as applied in *William R. Willis, Petitioner v. North Carolina Division of Marine Fisheries, Respondent* (92 EHR 0820).

**15A NCAC 19A .0202(d)(10) - CONTROL MEASURES - HIV**

Brenda B. Becton, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 19A .0202(d)(10) void as applied in *ACT-UP TRIANGLE (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe, Petitioners v. Commission for Health Services of the State of North Carolina, Ron Levine, as Assistant Secretary of Health and State Health Director for the Department of Environment, Health, and Natural Resources of the State of North Carolina, William Cobey, as Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina, Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources, Wayne Bobbitt Jr., as Chief of the HIV/STD Control Branch of the North Carolina Department of Environment, Health, and Natural Resources, Respondents* (91 EHR 0818).

*This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698.*

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b>ADMINISTRATION</b>				
LMS Express, Inc. v. Administration, Div of Purchase & Contract	92 DOA 0735	Morgan	06/04/93	
Stauffer Information Systems v. Community Colleges & Administration	92 DOA 0803	West	06/10/93	8:7 NCR 613
McLaurin Parking Co. v. Administration	92 DOA 1662	Morrison	04/02/93	8:3 NCR 320
<b>ALCOHOLIC BEVERAGE CONTROL COMMISSION</b>				
Alcoholic Beverage Control Comm. v. Ann Oldham McDowell	92 ABC 0260	Morgan	04/01/93	
Curtis Ray Lynch v. Alcoholic Beverage Control Comm.	92 ABC 0288	Gray	05/18/93	
Alcoholic Beverage Control Comm. v. Partnership, Phillip Owen Edward	92 ABC 0978	Gray	05/28/93	
Alcoholic Beverage Control Comm. v. Gary Morgan Neugent	92 ABC 1086	Becton	03/22/93	
Alcoholic Beverage Control Comm. v. Kirby Ronald Eldridge	92 ABC 1153	Chess	04/26/93	
Alcoholic Beverage Control Comm. v. Gloria Black McDuffie	92 ABC 1476	West	05/26/93	
Alcoholic Beverage Control Comm. v. Larry Isacc Hailstock	92 ABC 1483	Reilly	04/07/93	
Alcoholic Beverage Control Comm. v. Anthony Ralph Cecchini Jr.	92 ABC 1690	Morgan	06/29/93	
Johnnie L. Baker v. Alcoholic Beverage Control Commission	92 ABC 1735	Chess	05/07/93	
RAMSAC Enterprises, Inc. v. Alcoholic Beverage Control Comm.	93 ABC 0002	Morrison	07/02/93	
Alcoholic Beverage Control Comm. v. Aubrey Rudolph Wallace	93 ABC 0047	Gray	05/28/93	
Alcoholic Beverage Control Comm. v. Homer Patrick Godwin Jr.	93 ABC 0125	Reilly	05/13/93	
Alcoholic Bev. Control Comm. v. Mild & Wild, Inc., Sheila Scholz	93 ABC 1475	Nesnow	03/23/93	
<b>COMMERCE</b>				
Lester Moore v. Weatherization Assistance Program	93 COM 0105	Gray	03/08/93	
<b>CRIME CONTROL AND PUBLIC SAFETY</b>				
George W. Paylor v. Crime Victims Compensation Comm.	91 CPS 1286	Morgan	04/27/93	
Steven A. Barner v. Crime Victims Compensation Comm.	92 CPS 0453	Nesnow	06/01/93	
Anthony L. Hart v. Victims Compensation Comm.	92 CPS 0937	Chess	03/01/93	
Jennifer Ayers v. Crime Victims Compensation Comm.	92 CPS 1195	Reilly	03/19/93	
Janie L. Howard v. Crime Victims Compensation Comm.	92 CPS 1787	Reilly	03/26/93	
Isabelle Hyman v. Crime Victims Compensation Comm.	92 CPS 1807	Morrison	05/24/93	
James G. Pellom v. Crime Control & Public Safety	93 CPS 0034	Gray	05/05/93	
Moses H. Cone Mem Hosp v. Victims Compensation Comm.	93 CPS 0152	Nesnow	04/02/93	8:3 NCR 327
Phillip Edward Moore v. Crime Control & Public Safety	93 CPS 0169	Nesnow	05/20/93	
John Willie Leach v. Crime Victims Compensation Comm.	93 CPS 0263	Morrison	05/20/93	
Nellie R. Mangum v. Crime Victims Compensation Comm.	93 CPS 0303	Morrison	06/08/93	
Constance Brown v. Crime Victims Compensation Comm.	93 CPS 0351	Reilly	05/24/93	
<b>ENVIRONMENT, HEALTH, AND NATURAL RESOURCES</b>				
Charles L. Wilson v. Environment, Health, & Natural Resources	91 EHR 0664	Morgan	03/23/93	
Michael D. Barnes v. Onslow Cty Hlth & Environment and EHR	91 EHR 0825	Morgan	06/21/93	
William E. Finck v. Environment, Health, & Natural Resources	92 EHR 0040	Gray	06/14/93	
Utey C. Stallings v. Environment, Health, & Natural Resources	92 EHR 0062	Gray	03/15/93	
Safeway Removal, Inc. v. Environment, Health, & Natural Res.	92 EHR 0826	West	03/12/93	8:1 NCR 83
Elizabeth City/Pasquotank Cty Mun Airport Auth v. EHNR	92 EHR 1140	Gray	04/13/93	
Service Oil Company v. Environment, Health, & Natural Resources	92 EHR 1205	Reilly	05/27/93	
City of Salisbury v. Environment, Health, & Natural Resources	92 EHR 1472	Morrison	04/22/93	
Willie M. Watford v. Hertford Gates District Health Department	92 EHR 1600	Chess	03/24/93	
Standard Speciality Contractors, Inc. v. EHNR	92 EHR 1660	Reilly	05/21/93	
Angela Power, Albert Power v. Children's Special Health Svcs.	93 EHR 0008	Becton	03/24/93	
Erby Lamar Grainger v. Environment, Health, & Natural Resources	93 EHR 0071	Reilly	06/21/93	
Mustafa E. Essa v. Environment, Health, & Natural Resources	93 EHR 0146	Gray	03/29/93	

# CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Rosetta Brimage, Vanessa Pack v. Env. Health of Craven County	93 EHR 0206	Nesnow	05/20/93	
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92 DHR 1109  
92 DHR 1110

**BIO-MEDICAL APPLICATIONS OF NORTH  
CAROLINA, INC., d/b/a BMA OF RAEFORD,  
WEBB-LOHAVICHAN-MELTON RENTALS,  
BIO-MEDICAL APPLICATIONS OF NORTH  
CAROLINA, INC., d/b/a BMA OF FAYETTEVILLE,  
d/b/a FAYETTEVILLE KIDNEY CENTER AND  
WEBB-LOHAVICHAN RENTALS,**  
Petitioners,  
  
v.  
  
**NORTH CAROLINA DEPARTMENT OF HUMAN  
RESOURCES, DIVISION OF FACILITY SERVICES,  
CERTIFICATE OF NEED SECTION,**  
Respondent,  
  
and  
  
**DIALYSIS CARE OF NORTH CAROLINA, INC.  
d/b/a DIALYSIS CARE OF HOKE COUNTY,**  
Intervenor-Respondent.

92 DHR 1116

## RECOMMENDED DECISION

## STATEMENT OF THE CASE

The above-captioned matters are contested cases, consolidated for the purpose of hearing. Dialysis Care of North Carolina, Inc. d/b/a Dialysis Care of Cumberland County ("DCNC") and Bio-Medical Applications of North Carolina, Inc. d/b/a BMA of Raeford, Webb-Lohavichan-Melton Rentals, Bio-Medical Applications of North Carolina, Inc. d/b/a BMA of Fayetteville d/b/a Fayetteville Kidney Center and Webb-Lohavichan Rentals (hereinafter collectively referred to as "BMA") challenge the decision of the North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section ("CON Section" or the "Agency") to award a certificate of need ("CON") to BMA-Fayetteville and DCNC-Hoke and to deny BMA-Raeford's and DCNC-Cumberland's application for a CON.

The undersigned Administrative Law Judge presided at the hearing of this matter on May 12, 13, and 14, 1993, and June 7, 8, and 9, 1993, in Raleigh, North Carolina.

#### APPEARANCES

The Agency was represented at the hearing by Lauren Murphy Clemmons, Associate Attorney General, appearing on behalf of Attorney General Michael F. Easley. DCNC was represented by S. Todd Hemphill and Robert W. Kaylor of Bode, Call & Green. BMA was represented by Dean M. Harris and Willie O. Dixon, IV of Moore & Van Allen.

#### STIPULATIONS

A. DCNC, BMA and the Agency stipulated to the following prior to hearing:

1. It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.
2. It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.
3. It is stipulated that copies of any exhibits may be introduced into evidence in lieu of the originals.
4. BMA of Raeford's application did not conform to regulatory criterion 10 NCAC 3R .2213(b)(4) because it did not demonstrate the availability of electric power backup capability. If the Administrative Law Judge were to conclude that the agency erred when it denied BMA of Raeford's application and recommends that the application be approved, it would be necessary for the Administrative Law Judge to condition this recommended approval upon BMA's agreement to document the availability of electric power service backup prior to the issuance of a certificate of need to BMA of Raeford.
5. BMA of Raeford's application did not conform to regulatory criterion 10 NCAC 3R .2213(b)(2) because it did not contain a written agreement with a transplant center as required by this rule. If the Administrative Law Judge were to conclude that the agency erred when it denied BMA of Raeford's application and recommends that the application be approved, it would be necessary for the Administrative Law Judge to condition the recommended approval upon BMA's promise to provide the necessary transplant agreement to the agency prior to the issuance of a certificate of need.
6. DCNC of Cumberland's application did not conform to regulatory criterion 10 NCAC 3R .2215(12) because it did not contain any documentation from Cumberland County Vocational Rehabilitation. If the Administrative Law Judge were to conclude that the agency erred when it denied DCNC of Cumberland's application and recommends that the application be approved, it would be necessary for the Administrative Law Judge to condition this recommended approval upon DCNC of Cumberland's agreement to document that

vocational rehabilitation counseling and services will be available in Cumberland County.

7. If the Administrative Law Judge were to conclude that the agency erred when it denied DCNC of Cumberland's application, and recommends that the application be approved, then it is stipulated that the application would be financially feasible.

8. If the Administrative Law Judge were to conclude that the agency erred when it denied BMA of Raeford's application and recommends that the application be approved, then it is stipulated that the proposal contained in the BMA of Raeford application would be financially feasible.

9. If the Administrative Law Judge were to conclude that the agency erred when it denied DCNC of Cumberland's application and recommends that the application be approved, then it is stipulated that upon approval or conditional approval of DCNC of Cumberland, one isolation station may be allocated to DCNC of Cumberland and is to be utilized only for that purpose.

10. If the Administrative Law Judge were to conclude that the agency erred when it denied BMA of Raeford's application and recommends that the application be approved, then it is stipulated that upon approval or conditional approval of BMA of Raeford, one isolation station may be allocated to BMA of Raeford and is to be utilized only for that purpose.

11. It is stipulated that in the Required State Agency Findings, the Agency's findings in statutory criterion 13(b) contain a typographical error, in that it indicates that all applicants other than BMA Fayetteville were found "NC", or non-conforming. The Agency intended the notation to be "NA", meaning that the criterion was not applicable to those applicants.

12. It is stipulated that the following criteria are not at issue in these contested cases with respect to any application: Statutory criteria (3a), (5), (9), (10), (12), (13) and (14).

B. BMA and the agency stipulated to the following prior to hearing:

1. With regard to the application of BMA of Raeford, the issues in this contested case shall be whether the CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule:

a. When it found that BMA of Raeford's application did not conform, or conditionally conform, with G.S. §131E-183(a)(3). In addressing this issue, BMA of Raeford shall be entitled to introduce evidence of the dialysis station need in Robeson County and to argue that the agency erred when it concluded that this need was not relevant to criterion (a)(3); and

b. When it found that BMA of Raeford's application did not conform, or conditionally conform, with G.S. §131E-183(a)(4).

2. BMA of Raeford's application was found nonconforming with the need projections in the 1992 State Medical Facilities Plan ("SMFP") under criterion 1, and with G.S. §131E-183(a)(6), (12), and (18a) because the agency conditionally approved two other competing applications and the 1992 dialysis station allocation for End Stage Renal Dialysis ("ESRD") Planning Area 27 was not large enough to allow the approval of BMA of Raeford's application in addition to the two approved applications. BMA of Raeford's application would conform with the projections in the 1992 SMFP, and with G.S. §131E-183(a)(6), (12), and (18a) if one of the other or both of the approved applications had been disapproved.



3. BMA of Raeford's application did not conform to SMFP Policy E.2 under statutory criterion 1 and to regulatory criterion 10 NCAC 3R .2213(b)(4) because it did not demonstrate the availability of electric power backup capability. If the Administrative Law Judge were to conclude that the agency erred when it denied BMA of Raeford's application and recommends that the application be approved, it would be necessary for the Administrative Law Judge to condition this recommended approval upon BMA's agreement to document the availability of electric power service backup prior to the issuance of a certificate of need to BMA of Raeford.

4. BMA of Raeford's application did not conform with 10 NCAC 3R .2213(b)(2) because it did not contain a written agreement with a transplant center as required by this rule. If the Administrative Law Judge were to conclude that the agency erred when it denied BMA of Raeford's application and recommends that the application be approved, it would be necessary for the Administrative Law Judge to condition the recommended approval upon BMA's agreement to provide the necessary transplant agreement to the agency prior to the issuance of a certificate of need.

5. The agency found that BMA of Raeford's application did not conform with 1992 SMFP Policies A.1 and E.8 because it found that BMA of Raeford's application did not conform with G.S. §131E-183(a)(3) and (4). Because the issues presented by Policies A.1 and E.8 in this review are identical to those presented under G.S. §131E-183(a)(3) and (4), the parties stipulate that the Administrative Law Judge shall not be required to make separate findings and conclusions concerning the agency's findings concerning BMA of Raeford's conformity or nonconformity with 1992 SMFP Policies A.1 and E.8.

6. The agency found that BMA of Raeford's application did not conform with 1992 SMFP Policy A.3 because it found that the application did not conform with G.S. §131E-183(a)(4). Because the issues presented by Policy A.3 in this review are identical to the issues discussed under G.S. §131E-183(a)(4), the parties stipulate that the Administrative Law Judge shall not be required to make separate findings and conclusions concerning the agency's findings concerning BMA of Raeford's conformity or nonconformity with 1992 SMFP Policy A.3.

C. DCNC and the agency stipulated to the following prior to hearing:

1. DCNC of Cumberland's application was found nonconforming with the need projections in the 1992 SMFP under G.S. §131E-183(a)(1) and with G.S. §131E-183(a)(6) and (18a) because the agency conditionally approved two other competing applications and the 1992 dialysis station allocation for ESRD Planning Area 27 was not large enough to allow the approval of DCNC of Cumberland's application in addition to the two approved applications. DCNC of Cumberland's application would conform with the projections in the 1992 SMFP, and with G.S. §131E-183(a)(6) and (18a) if one or the other or both of the approved applications had been disapproved;

2. The agency found that DCNC of Cumberland's application did not conform with 1992 SMFP Policy A.3 because it found that the application did not conform with G.S. §131E-183(a)(4). Because the issues presented by Policy A.3 in this review are identical to the issues discussed under G.S. §131E-183(a)(4), the parties stipulate that the Administrative Law Judge shall not be required to make separate findings and conclusions concerning the agency's findings concerning DCNC of Cumberland's conformity or nonconformity with 1992 SMFP Policy A.3.

#### OFFICIAL NOTICE

The undersigned took official notice of the statutory language of N.C.G.S. §131E-183(a)(20) as it

existed between 1985 and prior to the 1987 amendment. The pre-amended version stated that:

The Department shall promulgate rules implementing criteria outlined in this sub-section to determine whether an applicant is to be issued a certificate for the proposed project. Criteria so implemented are to be consistent with federal law and regulations shall cover:

. . . (20) In the case of existing service or facilities, the quality care provided in the past.

This version of the statute and the 1987 amendment thereto are contained in 1987 N.C. Sess. Laws, c. 511, §1 [(later codified at N.C.G.S. §131E-183(a)(20) (effective July 1, 1997)].

### **BURDEN OF PROOF**

The Petitioners have the burden of proof in this contested case.

### **ISSUES**

The issues, as set forth in the Notice of Hearing, are as follows:

1. Whether the Respondent erred in denying Dialysis Care of North Carolina's application [in Cumberland County] for a certificate of need for the development of an end stage renal disease facility;
2. Whether the Respondent erred in approving, with conditions, Bio-Medical Applications of Fayetteville's application [in Cumberland County] for a certificate of need for the addition of end stage renal disease stations;
3. Whether the Respondent erred in denying Bio-Medical Applications of North Carolina's application [in Hoke County] for a certificate of need for the development of end stage renal disease stations;
4. Whether the Respondent erred in approving, with conditions, Dialysis Care of North Carolina's application [in Hoke County] for a certificate of need for the establishment of end stage renal disease stations.

The parties raised additional issues in the Prehearing Order as follows:

A. BMA's Issues with regard to the Cumberland County Applications.

1. Whether DCNC's application in Cumberland County misrepresented DCNC's mortality rate?
2. Is so, whether the Agency should have denied DCNC's application in Cumberland County for the additional reason that DCNC's application misrepresented DCNC's mortality rate?
3. Whether the Agency should have denied DCNC's application in Cumberland County for the additional reason that DCNC failed to demonstrate that it provided quality care in the past?

B. BMA's Issues with regard to the Hoke County Applications

1. Did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by accepting and reviewing DCNC's application in Hoke County without a contemporaneous application by the lessor of the facility or

a joint application by the lessor and lessee, and without payment of the appropriate application fees?

2. Did DCNC's application in Hoke County misrepresent DCNC's mortality rate?

3. If so, did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by conditionally approving DCNC's Hoke County application which misrepresented DCNC's mortality rate?

4. Did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by failing to properly consider:

- a. DCNC's record for quality of care;
- b. DCNC's level of support for its proposal;
- c. DCNC's record for recruitment and retention of nephrologists;
- d. DCNC's record for compliance with representations in its CON applications;

and

e. DCNC's arrangements for physician coverage and the closed medical staff which is described in DCNC's application?

5. Did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in approving DCNC's application in Hoke County for the purpose of creating competition, and thereby misinterpret and misapply statutory criterion (18a) of the CON Law?

6. Did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by relying on county-specific need projections rather than the planning area need projection for the Cumberland and Hoke planning area as set forth in the 1992 SMFP?

7. Did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by refusing to consider the need for ESRD stations at BMA's proposed facility in Hoke County to serve ESRD patients living in nearby areas of Robeson County?

8. Did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by failing to properly consider BMA's user-based methodology in determining the need for ESRD stations at BMA's proposed facility in Hoke County?

9. Did the Agency exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in making its decision to:

- a. deny the BMA application in Hoke County; or
- b. conditionally approve the DCNC application in Hoke County?

C. DCNC Issues with regard to its Cumberland County Application

1. DCNC contends that the issues in the consolidated contested cases 92 DHR 1109/10 are whether the Agency acted improperly and outside its statutory authority, acted erroneously, followed



improper procedure, acted arbitrarily or capriciously, or otherwise failed to act as required by law or rule in disapproving the Certificate of Need application of DCNC Cumberland, and in approving the Certificate of Need application of BMA-Cumberland.

2. Whether the CON Section improperly relied too heavily on letters of support in concluding that the BMA proposal was the most effective alternative to meet the needs of Cumberland County residents.

3. Whether the CON Section improperly concluded that BMA's application represented a more effective alternative with regard to coordination with the existing health care system and the availability of acute hospital care back-up services.

4. Whether the CON Section improperly concluded that the BMA application represented the most effective alternative with regard to availability of physician manpower and other clinical personnel.

5. Whether the CON Section improperly evaluated the need in its award of ESRD stations in Cumberland County.

6. Whether the CON Section improperly failed to consider the respective locations of the applicants' proposed facilities in considering access to the medically underserved in Cumberland County.

7. Whether the CON Section improperly evaluated the competitive effect of approving the BMA application and disapproving the DCNC application.

D. The Agency's issues

1. The issues presented by 92 DHR 1109 and 1110 and 92 DHR 1116 are whether the Respondent CON Section exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule:

a. When it conditionally approved the BMA- Fayetteville application (Project I.D. #M-4527-92);

b. When it conditionally approved the Dialysis Care of Hoke County application (Project I.D. #N-4566-92).

**FINDINGS OF FACT**

Upon consideration of the evidence presented at the contested case hearing, the undersigned makes the following findings of fact:

I. Background

1. On or about March 16, 1992, DCNC and BMA each submitted to the Agency applications for a CON to develop or expand ESRD facilities in Cumberland and Hoke Counties (Planning Area 27).

2. On or about March 23, 1992, the Agency determined that the applications were complete for the review cycle beginning April 1, 1992.

3. The Cumberland/Hoke ESRD review was a competitive review because the number of stations requested for approval in the applications exceeded the number of stations which the SMFP projected was needed for the Cumberland/Hoke Counties planning area.

4. A competitive review is one in which the approval of one applicant may result in the

disapproval of another applicant.

5. DCNC proposed in Project I.D. No. M-4567-92 to develop a twelve-station ESRD facility, including one isolation station, in Fayetteville, Cumberland County, North Carolina (hereinafter "DCNC-Cumberland").

6. BMA proposed in Project I.D. No. M-4527-92 to expand its existing ESRD facility in Fayetteville, Cumberland County, North Carolina from 39 to 46 stations (hereinafter "BMA-Fayetteville").

7. DCNC proposed in Project I.D. No. N-4566-92 to develop a seven-station ESRD facility, including one isolation station, in Raeford, Hoke County, North Carolina (hereinafter "DCNC-Hoke").

8. BMA proposed in Project I.D. No. N-4533-92 to develop a ten-station ESRD facility, including one isolation station, in Raeford, Hoke County, North Carolina (hereinafter "BMA-Raeford").

9. A thirty (30) day written comment period is available from the beginning of the review to allow applicants, any interested party, or any member of the public, to submit negative or positive written comments regarding the applications which are the subject of a review.

10. Both BMA and DCNC submitted written comments regarding the competing applications.

11. A public hearing was held on May 7, 1992, by the project analyst, with regard to the competing applications in ESRD Planning Area 27.

12. A public hearing gives the applicant a chance to comment on or rebut written comments raised by competing applicants, and allows members of the public to comment on the applications.

13. The law restricts the applicant to responding to written comments at the public hearing; an applicant may not augment its application or offer additional comments on its competitors' applications.

14. Representatives of DCNC and BMA appeared and offered comments at the public hearing.

15. By letter dated August 28, 1992, the Agency disapproved the applications of DCNC-Cumberland and BMA-Raeford and conditionally approved the applications of DCNC-Hoke to develop a seven-station ESRD facility and of BMA-Fayetteville to expand its existing 39-station ESRD facility in Fayetteville, North Carolina to 46 stations.

16. On September 25, 1992, DCNC-Cumberland filed a Petition for Contested Case Hearing with the Office of Administrative Hearings, identified as 92 DHR 1109/1110.

17. ON September 25, 1992, BMA-Raeford filed a Petition for Contested Case Hearing with the Office of Administrative Hearings, identified as 92 DHR 1116.

18. DCNC-Hoke moved to intervene in contested case 92 DHR 1116 on October 22, 1992 and was allowed to intervene by the undersigned by order filed February 23, 1993.

19. BMA-Fayetteville moved to intervene in contested case 92 DHR 1109/1110 on October 15, 1992 and was allowed to intervene by the undersigned by order filed February 23, 1993.

20. The above-referenced contested cases were consolidated by order of Chief Administrative Law Judge Julian Mann, III, on April 22, 1993.

21. At the time of the Agency's review, BMA had 25 ESRD facilities operational in North Carolina.

22. At the time of the Agency's review, DCNC had 5 ESRD facilities operational in North Carolina. One new facility has been opened since the review.

23. BMA-Fayetteville currently has two satellite ESRD facilities in Clinton and Lumberton, North Carolina. The three nephrologists residing in Fayetteville provide physician coverage for patients in Fayetteville, Clinton and Lumberton. BMA ESRD patients receive emergency care at Cape Fear Memorial Hospital in Fayetteville.

24. BMA's proposed facility in Raeford also would be a satellite facility of BMA-Fayetteville, with physician coverage by the same physicians, and with emergency care provided at Cape Fear Memorial Hospital.

25. DCNC's proposed facility in Raeford would be a satellite of its current facility in Pinehurst, with physician coverage provided by Mark Aarons, M.D., the medical director of DCNC-Pinehurst, and emergency care provided at Moore Regional Hospital, located in Pinehurst.

26. Fayetteville and Pinehurst are approximately the same distance from Raeford.

27. The 1992 State Medical Facilities Plan ("SMFP") contains specific allocations for additional or new dialysis stations.

28. Cumberland and Hoke Counties comprise a multi-county planning area designated as Health Services Area ("HSA") V, Planning Area 27.

29. The 1992 SMFP identifies a total allocation of 17 dialysis stations needed in the Cumberland/Hoke two county planning area.

30. The 17-station allocation for Cumberland/Hoke Counties in Table 10D, p. 108 of the 1992 SMFP was derived by adding the unmet station need identified in Table 10B, p. 105, for Cumberland and Hoke Counties.

31. The 17-station allocation is the determinative limitation on the number of stations to be developed in any given county in the multi-county planning area and in the multi-county planning area as a whole.

32. The CON Section was not obligated to award all 17 stations allocated for the Cumberland/Hoke planning area in the 1992 SMFP.

33. "Table 10B: Projection of Dialysis Patient Population and Estimated Station Need" on page 105 of the 1992 SMFP identified an unmet station need of 11.85 stations for Cumberland County and 5.57 stations for Hoke County.

34. The term "planning horizon" refers to the year in which need projections are made for health services or facilities.

35. With respect to the planning horizon for dialysis stations, the methodology in the 1992 SMFP only projects the need for stations through the end of the 1992 calendar year.

36. In order to meet the need identified for the planning horizon, an applicant must provide documentation in its application to show the need for its proposed number of stations by the year in which the SMFP projects that the stations will be needed, or in the case of dialysis applications, by the end of the first year of operation following completion of the project.

37. Three BMA patients appeared and testified at the hearing. They were Talmage Ellison of Laurinburg, North Carolina, Catherine Purcell of Raeford, North Carolina, and Josephine Bethea of Raeford,



North Carolina. All three patients testified that they received their care at BMA-Fayetteville, that they supported the application of BMA-Raeford to build a facility there, and that if BMA-Raeford were to receive the certificate of need, they would transfer their care to that facility.

II. N.C.G.S. §131E-183(a)(1)

38. N.C.G.S. §131E-183(a)(1) requires that a proposed project be consistent with the applicable policies and projections in the SMFP.

39. Both BMA-Fayetteville and DCNC-Hoke conform with the need projection and policies in the SMFP applicable to their proposed projects.

40. Stipulations B.2, B.3, B.5 and B.6 address BMA-Raeford's nonconformity with the need projections and policies in the SMFP.

41. Stipulations C.1 and C.2 address DCNC-Hoke's nonconformity with the need projections and policies in the SMFP.

III. N.C.G.S. §131E-183(a)(3)

42. N.C.G.S. §131E-183(a)(3) requires an applicant to identify the population to be served by the proposed project and to demonstrate the need that the population has for the proposed service.

A. Cumberland County Applicants

43. BMA-Fayetteville conforms with N.C.G.S. §131E-183(a)(3) because it has demonstrated in its application the need for a 7-station expansion in a 10 county service area, which includes Cumberland and Hoke Counties.

44. DCNC-Cumberland conforms with N.C.G.S. §131E-183(a)(3) because it has demonstrated in its application the need for an 11-station dialysis facility to serve patients in Cumberland County, its proposed service area.

B. Hoke County Applicants

45. DCNC-Hoke conforms with N.C.G.S. §131E-183(a)(3) because it has demonstrated the need in its application for its proposed 6 maintenance station dialysis facility, exclusive of one isolation station, for its proposed service area of Hoke County.

46. BMA-Raeford does not conform with N.C.G.S. §131E-183(a)(3) for the following reasons:

- a. BMA-Raeford's proposal to develop nine maintenance stations, exclusive of one isolation station, exceeds the SMFP identified need for 5.57 stations in Hoke County.
- b. BMA-Raeford's application does not demonstrate a need for its nine proposed stations.
- c. The relevant planning horizon for this ESRD review is 1993, the first year of operation for the proposed facility. Findings of fact 34, 35, and 36 are incorporated herein by reference.
- d. BMA-Raeford only demonstrated a need for seven maintenance stations, not nine maintenance stations, within the 1993 planning horizon.

IV. N.C.G.S. §131E-183(a)(4)

47. N.C.G.S. §131E-183(a)(4) requires an applicant to demonstrate that the least costly or most effective alternative has been proposed.

A. Cumberland County Applicants

48. BMA-Fayetteville is the most effective alternative for a dialysis facility in Cumberland County. Findings of fact 49 through 56 are incorporated herein by reference.

49. In comparison to DCNC-Cumberland County, BMA-Fayetteville demonstrated a higher level of community support and better coordination with the existing health care system, as well as better availability of acute hospital back-up services.

50. DCNC-Cumberland County provided two letters of support; the letter from Highsmith Raney Hospital was later retracted.

51. Other than DCNC's official representatives, no one spoke in favor of the DCNC application or opposed the BMA-Fayetteville application.

52. BMA-Fayetteville also demonstrated better arrangements for physician manpower and other personnel because BMA-Fayetteville had three nephrologists on staff at the Fayetteville Kidney Center who were available to treat patients at the Cumberland County facility.

53. At least one member of BMA's three nephrologists is "on call" at all times.

54. The BMA three-doctor nephrology group has seventeen years of experience in nephrology and has patient support for continuity of care.

55. DCNC-Cumberland did not identify a nephrologist to provide services in Cumberland County.

56. DCNC-Cumberland is not the most effective alternative for a facility in Cumberland County. Findings of fact 49 through 55 are incorporated herein by reference.

B. Hoke County Applicants

57. DCNC-Hoke is the most effective alternative for a dialysis station facility in Hoke County. Findings of fact 58 through 61(a) and (b) are incorporated herein by reference.

58. The number of stations which DCNC of Hoke County proposes more closely reflects the 1992 SMFP unmet station need for Hoke County than does the number of stations which BMA-Raeford proposes to develop in Hoke County. Findings of fact 61(a) and (b) are incorporated herein by reference.

59. DCNC-Hoke identified a nephrologist, Dr. Mark Aarons, who is available to provide services to patients in Hoke County.

60. Approving DCNC-Hoke County will increase the accessibility of ESRD services to Hoke County residents.

61. BMA-Raeford is not the most effective alternative because:

- a. this applicant proposes construction of a facility which will operate three more maintenance stations than needed in Hoke County pursuant to the 1992 SMFP;
- b. this applicant is also nonconforming to N.C.G.S. 131E-183(a)(3). Findings of fact 46(a), (b), (c), (d), are incorporated herein by reference.

62. The Agency customarily does not request clarifying information from an applicant in a competitive review after this applications are deemed complete for review.

63. It was not necessary for the project analyst to request clarifying information from BMA-Raeford during the competitive review period.

V. N.C.G.S. §131E-183(a)(6)

64. N.C.G.S. §131E-183 (a)(6) requires an applicant to demonstrate that its proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

65. Both BMA-Fayetteville and DCNC-Hoke demonstrate conformity to N.C.G.S. §131E-183(a)(6) because, based on a competitive analysis of the four proposals in this review, the approval of BMA-Fayetteville for 6 maintenance dialysis stations plus one isolation station, and the approval of DCNC-Hoke to develop 6 maintenance dialysis stations and one isolation station, best meets the needs of Cumberland and Hoke Counties.

66. The approval of any other applicant would result in the development of dialysis stations in excess of the 17 stations allocated in the 1992 SMFP for Cumberland and Hoke Counties.

67. DCNC of Cumberland County and BMA-Raeford are non-conforming to N.C.G.S. §131E-183(a)(6). Stipulations B.1 and C.1 are incorporated herein by reference.

VI. N.C.G.S. 131E-183(a)(7)

68. N.C.G.S. §131E-183(a)(7) requires the applicant to demonstrate the availability of resources, including health manpower and management personnel, for the provision of the proposed services, and to show that the use of these resources for these services will not preclude the alternative use of these resources to fulfill other important needs identified by the SMFP.

69. Each of the applicants demonstrated the availability of adequate medical and management personnel for their respective proposed services.

70. Each of the applicants conforms to N.C.G.S. §131E-183(a)(7).

71. An applicant may be conforming to N.C.G.S. §131E-183(a)(7), but non-conforming to N.C.G.S. §131E-183(a)(4), which is a comparative criterion, if the applicant fails to demonstrate that it is the most effective alternative under Criterion 4.

VII. N.C.G.S. §131E-183(a)(8)

72. N.C.G.S. §131E-183(a)(8) requires the applicant to demonstrate that it will provide the necessary ancillary and support services and that the proposed services will be coordinated with the existing health care system.

73. Each of the applicants demonstrated that its respective project coordinated with the existing health care systems in Cumberland and Hoke Counties because each applicant provided sufficient documentation of ancillary and support services.

74. Each of the applicants conforms to N.C.G.S. §131E-183(a)(8).

VIII. N.C.G.S. §131E-183(a)(18a)

75. N.C.G.S. §131E-183(a)(18a) requires an applicant to demonstrate the effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a



positive impact on the cost-effectiveness, quality, and access to the services proposed.

76. In applying this criterion, the analyst looks for the positive impact on the cost-effectiveness, quality, and access to services proposed.

77. Cost-effectiveness is also assessed under N.C.G.S. §131E-183(a)(1) and SMFP policy A.1, N.C.G.S. §131E-183(a)(3) and (5).

78. Quality is also assessed under N.C.G.S. §131E-183(a)(7).

79. Access is also assessed under N.C.G.S. §131E-183(a)(13).

80. The analyst assessed cost-effectiveness, quality and access under the criteria referenced in findings of fact 77, 78, and 79, as well as under criterion 18(a).

81. Each application is assessed individually on its merits under N.C.G.S. §131E-183(a)(18a) and, in this respect, criterion (18a) is a "stand-alone" criterion.

82. Criterion (18a) is not a comparative criterion and applicants are not compared to each other under this criterion.

83. The analyst applied N.C.G.S. §131E-183(a)(18a) in the review of the four competing applications in this case in accordance with the method described in findings of fact 76 through 82, which are incorporated herein by reference.

84. The approval of both BMA-Fayetteville and DCNC of Hoke County will have a positive impact on cost-effectiveness, quality, and access to services for dialysis patients in Cumberland and Hoke Counties.

85. Both BMA-Fayetteville and DCNC-Hoke are conforming to N.C.G.S. §131E-183(a)(18a).

86. The approval of BMA-Raeford will not have a positive impact on cost-effectiveness. Stipulation B.2 is incorporated herein by reference.

87. BMA-Raeford's application does not conform to N.C.G.S. §131E-183(a)(18a).

88. The approval of DCNC-Cumberland will not have a positive impact on cost-effectiveness. Stipulation C.1 is incorporated herein by reference. Therefore, DCNC of Cumberland County's application does not conform to N.C.G.S. §131E-183(a)(18a).

89. At the beginning of this competitive review, the analyst prepared a handwritten internal memorandum outlining, in chart format, seven different options for approving applicants. The chart included almost every approvable combination of applicants, except the option of approving only one applicant.

90. The analyst wrote the memorandum in order to conceptualize visually the various approval options and to communicate a specific question to the Chief of the CON Section, Lee Hoffman.

91. The analyst considered each of the options outlined in the chart during his analysis of the four competing applications.

92. The analyst's decision to approve BMA-Fayetteville and DCNC-Hoke and to disapprove DCNC-Cumberland and BMA-Raeford was the product of a reflective review process of the merits of each of the applications.

93. The analyst did not approve DCNC-Hoke for the purpose of creating competition between

DCNC and BMA.

IX. N.C.G.S. 131E-183(a)(20)

A. Interpretation of Criterion (20)

94. N.C.G.S. §131E-183(a)(20) requires an applicant already involved in the provision of health services to provide evidence that quality care has been provided in the past.

95. Hoffman was personally involved in the drafting of N.C.G.S. §131E-183(a)(20), as amended in 1987.

96. The Agency's intent in revising the statute in 1987 was to clarify the fact that the burden was on the applicant to demonstrate conformity to the statutory criteria.

97. The Agency applies N.C.G.S. §131E-183(a)(20) to the existing provider of healthcare services in a particular planning area.

98. Under the version of criterion (20) prior to the 1987 amendment, the Agency applied the statute to existing healthcare providers in a planning area.

99. The Agency's application of criterion (20) as described in finding of fact 97 is consistent with the agency's application and interpretation of criterion (20) as this statutory criterion existed prior to the 1987 amendment.

100. The Agency consults the Certification Section of the Division of Facility Services, which monitors facilities for compliance with federal statutory and regulatory requirements, to determine whether a facility has provided quality care in the past.

101. The analyst applied N.C.G.S. §131E-183(a)(20) in accordance with the agency interpretation by applying criterion (20) to BMA-Fayetteville, an existing facility, and by finding that criterion (20) was not applicable to BMA-Raeford, DCNC-Hoke, and DCNC-Cumberland, none of which were existing facilities.

102. BMA-Fayetteville conformed to N.C.G.S. 131E-183(a)(20) because no regulatory deficiencies were cited by the Certification Section for the BMA-Fayetteville facility for the eighteen months prior to the certificate of need review in this case.

103. DCNC's five facilities received no deficiencies from the Certification Section prior to the conclusion of the agency's review in August, 1992. Even if N.C.G.S. §183(a)(20) applied to existing facilities statewide, then DCNC would be conforming to criterion (20).

B. Mortality Rates

104. BMA did not submit written comments during the 30-day written comment period raising allegations regarding DCNC mortality rates, DCNC's record for quality of care, DCNC's record for recruitment and retention of nephrologists, or DCNC's record for compliance with representations in its CON applications.

105. The applicant has the responsibility during the written comment period to raise concerns and make available to the Agency that information which the applicant believes the Agency should consider during its application review process. Findings of fact 9, 10, 12, and 13 are incorporated herein by reference.

106. The opening date of operation for each of the DCNC facilities in North Carolina was as follows:

- a. DCNC-Eden: April 22, 1988
- b. DCNC-Hamlet: October 11, 1988
- c. DCNC-Pinehurst: November 29, 1990
- d. DCNC-Salisbury: July 31, 1989
- e. DCNC-Charlotte: July 23, 1990
- f. DCNC-Anson: October, 1992

107. As of December 31, 1989, the ending population for DCNC's dialysis facilities statewide was 53 patients.

108. As of December 31, 1990, the ending population for DCNC's dialysis facilities statewide was 91 patients.

109. As of December 31, 1991, the ending population for each of DCNC's facilities was as follows:

- a. DCNC-Eden: 40 patients
- b. DCNC-Hamlet: 42 patients
- c. DCNC-Pinehurst: 35 patients
- d. DCNC-Salisbury: 42 patients
- e. DCNC-Charlotte: 13 patients
- f. DCNC-Anson: N/A

110. As of December 31, 1989, the ending population for BMA's dialysis facilities statewide was 1265 patients.

111. As of December 31, 1990, the ending population for BMA's dialysis facilities statewide was 1604 patients.

112. The ending population of BMA-Fayetteville was 188 patients as of December 31, 1989, 212 patients as of December 31, 1990, and 223 patients as of December 31, 1991.

113. Mortality rates for ESRD patients may be calculated by different methodologies.

114. The CON Section does not look at mortality rates in applying N.C.G.S. §131E-183(a)(20).

115. Nancy Lew, Director of Health Care Information with National Medical Care, Inc., the parent corporation of BMA, testified that her method of calculating mortality was to take the patient population of a facility at the beginning of the year; add to that the patient population at the end of the year; divide that number by two, to obtain the average population over the year; and then divide that number into the number of deaths which occurred over the course of the year.

116. The method for calculating mortality in DCNC's application was to take the total number of patients treated during a given calendar year and divide this total number into the number of deaths during the course of the calendar year. The Agency has also used this method.



117. Lew determined that the 12% mortality rate in DCNC's application underrepresented the mortality rate because the denominator was overinflated.

118. Statistics regarding mortality rates can be skewed for facilities with smaller populations, and can stabilize as the populations increase.

119. Mortality rates tend to improve as medical staff at a facility gain experience.

120. In 1990, Dialysis Care's corporate-wide mortality rate, based upon Lew's method of calculating mortality, was 41.9 percent.

121. National Medical Care, Inc. has had facilities with mortality rates in excess of 30 and 40 percent.

122. Pursuant to the Agency's methodology, the mortality rates statewide in 1991 for North Carolina BMA and DCNC facilities were within one percent of the 19.9% average mortality rate for all facilities in the state in 1991.

123. ESRD patients in nursing homes often have advanced stages of disease and advanced age, and both conditions tend to increase the mortality rates of patients.

124. DCNC's Hamlet dialysis facility is located on the campus of a nursing home.

125. A facility's mortality rates may be some indication of quality of care, but these rates are not dispositive or conclusive of quality of care because mortality rates may be calculated using different methodologies and because many factors affect mortality rates.

126. There is not a uniform or national standard pursuant to which the CON Section may measure whether a particular mortality rate at a facility is a barometer of good or poor quality of care.

127. Prior to September 1992, the agency historically had difficulty obtaining and was unable to obtain facility-specific mortality data.

128. The agency is not required to consider mortality rates under N.C.G.S. §131E-183(a)(20).

X. Prior Delays of DCNC

129. The CON Section monitors an approved applicant's project following the issuance of a certificate of need.

130. The CON Section does not assume that an applicant's past difficulties or delays in a prior project will affect an applicant's project currently under review.

131. Some DCNC facilities were not operational within the time period projected in their applications due to delays in recruiting nephrologists. Findings of fact 104 and 105 are incorporated hereby by reference.

132. Jonna Honeycutt, Corporate Administrator of DCNC, and Anne Cobb, Area Administrator for BMA, each testified that it is not unusual for delays to occur in the implementation of ESRD facilities receiving certificates of need.

133. The evidence in the record does not show that any past delays at DCNC facilities will affect DCNC's proposed project in Hoke County.

XI. Lessor/lessee arrangements

134. Generally, the entity named as the lessor and the entity named as the lessee pay the application fee required upon submission of a CON application.

135. A lessor does not have to pay an application fee when the lessor is leasing office space to the applicant-lessee and is not incurring capital expenses to develop the facility, does not have a financial interest in the profits of the facility, and has no involvement in the provision of the proposed health service.

136. The lease arrangement between DCNC and Steven A. Connell, the lessor, constitutes a lease of the building.

137. Connell has no financial interest in the new institutional health service and no involvement in the provision of the health service offered by DCNC-Hoke.

138. DCNC will incur all capital expenses of developing, or upfitting the facility, and will retain all financial interests and all involvement in the operation of its proposed ESRD facility.

139. Connell, as lessor, is not required to join in DCNC-Hoke's application or submit a filing fee to the CON Section.

## XII. Service to Cumberland County ESRD Patients

140. The only circumstance under which the BMA-Raeford application for nine dialysis maintenance stations (three in excess of the identified SMFP need in Hoke County) could have been approved in conjunction with the BMA-Fayetteville application for six maintenance stations (five less than the identified SMFP need in Cumberland County) is if the BMA-Raeford applicant had proposed to serve Cumberland County patients.

141. BMA-Raeford did not propose to serve Cumberland County patients in its proposed nine station Hoke facility.

## XIII. Downsizing

142. BMA-Raeford's demonstration of financial feasibility under N.C.G.S. 131E-183(a)(5) is based on an application to construct a nine maintenance station dialysis facility.

143. The proposed BMA-Raeford facility would have to be downsized from nine maintenance stations to six maintenance stations in order to conform to the need identified in the SMFP for Hoke County and to be approved.

144. "Downsizing" is an approval option pursuant to which the Agency may reduce the number of stations proposed by an applicant and award the approved applicant a fewer number of stations.

145. The project analyst has downsized ESRD projects in the past, but never by more than one or two stations.

146. There is no Agency precedent for downsizing an ESRD facility by three stations.

147. The project analyst has only downsized existing ESRD facilities proposing expansion or relocation; the analyst has never downsized a proposed new ESRD facility.

148. BMA has offered no evidence that its proposed nine station Raeford facility would be financially feasible if downsized to the 5.57 stations, or 6 stations, identified as needed in the SMFP for Hoke County.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the undersigned Administrative Law Judge hereby makes the following Conclusions of Law:

1. The application of BMA-Fayetteville is consistent with all applicable plans, standards, and criteria, subject only to the conditions set forth in the Agency's initial decision to conditionally approve that application.
2. In making its initial decision to approve the application of BMA-Fayetteville, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule.
3. The application of DCNC-Cumberland is not consistent with all applicable plans, standards, and criteria.
4. In making its initial decision to disapprove the application of DCNC-Cumberland, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule.
5. The application of DCNC-Hoke is consistent with all applicable plans, standards and criteria, subject only to the conditions set forth in the Agency's initial decision to conditionally approve that application.
6. In making its initial decision to approve the application of DCNC-Hoke, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule.
7. The application of BMA-Raeford is not consistent with all applicable plans, standards and criteria.
8. In making its initial decision to disapprove the application of BMA-Raeford, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule.
9. The Agency properly applied N.C.G.S. §131E-183(a)(20) in this competitive review. The Agency did not err as a matter of law in its interpretation and application of N.C.G.S. §131E-183(a)(2) to existing health care facilities, as opposed to an applicant's facilities statewide, nor in its reliance on the Certification Section, nor in its failure to consider mortality rates. Assuming, *arguendo*, that if the Agency had erred in interpreting this statute as applying only to existing facilities, DCNC statewide had no deficiencies and would be conforming to criterion 20. The Agency may, but is not required as a matter of law, to consider mortality rates as a barometer of quality of care under N.C.G.S. §131E-183(a)(20).
10. The Agency did not err, fail to use proper procedure, or act arbitrarily and capriciously in approving DCNC-Hoke and disapproving BMA-Raeford by failing to evaluate DCNC's record of past delays or by failing to request clarifying information from BMA with regard to its Raeford application.
11. The Agency did not err as a matter of law in its interpretation and application of N.C.G.S. §131E-183(a)(18a).
12. The Agency's initial decision to disapprove the application of BMA-Raeford, and to approve BMA-Fayetteville and DCNC-Hoke is not unlawful because the Agency did not make its decision for the purpose of increasing or creating competition between DCNC and BMA.
13. The Agency did not exceed its authority and jurisdiction, act erroneously, fail to use proper



procedure, act arbitrarily and capriciously, or fail to act as required by law by reviewing DCNC-Hoke's application without a contemporaneous application and fee payment from the lessor of the proposed Hoke facility.

14. The Agency properly interpreted and properly relied on the 1992 SMFP county-specific need projections and the 1992 SMFP planning area need projection for the Cumberland/Hoke planning area and therefore did not exceed its authority and jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously or fail to act as required by law.

15. BMA-Raeford's application cannot be approved in conjunction with BMA-Fayetteville's application as a matter of law because BMA-Raeford does not propose to serve Cumberland County patients.

16. Based on the evidence in the record, or lack thereof, BMA-Raeford's application cannot be downsized to meet the 1992 SMFP identified need in Hoke County.

#### RECOMMENDATION

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that:

1. The initial decision by the CON Section to award a CON to BMA to expand its existing ESRD facility in Fayetteville should be affirmed, and a CON should be awarded to BMA for that project, subject to the conditions set forth in the Agency's initial decision to conditionally approve that application;

2. The initial decision by the CON Section to deny BMA's application for a CON to develop a 10-station ESRD facility in Hoke County should be affirmed;

3. The initial decision by the CON Section to deny DCNC's application for a CON to develop a 12-station ESRD facility in Fayetteville should be affirmed; and

4. The initial decision by the CON Section to award a CON to DCNC to develop a 7-station ESRD facility in Raeford should be affirmed, and a CON should be awarded to DCNC for that project, subject to the conditions set forth in the Agency's initial decision to conditionally approve that application.

#### ORDER

It is hereby ordered that the Agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, in accordance with North Carolina General Statute §150B-36(b).

#### NOTICE

The Agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the Agency who will make the final decision. G.S. §150B-36(a).

The agency is required by G.S. §150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearing.

The Agency that will make the final decision in this contested case is the North Carolina Department of Human Resources.

This the 22nd day of June, 1993.

---

Michael Rivers Morgan  
Administrative Law Judge

*The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.*

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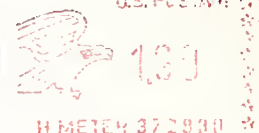
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