

NORTH CAROLINA

IN THIS ISSUE



REGISTER

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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

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.

TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE

TITLE	DEPARTMENT	LICENSING BOARDS	CHAPTER
1	Administration	Acupuncture	1
2	Agriculture	Architecture	2
3	Auditor	Athletic Trainer Examiners	3
4	Commerce	Auctioneers	4
5	Correction	Barber Examiners	6
6	Council of State	Certified Public Accountant Examiners	8
7	Cultural Resources	Chiropractic Examiners	10
8	Elections	Employee Assistance Professionals	11
9	Governor	General Contractors	12
10	Health and Human Services	Cosmetic Art Examiners	14
11	Insurance	Dental Examiners	16
12	Justice	Dietetics/Nutrition	17
13	Labor	Electrical Contractors	18
14A	Crime Control & Public Safety	Electrolysis	19
15A	Environment and Natural Resources	Foresters	20
16	Public Education	Geologists	21
17	Revenue	Hearing Aid Dealers and Fitters	22
18	Secretary of State	Landscape Architects	26
19A	Transportation	Landscape Contractors	28
20	Treasurer	Massage & Bodywork Therapy	30
*21	Occupational Licensing Boards	Marital and Family Therapy	31
22	Administrative Procedures (Repealed)	Medical Examiners	32
23	Community Colleges	Midwifery Joint Committee	33
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28	Juvenile Justice and Delinquency	Opticians	40
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		Osteopathic Examination & Reg. (Repealed)	44
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		Veterinary Medical Board	66

Note: Title 21 contains the chapters of the various occupational licensing boards.

NORTH CAROLINA REGISTER
 Publication Schedule for January 2002 – December 2002

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
volume & issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	non-substantial economic impact			substantial economic impact			270 th day from issue date
					end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	
16:13	01/02/02	12/06/01	03/15/02	01/17/02	02/01/02	02/20/02	05/00/02	03/04/02	03/20/02	05/00/02	09/29/02
16:14	01/15/02	12/19/01	04/01/02	01/30/02	02/14/02	02/20/02	05/00/02	03/18/02	03/20/02	05/00/02	10/12/02
16:15	02/01/02	01/10/02	04/15/02	02/16/02	03/04/02	03/20/02	05/00/02	04/02/02	04/22/02	01/29/03	10/29/02
16:16	02/15/02	01/25/02	05/01/02	03/02/02	03/18/02	03/20/02	05/00/02	04/16/02	04/22/02	01/29/03	11/12/02
16:17	03/01/02	02/08/02	05/01/02	03/16/02	04/01/02	04/22/02	01/29/03	04/30/02	05/20/02	01/29/03	11/26/02
16:18	03/15/02	02/22/02	05/15/02	03/30/02	04/15/02	04/22/02	01/29/03	05/14/02	05/20/02	01/29/03	12/10/02
16:19	04/01/02	03/08/02	06/03/02	04/16/02	05/01/02	05/20/02	01/29/03	05/31/02	06/20/02	01/29/03	12/27/02
16:20	04/15/02	03/22/02	06/17/02	04/30/02	05/15/02	05/20/02	01/29/03	06/14/02	06/20/02	01/29/03	01/10/03
16:21	05/01/02	04/10/02	07/01/02	05/16/02	05/31/02	06/20/02	01/29/03	07/01/02	07/22/02	01/29/03	01/26/03
16:22	05/15/02	04/24/02	07/15/02	05/30/02	06/14/02	06/20/02	01/29/03	07/15/02	07/22/02	01/29/03	02/09/03
16:23	06/03/02	05/10/02	08/15/02	06/18/02	07/03/02	07/22/02	01/29/03	08/02/02	08/20/02	01/29/03	02/28/03
16:24	06/17/02	05/24/02	09/03/02	07/02/02	07/17/02	07/22/02	01/29/03	08/16/02	08/20/02	01/29/03	03/14/03
17:01	07/01/02	06/10/02	09/03/02	07/16/02	07/31/02	08/20/02	01/29/03	08/30/02	09/20/02	01/29/03	03/28/03
17:02	07/15/02	06/21/02	09/16/02	07/30/02	08/14/02	08/20/02	01/29/03	09/13/02	09/20/02	01/29/03	04/11/03
17:03	08/01/02	07/11/02	10/01/02	08/16/02	09/03/02	09/20/02	01/29/03	09/30/02	10/21/02	01/29/03	04/28/03
17:04	08/15/02	07/25/02	10/15/02	08/30/02	09/16/02	09/20/02	01/29/03	10/14/02	10/21/02	01/29/03	05/12/03
17:05	09/03/02	08/12/02	11/15/02	09/18/02	10/03/02	10/21/02	01/29/03	11/04/02	11/20/02	01/29/03	05/31/03
17:06	09/16/02	08/30/02	11/15/02	10/01/02	10/16/02	10/21/02	01/29/03	11/15/02	11/20/02	01/29/03	06/13/03
17:07	10/01/02	09/10/02	12/02/02	10/16/02	10/31/02	11/20/02	01/29/03	12/02/02	12/20/02	05/00/04	06/28/03
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17:09	11/01/02	10/11/02	01/02/03	11/16/02	12/02/02	12/20/02	05/00/04	12/31/02	01/21/03	05/00/04	07/29/03
17:10	11/15/02	10/25/02	01/15/03	11/30/02	12/16/02	12/20/02	05/00/04	01/14/03	01/21/03	05/00/04	08/12/03
17:11	12/02/02	11/06/02	02/03/03	12/17/02	01/02/03	01/21/03	05/00/04	01/31/03	02/20/03	05/00/04	08/29/03
17:12	12/16/02	11/21/02	02/17/03	12/31/02	01/15/03	01/21/03	05/00/04	02/14/03	02/20/03	05/00/04	09/12/03

EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF RULE-MAKING PROCEEDINGS

END OF COMMENT PERIOD TO A NOTICE OF RULE-MAKING PROCEEDINGS: This date is 60 days from the issue date. An agency shall accept comments on the notice of rule-making proceeding until the text of the proposed rules is published, and the text of the proposed rule shall not be published until at least 60 days after the notice of rule-making proceedings was published.

EARLIEST REGISTER ISSUE FOR PUBLICATION OF TEXT: The date of the next issue following the end of the comment period.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
(1) **RULE WITH NON-SUBSTANTIAL ECONOMIC IMPACT:** An agency shall accept comments on the text of a proposed rule for at least 30 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.
(2) **RULE WITH SUBSTANTIAL ECONOMIC IMPACT:** An agency shall accept comments on the text of a proposed rule published in the Register and that has a substantial economic impact requiring a fiscal note under G.S. 150B-21.4(b1) for at least 60 days after publication or until the date of any public hearing held on the rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

U.S. Department of Justice

Civil Rights Division

JDR:TCH:DC:jdh
DJ 166-012-3
2001-3795
2001-3815

*Voting Section – GSt.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530*

December 18, 2002

Mr. Gary O Bartlett
Executive Secretary-Director
State Board of Elections
P.O. Box 27255
Raleigh, NC 27611-7255

Dear Mr. Bartlett:

This refers to Session Law 2001-466, which postpones the candidate qualifying period for all elections scheduled to be held on May 7, 2002, enables the State Board of Elections to further postpone candidate qualifying and to postpone the May 7, 2002 election under certain circumstances, enables the State Board of Elections to adopt rules to govern postponed qualifying and elections for 2002 and places certain limits on those rules, alters the procedures for the 2002 elections where a candidate dies after the close of qualifying, revises the date on which candidates for local boards of education will take office in 2002 if the May 7, 2002 election is postponed, requires that absentee voting data be reported by precinct and enables the State Board of Elections to adopt rules governing such reporting, makes certain changes in the State's uniformed services voting program, permanently changes the candidate qualifying period beginning in 2003, and revises certain definitions in the election code, for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on November 21, 2001; supplemental information was received on December 6, 2001.

The Attorney General does not interpose any objection to the changes set forth in Sections 1, 2, 4, and 5.1 of Session Law 2001-466. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

The above-referenced sections of Session Law 2001-466 include provisions that are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to this legislation will be subject to Section 5 review (e.g., further postponement of candidate qualifying periods or election schedules, adoption of rules by the State Board of Elections). See 28 C.F.R. 51.15.

On November 15, 2001, we received Session Law 2001-460 for Section 5 review (our File No. 2001-3795). Since Session Law 2001-460 is directly related to Section 3 of Session Law 466, these changes must be reviewed simultaneously. Accordingly, the sixty-day review period for these changes now before us will run concurrently with the most recent submission. Therefore, by January 22, 2002, we will either make a determination on these changes or request any specific items of additional information necessary to complete our review of these submissions under Section 5. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.39).

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:DHH:SLL:par
DJ 166-012-3
2001-3750

*Voting Section – GSt.
950 Pennsylvania Ave., N.W.
Washington, DC 20530*

December 20, 2001

Richard J. Rose, Esq.
Poyner & Spruill
P.O. Box 353
Rocky Mount, NC 27802-0353

Dear Mr. Rose:

This refers to the 2001 redistricting plan for the City of Rocky Mount in Edgecombe and Nash Counties, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on November 9, 2001; supplemental information was received on November 27, 2001.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:TCH:TAR:jdh
DJ 166-012-3
2001-3721

*Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128*

January 7, 2002

Deborah R. Stagner, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, NC 27602-1151

Dear Ms. Stagner:

This refers to the 2001 redistricting plan for the board of commissioners in Edgecombe County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on November 8, 2001.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:TCH:CKD:NT:DC;jdh
DJ 166-012-3
2001-3795
2001-3815

*Voting Section – GSt.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530*

January 14, 2002

Don Wright, Esq.
General Counsel
State Board of Elections
P.O. Box 27255
Raleigh, NC 27611-7255

Dear Mr. Wright:

This refers to Session Law 2001-460, which allows county boards of election to certify ballots and control voting systems, extends polling place hours in extraordinary circumstances, assigns modern meaning to election terms, provides county boards of election more flexibility in designing buffer zones, adopts technologically neutral guidelines, and authorizes the state board of elections to approve/disapprove all voting systems for counties and municipalities; and Section 3 of Session Law 2001-466, which revises certain definitions of the election code for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on November 15 and 21, 2001; supplemental information was received through January 10, 2002.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Acting Chief
Voting Section

STATE BOARD OF ELECTIONS

6400 Mail Service Center • Raleigh, NC 27699-6400

GARY O. BARTLETT
Director

Mailing Address:

PO Box 27255
Raleigh, NC 27611-7255
(919) 733-7173
Fax (919) 715-0135

January 10, 2002

Mr. Bill James
2010 Draymore Lane
Matthews, NC 28105

Dear Mr. James:

In a letter dated October 11, 2000, Susan Nichols of the Office of the Attorney General determined that certain personal gifts made to Mr. Arthur Griffin, an elected member of the Charlotte-Mecklenburg Board of Education, were not "contributions" governed by and reportable under the campaign finance reporting laws of North Carolina.

By a series of emails beginning in November 2001, and continuing most recently on January 2, 2002, you report that you have received a check for \$100 from an entity called "Kearns and Company," which you have not cashed. You state that you are aware that you may not receive political contributions from business entities, but, citing Ms. Nichols's letter, you state further your intention to cash the check and treat it as a personal gift, not a campaign contribution. In that connection, you ask several questions which I will attempt to answer in this opinion.

Because analysis of your questions may be applicable to other potential candidates, I am responding pursuant to the paragraph in N. C. Gen. Stat. 163-278.23 which authorizes the Executive Director of the State Board of Elections to issue opinions to candidates and others. As required by this statute, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register. This opinion will also be posted on the web page for the State Board of Elections (www.sboe.state.nc.us).

Your series of e-mails beginning in November 2001, present several questions. First, you ask whether you may accept a contribution of \$100 from "Kearns and Company" with a residence listed as the business address. You believe the company is owned by a husband and wife and has not been incorporated. Under N. C. Gen. Stat. 163-278.6(6) a contribution is defined as

"any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, to a candidate to support or oppose the nomination or election of one or more clearly identified candidates, to a political committee, to a political party, or to a referendum committee, whether or not made in an election year... ."

Since you characterize the check from Kearns and Company as a contribution, it must have been given in support of your future candidacy or towards a debt still extent from a previous candidacy.

Your specific concern is whether the campaign finance statutes permit you to accept corporate or other business contributions. Pursuant to N. C. Gen. Stat. 163-278.19, a "corporation, business entity, labor union, professional association or insurance company" is prohibited from making contributions to a candidate. Exceptions to this prohibition include when a corporation forms a political committee and makes contributions through it or the donor is an entity that meets the criteria of N. C. Gen. Stat. 163-278.19(f). The case which you reference, *N. C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), caused the General Assembly to legislate the exception set forth in 163-278.19(f) but did not otherwise remove the prohibition against business entities making contributions to candidates.

The campaign reporting staff will assume that any report listing a contribution by "Kearns and Company" is a business contribution, even when the address for the company is a residence, unless you obtain assurances from the contributor that he or she is making the contribution from personal funds maintained in a partnership account. Without documentation such as a letter so stating, you should not accept the contribution and if you have deposited it, you should return the contribution.

Your second question is when you are considered a "candidate" for campaign reporting purposes. A "candidate" is defined for the campaign reporting article in N. C. Gen. Stat. 163-278.6(4) as follows:

"The term 'candidate' means any individual who, with respect to a public office...has filed a notice of candidacy or a petition requesting to be a candidate, or has been certified as a nominee of a political party for a vacancy or has otherwise qualified as a candidate in a manner authorized by law, or has received funds or made payments or has given the consent for anyone else to receive funds or transfer anything of value for the purpose of exploring or bringing about that individual's nomination or election to office. ... Status as a candidate for the purpose of this Article continues if the individual is receiving contributions to repay loans or cover a deficit or is making expenditures to satisfy obligations from an election already held."

You state in your initial e-mail that you have an open campaign account. The Kearns and Company contribution was apparently intended for it. Your question about the permissibility of accepting a corporate contribution indicates the donation was a political contribution and not a personal gift. The intent of the person or persons making a donation at the time it is given, and the context in which the donation is made, is very important in determining whether it is a political contribution or a personal gift. Now you would like to characterize the contribution from Kearns and Company as a personal gift rather than a campaign contribution. To do so would be inconsistent with the apparent intent of the original contribution. You initially characterized it as a contribution and your e-mail gave no indication that it was a gift to you individually. This is the key distinction between the facts you have posed and those underlying the dinner honoring Arthur Griffin. All the evidence in that situation was that funds in excess of the expenses for the dinner honoring Mr. Griffin might be given to him as a personal gift. The donors of those funds did not intend for them to be used to support or oppose his candidacy for elective office or his duties in office and they were not solicited for that purpose.

You are correct that it is possible for a candidate to undermine the campaign reporting system by accepting gifts from individuals, loaning his or her campaign the same amount of money as the gift, and then maintaining it was never intended to be a political contribution. Quite frankly, the campaign reporting system is dependent on the honesty, integrity, and desire of candidates and their supporters to comply with applicable statutes. It is the intent of the law to regulate and provide disclosure of contributions made to candidates or to elected officials in support "of their duties and activities while in an elected office." N. C. Gen. Stat. 163-278.346. It is not the intent of the campaign reporting statutes to regulate personal gifts made to candidates or elected officials by friends and family members for the recipient's personal use. Thus, I appreciate your stated desire to comply with applicable statutes and your forthrightness in characterizing the check you received from Kearns and Company as a contribution and not as a gift. You may not, however, now change its character as a contribution by choosing to "accept" it as a personal gift.

Finally, there are motions pending in the case of *N. C. Right to Life, Inc. v. Leake* (E.D.N.C. No. 5:99-CV-798-BO(3)). There is no date by which the court must rule on these motions. If the decision on the motions has some bearing on this opinion then I will so inform you. Until you receive notification that this opinion is no longer in effect, you may rely on it as to the facts on which it is based.

Sincerely,

Gary O. Bartlett
Executive Secretary

cc: State Board of Elections Members
Kim Westbrook, Deputy Director Campaign Reporting
Peter S. Gilchrist, III, District Attorney for the 26th Prosecutorial District
Molly Masich, Director of APA Services, N. C. Register
Susan K. Nichols, Special Deputy Attorney General
Robert Joyce, Institute of Government
Dot Presser, Former State Board of Elections Member

A Notice of Rule-making Proceedings is a statement of subject matter of the agency's proposed rule making. The agency must publish a notice of the subject matter for public comment at least 60 days prior to publishing the proposed text of a rule. Publication of a temporary rule serves as a Notice of Rule-making Proceedings and can be found in the Register under the section heading of Temporary Rules. A Rule-making Agenda published by an agency serves as Rule-making Proceedings and can be found in the Register under the section heading of Rule-making Agendas. Statutory reference: G.S. 150B-21.2.

TITLE 02 – DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES

CHAPTER 09 – FOOD AND DRUG PROTECTION DIVISION

Notice of Rule-making Proceedings is hereby given by NC Pesticide Board in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 02 NCAC 09L .1001, .1003-.1005. Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 143-458; 143-463

Statement of the Subject Matter: These Rules establish requirements for aerial application of pesticides.

Reason for Proposed Action: The Pesticide Board initiated rule-making proceedings as a result of recommendations received from its Pesticide Advisory Committee. The proposed changes would delete certain outdated or duplicative definitions and equipment specifications; would revise the Sections dealing with restricted areas to replace certain zero deposit standards with an acceptable residue level which the PAC feels is still fully protective of human health; would permit the application of specific pesticides within 100 feet of a residence if the inhabitants of legal age have given written consent to the application; and would establish a new rule dealing with "prima facie evidence of violation." The Pesticide Advisory Committee recommended the proposed revisions as more practical than the current rules, while still being fully protective of human health.

Comment Procedures: Written comments may be submitted to James W. Burnette, Jr., Secretary, NC Pesticide Board, PO Box 27647, Raleigh, NC 27611.

Citation to Existing Rule Affected by this Rule-making: 15A NCAC 02H .0126. Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 143-215.1, 143-215.3

Statement of the Subject Matter: Permanent rulemaking for implementation of federally delegated NPDES stormwater permit requirements under Phase II of the NPDES stormwater program.

Reason for Proposed Action: NC DENR is the delegated authority to implement a Federal program. The federal rules changed in December 1999. Agency needs to make rule changes to implement the new program requirements. These Rules may be adopted as temporary rules.

Comment Procedures: Send comments to Darren England, Division of Water Quality, Stormwater & General Permits Unit, 1617 Mail Service Center, Raleigh, NC 27699-1617. Comments may also be submitted electronically to stormwater@ncmail.net.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 21 – BOARD OF GEOLOGISTS

Notice of Rule-making Proceedings is hereby given by the North Carolina Board for Licensing of Geologists in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 21 NCAC 21 .0103-.0104, .0106-.0107, .0301-.0302, .0501-.0504, .0514-.0515, .0603-.0607, .0802-.0804, .0902-.0903, .1001-.1002 - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 89E

Statement of the Subject Matter: Address change, re disciplinary matters, licensing by comity rules, repeal letter of caution, clarify appeal rights to letter of reprimand, conform to the requirements of OAH, change time limit on Board ruling

Reason for Proposed Action: Changes will be made to reflect current practice and law.

Comment Procedures: Written comments should be mailed to the NC Board for Licensing of Geologists, PO Drawer 41225, Raleigh, NC 27629-1225.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

Notice of Rule-making Proceedings is hereby given by NC Department of Environment and Natural Resources, Environmental Management Commission in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

This Section contains the text of proposed rules. At least 60 days prior to the publication of text, the agency published a Notice of Rule-making Proceedings. The agency must accept comments on the proposed rule for at least 30 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. The required comment period is 60 days for a rule that has a substantial economic impact of at least five million dollars (\$5,000,000). Statutory reference: G.S. 150B-21.2.

TITLE 25 – OFFICE OF STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to amend the rules cited as 25 NCAC 01E .0802, .0804, .0817-.0818, and repeal the rules cited as 25 NCAC 01E .0803, .0807-.0808, .0812, .0814-.0816, .0819. Notice of Rule-making Proceedings was published in the Register on November 15, 2001.

Proposed Effective Date: April 1, 2003

Public Hearing:

Date: March 20, 2002

Time: 10:00 a.m.

Location: Administration Building, Third Floor Conference Room, 116 W. Jones Street, Raleigh, NC

Reason for Proposed Action: *The above referenced rules are proposed to be amended and/or repealed in order to comply with the changes of the Uniformed Services Employment and Reemployment Rights Act.*

Comment Procedures: *Written comments may be submitted to Peggy Oliver, Hearing Officer, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331. Oral comments will be received at the public hearing. Written comments must be received no later than March 18, 2002.*

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 01- OFFICE OF STATE PERSONNEL

SUBCHAPTER 01E – EMPLOYEE BENEFITS

SECTION .0800 – MILITARY LEAVE

25 NCAC 01E .0802 MILITARY LEAVE

Leave ~~Military leave with pay~~ shall be granted to employees of the State ~~members of reserve components of the U.S. Armed Forces~~ for certain periods of active duty training service in the uniformed services in accordance with G.S. 127A-116 and the Uniformed Services Employment and Reemployment Act of 1994 and Military leave shall also be given for state military duty to members of the State Defense Militia as outlined in Rule .0820 of this Section (National Guard, including the State Defense Militia) and the Civil Air Patrol as outlined in Rule .0806 of this Section for state military duty.

Authority G.S. 126-4; 127A-116.

25 NCAC 01E .0803 DEFINITIONS

~~(a) "Armed forces or active military service" means Army, Navy, Air Force, Marine Corps, Coast Guard and other organizations which are brought into federal military service during an emergency or wartime.~~

~~(b) "Extended active duty" means that period of time for which an employee is ordered to active military service under the following circumstances:~~

- ~~(1) one voluntary enlistment or entry into any of the active military services for a period of four years or less at any time during the employee's career as a state employee or for all such enlistments or entries made during a declared state of national emergency or during time of war;~~
- ~~(2) upon call up or order to federal active duty for an employee in the National Guard or one of the other reserve components;~~
- ~~(3) induction into active military service via selective service conscription.~~

~~(c) Reserve components of the U.S. Armed Forces are the National Guard, the Army Reserve, the Naval Reserve, the Marine Corps Reserve, the Air Force Reserve and the Coast Guard Reserve. The Civil Air Patrol is not a reserve component; it is an Air Force Auxiliary and its members are not subject to obligatory service. The National Guard is unique among the reserve components in that it has a dual role, serving both as a Federal reserve component and as the State Militia. In its role as State Militia the North Carolina Army National Guard and the North Carolina Air National Guard respond to the Governor who is their Commander in Chief and serves as the military arm of the State government. The State Defense Militia, which is a component of the National Guard, is also a part of the State Militia. Therefore, the National Guard is subject to active State duty upon order of the Governor.~~

Authority G.S. 127A-116.

25 NCAC 01E .0804 PERIODS OF ENTITLEMENT FOR ALL RESERVE COMPONENTS

(a) Military leave with pay for training shall be granted to members of the Uniformed Services who are full-time or part-time employees with a permanent, trainee, time-limited or probationary appointment for up to 120 working hours (prorated for part-time employees) during the Federal fiscal year beginning October 1 and ending on September 30, for any type of active military duty for members not on extended active duty, including:

- (1) active duty for training; and
- (2) inactive duty training. If the drill is not scheduled on the employee's off-days, the employee has the option of requesting that the work schedule be rearranged, or the employee may use any unused portion of the 120 hours

~~leave with pay, vacation leave, or leave without pay.~~

~~(b) Although regularly scheduled unit assemblies occurring on weekends and referred to as "drills" do not normally require military leave, the employing agency is required to excuse an employee for all regularly scheduled military training duty. If necessary the employee's work schedule shall be rearranged to enable the employee to attend these assemblies. To determine the dates of these regularly scheduled unit assemblies, the employing agency may require the employee to provide a unit training schedule which lists training dates for a month or more in advance. Military leave with pay [from Paragraph (a) of this Rule] or vacation may be used if "drills" occur on weekdays.~~

~~(b) Military leave with pay shall be granted to members of the Civil Air Patrol as defined in Rule .0806 of this Section.~~

~~(c) An employee shall be granted necessary time off when the employee must undergo a required physical examination relating to membership in a reserve component without charge to leave.~~

~~(d) Military leave with pay shall be granted to members of the State Defense Militia as defined in Rule .0820 of this Section.~~

Authority G.S. 126-4(5).

25 NCAC 01E .0807 UNACCEPTABLE PERIODS

~~Employees shall not be entitled to military leave with pay for the following periods; regularly scheduled unit assemblies usually occurring on weekends and:~~

- ~~(1) duties resulting from disciplinary actions imposed by military authorities;~~
- ~~(2) for unscheduled or incidental military activities such as volunteer work at military facilities (not in duty status), unofficial military activities, etc.;~~
- ~~(3) for inactive duty training (drills) performed for the convenience of the member, such as equivalent training, split unit assemblies, make-up drills, etc.~~

~~Employing agencies are not required to excuse an employee for military service performed under circumstances described in Items (1), (2), and (3) of this Rule.~~

Authority G.S. 126-4(5).

25 NCAC 01E .0808 ADMINISTRATIVE RESPONSIBILITY

~~The employing agency may require the employee to submit a copy of the orders or other appropriate documentation evidencing performance of required military duty.~~

Authority G.S. 126-4; 127A-116.

25 NCAC 01E .0812 MILITARY LEAVE WITHOUT PAY: ATTENDANCE AT SERVICE SCHOOLS

~~(a) Military leave without pay shall be granted for certain periods of active duty or for attendance at service schools. Except for extended active duty (covered in Rule .0803 of this Section) use of all or any portion of an employee's 120 hours annual military leave (prorated for part-time employees) with pay or regular vacation leave may be used in lieu of or in conjunction with military leave without pay.~~

~~(b) Military leave without pay shall be granted for attendance at service schools when such attendance is mandatory for continued retention in the military service.~~

~~(c) For purposes other than retention, military leave without pay may be granted employees for attendance at resident military service schools. However, when the employee is required by a reserve component to attend a resident specialized military course because the course is not available by any other means (i.e., correspondence course, USAR school, etc.) military leave without pay shall be granted. To verify that such a course is mandatory, the agency may contact the Office of the Adjutant General, North Carolina National Guard, ATTN: Vice Chief of Staff-State Operations (VCSOP).~~

Authority G.S. 126-4(5).

25 NCAC 01E .0814 EXTENDED-ACTIVE DUTY

~~(a) Military leave without pay shall be granted, as outlined in this Rule, for periods of active duty in the Armed Forces of the United States. Use of military leave with pay is not authorized upon entry into extended active duty.~~

~~(b) Employee Eligibility. Full-time or part-time permanent, trainee, and probationary employees who enter active military service under situations as defined in Rule .0803(b) of this Section are eligible for leave without pay.~~

~~(c) Additional leave without pay shall be granted for the following periods:~~

- ~~(1) While awaiting entry into active duty provided any delay is not due to employee's own fault. If desired by the employee this shall include any period up to 30 days to allow employee to settle any personal matters.~~
- ~~(2) The period immediately following military service while employee's reinstatement with state government is pending provided the employee applies for such reinstatement within 90 days following release from active duty. Please note that it is the employee's responsibility to apply for reinstatement within the 90-day period.~~
- ~~(3) Any period of involuntary extension of an enlistment which originally was made for four years or less when such extension is not made at the employee's request or due to his own fault. In case of involuntary extension the employee may be required to present satisfactory evidence that such extension was in fact involuntary.~~
- ~~(4) Employees hospitalized for service-connected disability under honorable conditions and not due to their own misconduct shall be entitled to military leave without pay for that period certified by the attending physician as required for adequate recuperation to return to state employment. Also, the employee shall be entitled to leave without pay for the period from the time of release by the physician until actually reinstated in state employment provided the employee applies for such reinstatement within 90 days of such release by the physician.~~

Authority G.S. 126-4; 127A-116.

25 NCAC 01E .0815 EMPLOYEE RESPONSIBILITY: LEAVE WITHOUT PAY

~~The employee shall make available to the agency head a copy of orders to report for active duty, shall advise the agency head of the effective date of leave and the probable date of return, shall provide the agency head with any requested information regarding military service, shall be responsible for making application for reinstatement within 90 days from the date of separation from service and shall notify the agency of any decision not to return.~~

Authority G.S. 126-4(5).

25 NCAC 01E .0816 EMPLOYER RESPONSIBILITY

~~It shall be the responsibility of the agency head to ascertain that the employee is eligible for military leave without pay. The agency head shall explain to the employee the rights and benefits concerning leave, salary increases, retirement status, and reinstatement from leave. Forms PD-105 indicating final separation shall be submitted if the employee exceeds the time limitations for military leave without pay, or if the agency learns during the period of leave without pay that the employee will not return to state service.~~

Authority G.S. 126-4.

25 NCAC 01E .0817 RETENTION AND CONTINUATION OF BENEFITS

(a) The employee may choose to have accumulated vacation leave paid in a lump sum, may exhaust this leave, or may retain part or all of accumulated leave until return to state service; the maximum accumulation of 240 hours applies to lump sum payment.

(b) The employee shall retain all accumulated sick leave and continue to earn time toward salary increases and ~~aggregate total~~ State service. Entitlement is given to full retirement membership service credit in accordance with the provisions of the Teachers' and State Employees' Retirement System ~~for the period of such active service in the Armed Forces after being separated or released, or becoming entitled to be separated or released, from active military service for honorable conditions. Under this provision, credit is received for such service upon filing with the Teachers' and State Employees' Retirement System a copy of the service record showing dates of entrance and separation. (In addition, the retirement membership service credit is available to employees who return to state employment within a period of two years after the earliest discharge date, or any time after discharge and who have rendered 10 or more years of~~

~~membership in the retirement system.) Voluntary enlistments following the earliest discharge are not creditable.~~

Authority G.S. 126-4(5).

25 NCAC 01E .0818 REINSTATEMENT FROM LEAVE WITHOUT PAY FOR MILITARY SERVICE

Reinstatement shall be made in accordance with the Uniformed Services Employment and Reemployment Act of 1994.

~~(a) Employees on leave without pay who are separated or discharged from military service under honorable conditions and who apply for reinstatement within the established time limits shall be reinstated to the same position or one of like status, seniority and pay with the same agency or with another state agency. If, during military service, an employee is disabled to the extent that the duties of the original position cannot be performed, the employee shall be reinstated to a position with duties compatible with the disability.~~

~~(a) shall be reinstated to same position or one of like status, seniority and pay with the same agency or with another state agency. If, during military service, an employee is disabled to the extent that the duties of the original position cannot be performed, the employee shall be reinstated to a position with duties compatible with the disability.~~

~~(b) The employee's salary upon reinstatement shall be based on the salary rate just prior to leave plus any general salary increases due while on leave. In no case will the reinstated employee's salary be less than when placed in a military leave status. If the employee was in trainee status at the time of military leave, the addition of trainee adjustments may be considered, at the discretion of the agency head, if it can be determined that the military experience was directly related to development in the area of state work to be performed. Employees who resign without knowledge of their eligibility for leave without pay and reinstatement benefits, but who are otherwise eligible for the reinstatement benefits of this Paragraph, shall be reinstated from military service the same as if they had applied for and been granted leave without pay for military service.~~

Authority G.S. 126-4(5).

25 NCAC 01E .0819 RESERVE ENLISTMENT PROGRAM OF 1963 (REP-63)

~~The employee may use all or part of his/her 120 hours of military leave with pay or regular vacation leave or a combination of the two in lieu of military leave without pay.~~

Authority G.S. 126-4(5).

This Section includes temporary rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code and includes, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements. Pursuant to G.S. 150B-21.1(e), publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings unless this notice has been previously published by the agency.

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Rule-making Agency: Department of Administration

Rule Citation: 01 NCAC 05B .1522

Effective Date: January 14, 2002

Findings Reviewed and Approved by: Julian Mann, III

Authority for the rulemaking: G.S. 143-59

Reason for Proposed Action: Session Law 2001-240 enacts a law that allows the State to add a percent increase to bids of nonresident bidders where the nonresident bidders' home States grant preferences to in-State bidders (reciprocal preference). The secretary is required, by January 1, 2002, to electronically publish a list of States that give preferences. The law provides that the Secretary may adopt temporary rules to implement this act. Therefore, we must have the rules that procurement officials will use to apply this reciprocal preference, in place by January 1, 2002.

Comment Procedures: Any person interested in making written or verbal comment to this proposed rule adoption should submit such comment to T. Brooks Skinner, Jr., General Counsel, NC Department of Administration, 116 W. Jones St., Raleigh, NC 27603-8003, phone (919) 807-9571, email brooks.skinner@ncmail.net.

CHAPTER 05 - PURCHASE AND CONTRACT

SUBCHAPTER 05B - PURCHASE PROCEDURES

SECTION .1500 - MISCELLANEOUS PROVISIONS

01 NCAC 05B .1522 RECIPROCAL PREFERENCE

(a) To discourage other states from applying in-state preferences against North Carolina's resident bidders, all agencies shall apply a reciprocal preference, when required in this Section, on all contracts for equipment, materials, supplies, and services, that exceed twenty-five thousand dollars (\$25,000) in value. This shall be done for the purpose of determining the low bidder only and there shall be no increase in price actually paid as a result of this determination.

(b) The Secretary shall publish on the Division of Purchase and Contract's internet site, a list of states and their in-state preference, if any, and all agencies shall use this list to determine if a nonresident bidder is from a State that has an in-State preference for the commodity or service being bid, and how much that preference is.

(c) For each of the contracts described in Paragraph (a) of this Rule, the agency shall apply the reciprocal preference to each nonresident bidder located in a state that has an in-state

preference for that equipment, material, supply or service. The amount of the reciprocal preference applied shall be identical to that applied in that state for that equipment, material, supply or service.

(d) Each solicitation document used for the contracts described in Paragraph (a) of this Rule, shall include space for a bidder to give their principal place of business address if it is different than the address given in the execution section of the solicitation document. This shall not prevent the agency that issued the solicitation document from investigating this information and concluding that the principal place of business is different, according to their interpretation of G.S. 143-59(b).

(e) A reciprocal preference shall not be used when procurements are being made under G.S. 143-53(a)(5) and G.S. 143-57.

(f) If the use of the reciprocal preference changes which bidder is the low bidder, the Secretary may waive the use of the reciprocal preference, after consultation with the Board of Award, and after taking into consideration such factors as, competition, price, product origination, and available resources.

(g) For the purpose of this Section, a resident bidder is defined as an offeror that has paid unemployment taxes or income taxes in this State and whose principal place of business is located in this State; a nonresident bidder is defined as an offeror that is not a resident bidder as defined in Paragraph (a) of this Rule; a principal place of business is the principal place from which the trade or business of the company is directed or managed; and a bidder and offeror, as well as bid and proposal, are interchangeable.

History Note: Authority G.S. 143-59; Temporary Adoption Eff. January 14, 2002.

Rule-making Agency: NC Department of Administration

Rule Citation: 01 NCAC 35 .0101, .0103, .0201-.0205, .0301-.0302, .0304-.0306, .0308-.0309

Effective Date: February 15, 2002

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 143-340(26)

Reason for Proposed Action: The SECC has grown significantly in recent years with more charitable organizations applying to participate every year. More detailed application procedures have become necessary as have clarification of local responsibilities and tightening of pledge processing procedures. The new rules are designed to provide more flexibility in providing financial information for small organizations. A proposed \$25.00 application fee has been removed. Several technical changes are included as well.

Comment Procedures: *Written comments may be sent to T. Brooks Skinner, Jr., General Counsel, NC Department of Administration, 1301 Mail Service Center, Raleigh, NC 27612-1301.*

**CHAPTER 35 - STATE EMPLOYEES COMBINED
CAMPAIGN**

SECTION .0100 - PURPOSE AND ORGANIZATION

01 NCAC 35 .0101 DEFINITIONS

For purposes of this Chapter, the following definitions apply:

- (1) "Charitable organization." A non-partisan organization that is tax-exempt for both the IRS and N.C. tax purposes. The organization must receive contributions that are tax deductible by the donor.
- (2) "Audit" or "audited financial statement." An examination of financial statements of an organization by a CPA, conducted in accordance with generally accepted auditing standards, to determine whether, in the CPA's opinion, the statements conform with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting.
- (3) "State Employees Combined Campaign" or "SECC." The official name of the state employees charitable fund-raising drive.
- (4) "Federation" or "Federated Group" means a group of voluntary charitable human health and welfare agencies organized for purposes of supplying common fund-raising, administrative, and management services to its constituent members.
- (5) "Fund-raising expenses" (supporting activities) means expenses of all activities that constitute, or are an integral and inseparable part of, an appeal for financial support. Fund-raising expenses represent the total expenses incurred in soliciting contributions, gifts, grants, etc.; participating in federated fund-raising campaigns; maintaining donor mailing lists; preparing and distributing fund-raising manuals, instructions and other materials; and conducting other activities involved with soliciting contributions.
- (6) "Administrative expenses" (supporting activities) means expenses for reporting and informational activities related to business management and administrative activities which are neither educational, nor direct conduct of program services, nor fund-raising services.
- (7) "Program service expenses" means expenses for those activities that the reporting organization was created to conduct which fulfill the purpose or mission for which the organization exists, exclusive of fund-raising and administrative expenses, and which, along

with any activities commenced subsequently, form the basis of the organization's current exemption from tax.

- (8) "Fund-raising consultant" means any person who meets all of the following:
 - (a) Is retained by a charitable organization or sponsor for a fixed fee or rate under a written agreement to plan, manage, conduct, consult, or prepare material for the solicitation of contributions in this State;
 - (b) Does not solicit contributions or employ, procure, or engage any person to solicit contributions; and
 - (c) Does not at any time have custody or control of contributions.
- (9) "Fund-raising solicitor" means any person who is not a fund-raising consultant and does either of the following for compensation:
 - (a) Performs any service, including the employment or engagement of other persons or services, to solicit contributions for a charitable organization or sponsor; or
 - (b) Plans, conducts, manages, consults, whether directly or indirectly, in connection with the solicitation of contributions for a charitable organization or sponsor.
- (10) "Review" or "reviewed financial statement." An examination of financial statements of an organization by a CPA. The CPA performs inquiry and analytical procedures that provide the CPA with a reasonable basis for expressing limited assurance that there are no material modifications that should be made to the statements in order for them to be in conformity with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10; Eff. February 1, 1984; Amended Eff. December 1, 1994; December 1, 1993; May 1, 1987; Temporary Amendment Eff. February 15, 2002.

**01 NCAC 35 .0103 ORGANIZATION OF THE
CAMPAIGN**

The State Employees Combined Campaign is organized as follows:

- (1) Chair. Each year the Governor may appoint a Statewide Combined Campaign Chair from one of the Executive Cabinet, Council of State, System of Community Colleges, or University Administration agencies. The Campaign Chair ~~or the Campaign Chair's designee~~ shall serve as director of the campaign. The responsibilities of the Chair include enlisting the support and cooperation of the head of

each state department and university in coordinating an effective campaign, promoting the participation of all employees at all levels of campaign policy and operation, setting the dates and approving the published materials for the Combined Campaign, contracting for the Statewide Campaign Organization, and appointing ~~members to~~ and serving as chair of the SECC Advisory Committee. For the purposes of selecting a Statewide Campaign Organization, the Statewide Combined Campaign Chair will consider the following criteria:

- (a) The organization must have demonstrated ability to manage large-scale fund-raising campaigns.
- (b) The organization must have the ability and willingness to work with a statewide system of local organizations capable of effectively managing local combined campaigns and relating to the Statewide Campaign Organization.
- (c) The organization must have an audit to demonstrate acceptable financial accountability.
- (d) The organization must be a tax-exempt organization under the Internal Revenue Code.
- (e) The organization must be willing and able, if required, to provide a bond in an amount satisfactory to the SECC Advisory Committee to protect the participant organizations and ~~donors-contributors~~.

(2) SECC Advisory Committee. This ongoing committee serves as a central application point for all charitable organizations applying to participate in the SECC.

- (a) The committee recommends overall policy for the campaign to the Governor, the Statewide Campaign Chair, and necessary state agencies and recommends the criteria for participation by charitable organizations. The committee reviews the recommendations made by the Statewide Campaign Organization and accepts or rejects its recommendations. Prior to each year's campaign, the SECC Advisory Committee shall approve a budget to cover all of its costs related to the campaign and shall develop an annual work plan. The committee may, in its discretion, require the Statewide Campaign Organization to provide a bond, as provided in Item (1)(e) of this Rule.
- (b) The committee is composed of at least ~~40~~ 20 state employee members

appointed by the Statewide Campaign Chair. Members serve ~~three-year~~ four-year staggered ~~terms at the pleasure of the Statewide Campaign Chair-terms.~~ If a vacancy occurs, the Statewide Campaign Chair shall appoint a replacement to fill the unexpired term. ~~Any member may be reappointed at the end of his or her term. No member shall serve more than two consecutive terms of four years.~~

- (c) The SECC Advisory Committee will meet at the discretion of the Statewide Campaign Chair; however, no fewer than four meetings per year will be held. The SECC Advisory Committee shall conduct business only when a quorum of one-third of the committee membership, including the Statewide Campaign Chair or a designee is present.
- (d) Any State employee who serves on the SECC Advisory Committee shall not participate in any decision where that employee may have a conflict of interest or the appearance of a conflict of interest, either of a personal nature or with regard to the agency in which the employee works. Any SECC Advisory Committee member who is also a member or a charitable organization's board or serves in a significant leadership role shall recuse himself from taking part in deliberation or voting on matters by which that charitable organization may be impacted.

(3) Statewide Campaign Organization. The Statewide Campaign Organization shall be selected by the Statewide Campaign Chair. The entity selected to manage the campaign shall conduct its own organization operations separately from duties performed as the Statewide Campaign Organization. The duties of the Statewide Campaign Organization include, but are not limited to, the following:

- (a) serving as the financial administrator of the SECC;
- (b) determining if the applicant agencies meet the requirements of Rule .0202 of this Chapter;
- (c) submitting to the Statewide Campaign Chair the name of an organization to serve as Local Campaign Organization;
- (d) providing ~~the necessary supervision of data-centralized pledge~~ processing services in order to process all ~~payroll deduction~~ pledge forms of state employees;

- (e) compilingreceiving reports from the for the Local Campaign Organization SECC Advisory Committee and notifying federations and independent agencies no later than March 1 following the close of the campaign on December 1 of the amounts designated to them and their member agencies and of the amounts of the undesignated funds allocated to them;
 - (f) transmitting quarterly to each federation and independent agencyLocal Campaign Organization its share of the state employees payroll deduction funds. Interest earnings will be disbursed to each participating federation and independent agency based on its proportionate share of the campaign's total gross contributions if an interest bearing account is established. Undesignated funds shall be distributed in accordance with the rules in this Chapter;
 - (g) printing and distributing the pledge form, the campaign report form and collection envelopes to the Local Campaign Organization;
 - (h) maintaining an accounting of all funds raised and submitting an interim unaudited end-of-campaign report of the following:
 - (i) amounts contributed and pledged;
 - (ii) number of contributions; and
 - (iii) amounts distributed to each participating agency;
 - (i) Once—once applications for acceptance into the campaign have been recommended to the SECC Advisory Committee by the Statewide Campaign Organization, preparing a list of all accepted organizations and distributing them to all applicants, applicants;
 - (j) coordinating an annual statewide or regional training session for Local Campaign Organizations and state employee volunteers;
 - (k) servng as liaison to participating charitable organizations;
 - (l) providing staff to administer the SECC in consultation with SECC Advisory Committee;
 - (m) preparing an itemized budget of anticipated campaign and administrative expenses for the SECC;
 - (n) preparing a suggested annual work plan of goals and objectives for the SECC;
 - (o) educating state employees in the services provided through their support;
 - (p) overseeing the operations of the Local Campaign Organizations to ensure that they are performing their duties;
 - (q) deducting, before disbursements are made, direct costs of operating the campaign from the gross contributions and charging each federation or independent agency its proportionate share of the campaign's operational cost. The Statewide Campaign Organization and Local Campaign Organizations shall justify the actual costs of the campaign, which should not exceed 10% respectively of gross contributions;
 - (r) maintaining records related to campaign activities; and
 - (s) providing such other central management functions as may be agreed upon as essential in its contract with the State Campaign Chair.
- (4) Local Campaign Chair. The Governor, if asked by the local charitable organizations accepted into the Combined Campaign, may appoint an area representative from either state government or the University of North Carolina system to serve as the Local Chair. This person will be responsible for forming a Local Advisory Committee for recruitment of volunteer state ~~employees, employees,~~ enlisting and confirming top management support, communicating to area state employees the Chair's support for and participation in the campaign, and providing that the campaign is conducted using the knowledge and expertise of the SECC to insure success.
- (5) Local Advisory Committee. The Local Advisory Committee—This committee is responsible for the approval of local campaign literature, review of past performance, the establishment of local goals as needed, and the distribution of any undesignated funds made available for distribution.distribution, the development of a budget and campaign plan, the approval of local publicity materials, the conduct of the campaign, and the recognition of volunteers and contributors.
- (a) The committee is composed of at least 10 state employee members appointed by the Local Campaign Chair. Members serve four-year staggered terms. If a vacancy occurs, the Local Campaign Chair shall appoint a replacement to fill the unexpired term. No member shall

- serve more than two consecutive terms of four years.
- (b) The Local Advisory Committee will meet at the discretion of the Local Campaign Chair The Local Advisory Committee shall conduct business only when a quorum of one-third of the committee membership, including the Local Campaign Chair or a designee is present.
- (5)(6) The Campaign Chair shall approve or reject the State Campaign Organization's recommendation for Local Campaign Organization and name an agency as the Local Campaign Organization. The Local Campaign Organization must identify itself on all printed materials as the local SECC organization.
- (a) Any SECC charitable organization wishing to be selected as a Local Campaign Organization must submit a timely application in accordance with the deadline set by the Statewide Campaign Organization that includes:
- (i) A written campaign plan sufficient in detail to allow the SCO to determine if the applicant could administer an efficient and effective SECC. The campaign plan must include a proposed SECC budget that details all estimated costs required to operate the SECC. The budget may not be based on the percentage of funds raised in the local campaign;
- (ii) A statement signed by the applicant's director or equivalent pledging to:
- (A) administer the SECC fairly and equitably;
- (B) conduct campaign operations (such as training, kick-off and other events) separate from the applicant's non-SECC operations; and
- (C) abide by the directions, decisions and supervision of the Statewide Campaign Organization, State Advisory Committee and the Local Campaign
- Advisory Committee;
- (iii) A statement signed by the applicant's director or equivalent acknowledging that applicant is subject to the provisions of 01 NCAC 35. State Employees Combined Campaign.
- (a)(b) For the purpose of selecting a Local Campaign Organization, the Statewide Campaign Chair and Statewide Campaign Organization will consider the following criteria:
- (i) whether the local organization is willing to conduct a local SECC;
- (ii) whether the organization agrees to comply with the terms of the State/Local Organizations contract;
- (iii) whether the organization has community and state employee support and volunteer involvement;
- (iv) whether the organization has a demonstrated ability and successful history of managing fund-raising campaigns that include:
- (A) development of campaign strategy;
- (B) development of campaign materials;
- (C) development of volunteer campaign structures;
- (D) training of volunteer solicitors;
- (E) a financial structure and resources that can efficiently manage, account for, and disburse funds;
- (F) being a participant organization of the campaign;
- (G) ability to develop financial relationships with a network of statewide organizations so as to ensure the orderly transmittal, disbursement, accounting of, and reporting of donations and pledges;

(v) whether the organization is willing and able to provide a bond, if required, in an amount satisfactory to the SECC Advisory Committee to protect the participant organizations and ~~donors, contributors.~~

~~(b)(c)~~ The Local Campaign Organization shall assist the Local Campaign Chair and Local Campaign Advisory Committee in the training of volunteers, the ordering and distribution of campaign literature, and the collection of pledge reports and envelopes from the state agency volunteers. ~~volunteers, the development of campaign reports, and the forwarding of one copy of each payroll deduction pledge to the Statewide Campaign Organization. In addition, an end of campaign report shall be sent to the Statewide Campaign Organization by February 1 following the close of the campaign on December 31 for inclusion in the required fiscal reports.~~

~~(c)~~ The Local Campaign Organization shall:

~~(i)~~ establish an interest-bearing account with a bank in order to receive deposits of collected funds. Interest earnings shall be disbursed to each participating federation and independent agency based on its proportionate share of the campaign's total gross contributions if an interest-bearing account is established;

~~(ii)~~ distribute the funds from the contributions in accordance with designations made by state employees. Undesignated funds shall be distributed in accordance with the rules in this Chapter. Each Local Campaign Organization shall disburse contributions quarterly to participating federations and independent agencies;

~~(iii)~~ be permitted to deduct, before any disbursements are made, direct costs of operating the campaign from the gross contributions, and shall charge each federation

~~or independent agency its proportionate share of the campaign's operational cost. The Local Campaign Organization shall justify the actual costs of the campaign, which should not exceed 10% of gross receipts; and~~

~~(iv)~~ notify the federations and independent agencies no later than March 1 following the close of the campaign on December 31 of the amounts designated them and their member agencies and of the amounts of the undesignated funds allocated to them.

~~(6)(7)~~ A three-year contract between the state and the Statewide Campaign Organization, and the Statewide and Local Campaign Organizations, will be executed in order to develop an acceptable audit trail. The contracts will allow a reasonable charge for campaign expenses to be claimed by the Statewide Campaign Organization and the Local Organization. All terms and conditions of these contracts are subject to review and approval by the Statewide Campaign Chair.

(a) The Statewide Campaign Organization and Local Campaign Organizations shall recover from gross receipts of the campaign their expenses which should reflect the actual costs of administering the campaign. Actual costs of the campaign must be justified and should not exceed 10% of gross receipts. The campaign expenses shall be shared proportionately by all the recipient organizations reflecting their percentage share of gross campaign receipts. The SECC Advisory Committee reserves the right to waive the 10% annual fee. No direct costs associated with the campaign will be borne by the State. All costs shall be borne by the proceeds from the campaign.

(b) The failure of the Statewide Campaign Organization or the Local Campaign Organization to perform any of its respective responsibilities listed in this Section may be grounds for removal and disqualification by the Chair to serve in its capacity for one year. Before deciding on removing or disqualifying an organization, the Chair shall give the organization an opportunity to respond to any allegations of failure to perform its responsibilities. The

organization must submit its response to the Chair within 10 days from notification postmark date. The Chair shall issue a written determination based on a review of all of the information submitted.

(8) Solicitation Campaign Organization. The campaign shall be divided into no more than 15 local administrative regions, and managed within each state department and university according to the following structure:

(a) State Department Head and University Chancellor. The director or chancellor of each state department and university sets the tone and provides leadership for the campaign. This person shall ensure that voluntary fundraising within the department or university is conducted in accordance with these policies and procedures, communicate support for the campaign to all employees, and appoint Department Executives within the agency's or university's central office.

(b) Department Executives. Department Executives manage the campaign at the agency or university level. The Department Executives undertake the official statewide campaign within their agencies or university providing active and essential support. The Department Executives ensure that personal solicitations are organized and conducted in accordance with the procedures set forth in these regulations and appoint local agency coordinators at agency institutions or local offices and provide direction and guidance to the local coordinators.

(c) Local Agency Coordinators. Local agency coordinators are appointed by their respective Department Executives and manage the campaign in agency institutions or local offices. The local agency coordinators undertake the official campaign within their institution or local office assisting in setting campaign goals and providing active and essential support. The local agency coordinators ensure that personal solicitations are organized and in accordance with the procedures set forth in these regulations and work with solicitors to achieve a successful campaign.

(d) Local Agency Solicitors. Solicitors work with local agency coordinators to promote the campaign. Solicitors

communicate the importance of the campaign to their fellow workers, encourage participation by payroll deduction, explain how to designate gifts and answer questions regarding the campaign. Solicitors personally solicit employees in their assigned area, report all pledges and contributions to the local agency coordinator and ensure that pledge forms are properly distributed, completed and collected. Solicitors also assist in planning campaign strategies and events.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10; Eff. February 1, 1984; Amended Eff. December 1, 1994; December 1, 1993; February 3, 1992; June 1, 1988
Temporary Amendment Eff. February 15, 2002.

SECTION .0200 - APPLICATION PROCESS AND SCHEDULE

01 NCAC 35 .0201 APPLICATIONS

(a) To be eligible to participate in the State Employees Combined Campaign, an organization must apply annually for consideration, either as an independent organization or as a federation.

(b) Independent organizations and federations wishing to receive an application can do so by making a request in writing to the Statewide Campaign Organization. Such written requests may be made by letter, facsimile or email communication; however, oral, telephone or verbal requests shall not be honored.

(c) Any independent organization or federation which was eligible to participate in the State Employees Combined Campaign immediately preceding the campaign for which application is currently made shall be required only to submit to the Statewide Campaign Organization its most recent information, which shall specifically update the requirements of 01 NCAC 35 .0202 and include a completed Certificate of Compliance.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10; Eff. February 1, 1984; Amended Eff. December 1, 1993; Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0202 CONTENT OF APPLICATIONS

(a) All organizations seeking inclusion in the State Employees Combined Campaign must submit an application to the state campaign. The application must include a completed State Employees Combined Campaign Certificate of Compliance, provided by the Statewide Campaign Organization. Included in or attached to the Certificate of Compliance must be:

(1) A letter from the board of directors requesting inclusion in the campaign.

- (2) A complete description of services provided, the service area of the organization, and the percentage of its total support and revenue that is allocated to administration and ~~fund-raising, fund-raising or copies of its annual report, newsletters, brochures and fact sheets as long as they include the required information.~~
- (3) The most recent audited financial statement prepared by a CPA within the past two years. ~~The SECC Advisory Committee shall permit organizations with annual budgets of less than three hundred thousand dollars (\$300,000) total support and revenue to submit an audited financial statement or review prepared by a CPA. Total support and revenue is determined by the IRS Form 990 covering the organization's most recent fiscal year ending not more than two years prior to the current year's campaign date. The CPA opinion rendered on the financial statement must be unqualified.~~ The year end of such audited financial statement ~~or review~~ must be no earlier than two years prior to the current year's campaign date. The SECC Advisory Committee may grant an exception to this requirement if an organization has filed its Articles of Incorporation with the Secretary of State's Office since March 1 of the preceding year of the current campaign.
- (4) A ~~completed and signed~~ copy of the organization's IRS 990 form ~~exclusive of other IRS schedules or sufficient documentation regardless of whether or not the IRS requires the organization to file the form,~~ to indicate program services, administrative and fund-raising expenses. ~~The IRS 990 form and CPA audit or review shall cover the same fiscal year and, if revenue and expenses on the two documents differ, these amounts must be reconciled on an accompanying statement by the CPA who completed the financial audit or review.~~
- (5) A board statement of assurance of non-discrimination of employment, board membership and client services. ~~The policy must be board approved, in written form, and available to the SECC.~~
- (6) A description of the origin, purpose and structure of the ~~organization, organization or copies of articles of incorporation and bylaws.~~
- (7) A list of the current members of the board, including their addresses.
- (8) A letter from the board of directors certifying compliance with the eligibility standards listed in Paragraph (b) of this Rule.
- (9) ~~When a federated fund-raising organization submits an application, they may submit the credentials of the federation only, not each member agency. A federation may submit applications on behalf of its member agencies; however, the application shall include a~~ completed and signed Certificate of Compliance for each member agency. If any member agency is new to the federation, or did not participate in the SECC during the previous year, the federation shall provide a complete application and sufficient documentation to show that the member agency is in compliance with all eligibility criteria. By the submission of such, the federations certify that all of their member agencies comply with all the SECC regulations, unless there are exceptions. If there are exceptions to the requirements, the federations must disclose such and explain to the satisfaction of the Statewide Combined Campaign Advisory Committee the reasons for the exception. The SECC Advisory Committee may elect to review, accept or reject the certifications of the eligibility of the member agencies of the federations. If the Committee requests information supporting a certification of eligibility, that information shall be furnished promptly. Failure to furnish such information within 10 days of the notification postmark date constitutes grounds for the denial of eligibility of that member agency.
- (10) The SECC Advisory Committee may elect to decertify a federation or independent agency which makes a false certification, subject to the requirement that any federation or independent agency that the Committee proposes to decertify shall be notified by the Statewide Campaign Organization of the Committee's decision stating the grounds for decertification. The federation or independent agency may file an appeal to the Committee within 10 days of the notification postmark date. False certifications are presumed to be deliberate. The presumption may be overcome by evidence presented at the appeal hearing.
- (b) Organizations must meet the following criteria to be accepted as participants in the Combined Campaign:
- (1) Must be licensed to solicit funds in North Carolina if a license is required by ~~law, law~~ and provide written proof of the same. All organizations applying as domestic or foreign nonprofit corporations must also submit a certificate of existence (for domestic corporations) or a certificate of authorization (for foreign corporations) issued by the office of the North Carolina Secretary of State pursuant to G.S. 55A-1-28.
- (2) Must provide written proof of tax exempt status for both federal income tax under Section 501(c)(3) of the Internal Revenue Code and ~~N.C. state~~ tax purposes under Sections 105-125 and 105-130.11(3), respectively, of the North Carolina General Statutes, but the organization must not be a

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- (3) private foundation as defined in Section 509(a) of the Internal Revenue Code. Organizations must certify that contributions from state employees are tax deductible by the donor under N.C. and federal law.
- (3) Must prepare and make available to the general public an audited financial ~~statement.~~ statement prepared by a CPA within the past two years. The SECC Advisory Committee shall permit organizations with annual budgets of less than three hundred thousand dollars (\$300,000) total support and revenue to submit an audited financial statement or review prepared by a CPA. Total support and revenue is determined by the IRS 990 form covering the organization's most recent fiscal year ending not more than two years prior to the current year's campaign date. The CPA opinion rendered on the financial statements must be unqualified. The year end of such audited financial statement or review must be no earlier than two years prior to the current year's campaign date. The SECC Advisory Committee may grant an exception to this requirement if an organization has filed its Articles of Incorporation with the Secretary of State's Office since March 1 of the preceding year of the current campaign.
- (4) Must provide a completed and signed copy of the organization's IRS 990 form exclusive of other IRS schedules regardless of whether or not the IRS requires the organization to file the form, to indicate program services, administrative and fund-raising expenses. The IRS 990 form and CPA audit or review shall cover the same fiscal year and, if revenue and expenses on the two documents differ, these amounts must be reconciled on an accompanying statement by the CPA who completed the financial audit or review. If fund-raising and administrative expenses are in excess of 25 percent of total revenue, must demonstrate to the satisfaction of the SECC that those expenses for this purpose are reasonable under all the circumstances of the case. The SECC may reject any application from an agency with fund-raising and administrative expenses in excess of 25 percent of total revenue, unless the agency demonstrates to the satisfaction of the Committee that its actual expenses for those purposes are reasonable under all the circumstances in its case. The Committee reserves the right to waive the 25 percent excess rule.
- (5) Must certify that all publicity and promotional activities are truthful and non-deceptive and that all material provided to the SECC is truthful, non-deceptive, includes all material facts, and makes no exaggerated or misleading claims.
- (6) Must agree to maintain the confidentiality of the contributor list.
- (7) Must permit no payments of commissions, kickbacks, finders fees, percentages, bonuses, or overrides for fund-raising, and permit no paid solicitations by a fund-raising consultant or solicitor in the SECC.
- (8) Must have a written board policy of non-discrimination on the basis of race, color, religion, sex, age, national origin or physical or mental disability for clients of the agency, employees of the agency and members of the governing board. Nothing herein denies eligibility to any voluntary agency which is otherwise eligible because it is organized by, on behalf of, or to serve persons of a particular race, color, religion, sex, age, national origin or physical or mental disability.
- (9) Must provide benefits or services to state employees or their families within a solicitation ~~area.~~ area and be available through a telephone number to respond to inquiries from state employees. Examples of services include:
- ~~(A) — research and education in the health and welfare or education fields;~~
 - ~~(B) — family and child care services;~~
 - ~~(C) — protective services for children and adults;~~
 - ~~(D) — services for children and adults in foster care;~~
 - ~~(E) — services related to the management and maintenance of the home;~~
 - ~~(F) — day care services for adults and children;~~
 - ~~(G) — transportation services, information referral and counseling services;~~
 - ~~(H) — the preparation and delivery of meals;~~
 - ~~(I) — adoption services;~~
 - ~~(J) — emergency shelter care and relief services;~~
 - ~~(K) — safety services;~~
 - ~~(L) — neighborhood and community organization services;~~
 - ~~(M) — recreation services;~~
 - ~~(N) — social adjustment and rehabilitation services;~~
 - ~~(O) — health support services; or~~
 - ~~(P) — a combination of services designed to meet the needs of special groups such as the elderly or disabled.~~
- However, an international organization which provides health and welfare services overseas, whose activities do not require a local presence and which meet the other eligibility criteria in these Rules, may be accepted for participation in the campaign.
- (10) If included in the previous year's campaign, must have received a minimum of two hundred and fifty dollars (\$250.00) in designated funds. If this minimum level is not

attained, the organization is ineligible to apply for inclusion in the campaign for the next three years. Undesignated money shall not be used to meet the minimum requirement. This provision applies to all member agencies of federations as well as independent organizations.

(11) Must not be created specifically to take advantage of the opportunity to participate in the SECC.

(12) Must not use SECC contributions for lobbying activities.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10; Eff. February 1, 1984; Amended Eff. December 1, 1994; December 1, 1993; February 3, 1992; June 1, 1988; Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0203 REVIEW AND SCHEDULE

(a) Complete applications must be submitted to the Statewide Campaign Organization by February 15 annually to be included in the fall campaign. Incomplete applications shall not be considered by the Committee. The Statewide Campaign Organization will report to the Committee its recommendation on each application within four three weeks of the closing deadline. The Committee shall affirm or reject each recommendation by the Statewide Campaign Organization and shall inform the Statewide Campaign Organization of its decisions.

(b) The Statewide Campaign Organization and the Committee shall review the application materials for accuracy, completeness and compliance with these regulations. The Committee may reject an application for failing to meet any of the criteria outlined in these Rules. Failure to supply any of the information required by the application may be judged a failure to comply with the requirements of public accountability, and the applicant may be ruled ineligible for inclusion.

(c) The Statewide Campaign Organization or the Committee may request such additional information required by these Rules as they deem necessary to complete these reviews. An organization that fails to comply with such requests within 10 days of the notification postmark date may be judged ineligible.

(d) The burden of demonstrating eligibility shall rest with the applicant.

(e) If the due date in Paragraph (a) of this Rule falls on a Saturday, Sunday or a legal holiday, then the information must be received by the Statewide Campaign Organization or postmarked by the end of the next day which is not a Saturday, Sunday or a legal holiday.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10; Eff. February 1, 1984; Amended Eff. February 3, 1992; May 1, 1987; Transferred and Recodified from 01 NCAC 35 .0301 Eff. December 1, 1993; Amended Eff. December 1, 1994; December 1, 1993; Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0204 RESPONSE

All applicants will be notified by the Statewide Campaign Organization of the Committee's decision within 45 days of the closing deadline. An applicant who is dissatisfied with the determination of its application may file an appeal to the State Advisory Committee within 10 days of the notification postmark date. An applicant who is dissatisfied with either the Committee's decision or the appeal determination of the Committee may commence a contested case by filing a petition under G.S. 150B-23 within 60 days of notification postmark date of the Committee's decision.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10; Eff. February 1, 1984; Amended Eff. February 3, 1992; June 1, 1988; July 1, 1987; Transferred and Recodified from 1 NCAC 35 .0302 Eff. December 1, 1993; Amended Eff. January 1, 1995; December 1, 1993; Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0205 AGREEMENTS

(a) Following acceptance into the SECC, federations and independent agencies shall execute a contract with the State. The parties shall agree to abide by the terms and conditions of the rules. The contract shall be signed by the State Chair, the Statewide Campaign Organization, the organization's board chair and the organization's chief executive officer.

(b) Each federation shall accept responsibility for the accuracy of the distribution amount to their member agencies. Each federation must be able to justify amounts deducted from their disbursements to participating agencies. These deductions shall not exceed 10% of gross receipts. Each federation must be willing and able to provide a bond, if required, in an amount satisfactory to the SECC Advisory Committee to protect the participant organizations and donors-contributors.

(c) Each federation is expected to disburse on the basis of actual funds received, both designated and undesignated, rather than the amount pledged. Each federation shall disburse contributions quarterly to participating member agencies.

(d) The SECC Advisory Committee at its discretion may discontinue distribution of funds to any independent agency that ceases to comply with the criteria and procedures as set forth in these Rules. The remainder of the agency funds will be distributed as the SECC Advisory Committee may designate.

(e) In the event a federation ceases to comply with the criteria and procedures as set forth in these Rules, the SECC Advisory Committee will distribute the designated and undesignated funds contributed to the federation equally among the SECC charitable organizations under said federation.

(f) In the event a SECC charitable organization in a federation ceases to comply with the criteria and procedures as set forth in these Rules, the SECC Advisory Committee will distribute the funds contributed to that organization, designated and undesignated, to the federation for distribution in accordance with federation policy.

(g) In the event a SECC charitable organization or any of its directors, officers or employees are the subject of any investigation or legal proceeding by any federal, state or local law enforcement authority based upon its charitable solicitation activities, delivery of program services, or use of funds, the

organization must disclose the same to the SECC within 10 days of its learning of the investigation or proceeding. It must also disclose within 10 days the outcome of any such investigation or proceeding.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10;
 Eff. December 1, 1994;
Temporary Amendment Eff. February 15, 2002.

SECTION .0300 - GENERAL PROVISIONS

01 NCAC 35 .0301 OTHER SOLICITATION PROHIBITED

No charitable organization shall engage in any direct monetary solicitation activity at any state employee work site, except as a participant in the State Employees Combined Campaign and in accordance with 01 NCAC 35. Not more than one on the job solicitation for funds will be made in any year at any location on behalf of participating SECC agencies. The prohibition does not include Red Cross sponsored Bloodmobiles or employee association solicitations.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10;
 Eff. February 1, 1984;
 Transferred and Recodified from 01 NCAC 35 .0401 Eff. December 1, 1993;
 Amended Eff. December 1, 1993;
Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0302 COERCIVE ACTIVITIES PROHIBITED

(a) In order to insure that donations are made on a voluntary basis, actions that do not allow free choice or that create an impression of required giving are prohibited. Peer solicitation is encouraged. Employee gifts shall be kept confidential, except that employees may opt to have their designated contributions acknowledged by the recipient organizations.

(b) All activities of the campaign shall be conducted in a manner that promotes a unified solicitation on behalf of all participants. While it is permissible to individually identify, describe or explain the charitable organizations in the campaign for informational purposes, no person affiliated with the campaign shall engage in any campaign activity that is construed to either advocate or criticize any specific charitable organization.

~~(b)(c)~~ The following activities are not permitted:

- (1) The providing and using of contributor lists for purposes other than the routine collection, forwarding, and acknowledgement of contributions. Recipient organizations that receive the names and addresses of state employees must segregate this information from all other lists of contributors and only use the lists for acknowledgement purposes. This segregated list may not be sold or in any way released to anyone outside of the recipient organization. Failure to protect the integrity of this information may result in penalties up to expulsion from the campaign.

- (2) The establishment of personal dollar goals or quotas.
- (3) The developing and using of lists of non-contributors.

~~(e)(d)~~ Violations of these Rules by a participant organization may result in the decertification of the organization. The organization shall be given notice of an opportunity to be heard prior to any action being taken by the Committee. Any organization who is dissatisfied with the determination of its decertification may file an appeal to the Committee within 10 days of the notification postmark date. An organization who is dissatisfied with either the Committee's decision or the appeal determination of the Committee may commence a contested case by filing a petition under G.S. 150B-23 within 60 days of notification postmark date of the Committee's decision.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10;
 Eff. February 1, 1984;
 Transferred and Recodified from 1 NCAC 35 .0402 Eff. December 1, 1993;
 Amended Eff. December 1, 1994; December 1, 1993;
Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0304 METHODS OF GIVING AND TERMS OF CONTRIBUTION

(a) Payment may be made by payroll deduction, cash, or personal check-check or credit card. If an employee chooses to use the payroll deduction method of contributing, he/she must agree to have the deduction continue for one year with equal amounts deducted from each check ~~(monthly-monthly, semi-monthly~~ or biweekly depending on the payroll). If the employee authorizes payroll deduction, the minimum amount of the deduction is five dollars (\$5.00) per month. All deductions will start with the January payroll and continue through December. If the employee discontinues employment, or actively chooses to discontinue payment, the state will not be responsible for the collection of the unpaid pledge. No deduction will be made for any period in which the employee's net pay, after all legal and previously authorized deductions, is insufficient to cover the allotment. No adjustments will be made in subsequent periods to make up for deductions missed. An employee who wishes to participate in a subsequent campaign must file a new pledge form valid for the subsequent campaign.

(b) The State of North Carolina will provide new employees the opportunity to contribute to the SECC when any State or university human resources office is reviewing the final details of employment with each new employee. There shall be no implication that a contribution is a requirement for employment, but material and an interpretation of the state policy and SECC shall be provided.

(c) An employee transferred from one state agency to another must request a copy of the employee's payroll deduction authorization form from the first state agency and submit the copy to the second state agency or complete and submit an additional form if required by the second state agency.

(d) Temporary, contract and retired state employees shall be eligible to participate in the SECC.

History Note: Authority G.S. 143-3.3; 143-340(26); 143B-10;

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Eff. February 1, 1984;
Amended Eff. February 3, 1992; May 1, 1987;
Transferred and Recodified from 1 NCAC 35 .0403 Eff.
December 1, 1993;
Amended Eff. December 1, 1993;
Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0305 CAMPAIGN LITERATURE

(a) Each charitable organization accepted as a part of the campaign:

- (1) Shall provide adequate information about its services including administrative/fund-raising costs, to the Local Campaign Organization for use in the local campaign;
- (2) ~~Shall not be listed more than one time in the campaign literature. Shall not be listed more than one time in the campaign literature unless the SECC Advisory Committee, in consultation with the Statewide Campaign Organization, determine the following:~~
 - (A) ~~It is in contributors' interests to more specifically direct their gifts to separate geographic locations; and~~
 - (B) ~~The organization maintains records that determine that gifts so designated to that geographic area accrue only to the benefit and purposes of the organization in that designated area; and~~
- (3) ~~Shall not be permitted to distribute agency material that is a solicitation or that in any way provides revenue to such charitable organization.~~

~~(b) The State Employees Combined Campaign shall provide a campaign brochure designed by the SECC Advisory Committee and all publicity will be subject to the State Chair's approval and free of undue or disproportionate publicity in favor of any one agency or federation of agencies.~~

~~(c) The State Chair shall approve, prior to distribution, the content of any campaign pledge/designation card to ensure that the information contained is accurate and complies with the State Controller's requirements for format and substance.~~

History Note: Authority G.S. 143-3.3; 143-340(26);
143B-10;
Eff. February 1, 1984;
Amended Eff. May 1, 1987;
Transferred and Recodified from 1 NCAC 35 .0404 Eff.
December 1, 1993;
Amended Eff. December 1, 1994; December 1, 1993;
Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0306 DESIGNATION CAMPAIGN

(a) Each employee shall be given the opportunity to designate which agency or group of agencies shall benefit from his or her contribution to the State Employees Combined Campaign. Each employee will be given a list of the approved agencies in the campaign in order to help them make the decision. The state employee may only designate the federations and agencies that are listed. Write-ins are prohibited.

(b) Designations made to organizations not listed are not invalid, but will be treated as undesignated funds and distributed accordingly.

(c) Contributions designated to a federation will be shared in accordance with the federation's policy.

~~(d) All designated contributions shall be a minimum contribution of ten dollars (\$10.00) annually per agency designated. If a designation does not comply with the minimum required, the designation is invalid, and will be treated as undesignated funds and distributed accordingly.~~

~~(e) An employee may not change the designated agency or group of agencies designated to receive amounts pledged outside the time the campaign is being conducted.~~

History Note: Authority G.S. 143-3.3; 143-340(26);
143B-10;
Eff. February 1, 1984;
Transferred and Recodified from 01 NCAC 35 .0405 Eff.
December 1, 1993;
Amended Eff. December 1, 1994; December 1, 1993;
Temporary Amendment Eff. February 15, 2002.

01 NCAC 35 .0308 EFFECTIVE DATE OF AMENDED RULES

~~These amended rules shall be effective for the 1994 SECC and thereafter.~~

History Note: Authority G.S. 143-3.3; 143-340(26);
143B-10;
Eff. May 1, 1987;
Transferred and Recodified from 1 NCAC 35 .0407 Eff.
December 1, 1993;
Amended Eff. December 1, 1993;
Temporary Repeal Eff. February 15, 2002.

01 NCAC 35 .0309 CAMPAIGN OPERATION

~~(a) The official name of the state employee giving system of North Carolina is the State Employees Combined Campaign.~~

~~(b) The campaign solicitation period shall be conducted annually during the period after August 1 and before November 30; in any event it shall not extend beyond December 1. The Statewide Campaign Chair may specify the campaign period to be uniform statewide.~~

~~(c) The fiscal year for the State Employees Combined Campaign will be January 1 through December 31.~~

History Note: Authority G.S. 143-3.3; 143-340(26);
143B-10;
Temporary Adoption Eff. February 15, 2002.

TITLE 12 – DEPARTMENT OF JUSTICE

Rule-making Agency: *NC Private Protective Services Board*

Rule Citation: *12 NCAC 07D .0807*

Effective Date: *January 14, 2002*

Findings Reviewed and Approved by: *Julian Mann, III*

TEMPORARY RULES

Authority for the rulemaking: *G.S. 74C-5; 74C-13*

Reason for Proposed Action: *The Private Protective Services Board had revamped its firearms training program for armed security officers. The Board considers firearms training as one of its most important functions as the public health, safety and welfare is directly impacted by the competency of the armed security officers that work posts across the state. Because of the significant impact upon the public, the Board requests that the amendments be adopted as a temporary rule, pending passage of a permanent rule.*

Comment Procedures: *Written comments may be provided to the Board by submission to W. Wayne Woodard, Administrator, Private Protective Services Board, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.*

CHAPTER 07 - PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 07D - PRIVATE PROTECTIVE SERVICES BOARD

SECTION .0800 - ARMED SECURITY GUARD FIREARM REGISTRATION PERMIT

12 NCAC 07D .0807 TRAINING REQUIREMENTS FOR ARMED SECURITY GUARDS

(a) Applicants for an armed security guard firearm registration permit shall first complete the basic unarmed security guard training course set forth in 12 NCAC 07D .0707.

~~(a)~~(b) Applicants for an armed security guard firearm registration permit shall complete a basic training course for armed security guards which consists of at least 20 hours of classroom instruction including:

- (1) legal limitations on the use of handguns and on the powers and authority of an armed security guard, including but not limited to, familiarity with rules and regulations relating to armed security guards (minimum of four hours);
- (2) handgun safety, including but not limited to, range firing procedures (minimum of one hour);
- (3) handgun operation and maintenance (minimum of three hours);
- (4) handgun fundamentals (minimum of eight hours); and
- (5) night firing (minimum of four hours).

~~(b)~~(c) In addition to the requirements set forth in Paragraphs (a) and (b) of this Rule and prior to being issued a permit, Applicants applicants shall attain an a score of at least 80 percent score accuracy on a firearms range qualification course approved by the Board and the Attorney General, a copy of which is on file in the administrator's Director's office.

~~(c)~~(d) All armed security guard training required by 12 NCAC 07D shall be administered by a certified trainer and shall be successfully completed no more than 90 days prior to the date of issuance of the armed security guard firearm registration permit.

~~(d)~~(e) All applicants for an armed security guard firearm registration permit must obtain training under the provisions of this Section using their duty weapon and their duty ammunition.

~~(e)~~(f) No more than six new or renewal armed security guard applicants per one instructor shall be placed on the firing line at any one time during firearms range training.

(g) Applicants for re-certification of an armed security guard firearm registration permit shall complete a basic recertification training course for armed security guards which consists of at least four hours of classroom instruction and shall be a review of the requirements set forth in Paragraphs (b)(1)-(b)(5) of this Rule. Applicants for recertification of an armed security guard firearm registration permit shall also complete the requirements of Paragraph (c) of this Rule.

(h) To be authorized to carry a standard 12 gauge shotgun in the performance of their duties as an armed security guard, an applicant shall complete, in addition to the requirements of Paragraphs (a), (b) and (c) of this Rule, four hours of classroom training which shall include the following:

- (1) legal limitations on the use of shotguns;
- (2) shotgun safety, including but not limited to, range firing procedures;
- (3) shotgun operation and maintenance; and
- (4) shotgun fundamentals.

An applicant may take the additional shotgun training at a time after the initial training in this Rule. If the shotgun training is completed at a later time, the shotgun certification shall run concurrent with the armed registration permit.

(i) In addition to the requirements set forth in Paragraph (h) of this Rule, applicants shall attain a score of at least 80 percent accuracy on a shotgun range qualification course approved by the Board and the Attorney General, a copy of which is on file in the Director's office.

(j) Applicants for shotgun recertification shall complete an additional one hour of classroom training as set forth in Paragraphs (h)(1)-(h)(4) of this Rule and shall also complete the requirements of Paragraph (i) of this Rule.

(k) Applicants for an armed security guard firearm registration permit who possess a current firearms trainer certificate shall be given, upon their written request, a firearms registration permit that will run concurrent with the trainer certificate upon completion of an annual qualification with their duty weapons as set forth in Paragraph (c) of this Rule.

History Note: Authority G.S. 74C-5; 74C-13;

Eff. June 1, 1984;

Amended Eff. November 1, 1991; February 1, 1990; July 1, 1987;

Temporary Amendment Eff. January 14, 2002.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

Rule-making Agency: *North Carolina Department of Transportation – Division of Highways*

Rule Citation: *19A NCAC 02F .0101-.0103*

Effective Date: *January 11, 2002*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 113A-9; 113A-11; 143B-10(j)*

Reason for Proposed Action: *The Department of Transportation has proposed these Rules for adoption pursuant to the authority granted by the North Carolina General Assembly in Section 27.22 of Session Law 2001-424.*

Comment Procedures: *Any interested person may submit written comments on the proposed rule by mailing the comments to Emily Lee, NCDOT, 1501 Mail Service Center, Raleigh, NC 27699-1501 by May 31, 2002.*

CHAPTER 02 - DIVISION OF HIGHWAYS

SUBCHAPTER 02F – DEPARTMENT OF TRANSPORTATION'S MINIMUM CRITERIA

SECTION .0100 – MINIMUM CRITERIA

19A NCAC 02F .0101 PURPOSE

This Section establishes minimum criteria to be used in determining when the preparation of environmental documents pursuant to the North Carolina Environmental Policy Act (NCEPA) is not required.

History Note: Authority G.S. 113A-11; G.S. 143B-10; Temporary Adoption Eff. January 11, 2002.

19A NCAC 02F .0102 MINIMUM CRITERIA

The following minimum criteria are established as an indicator of the types and classes of thresholds of activities at and below which environmental documentation under the NCEPA is not required:

- (1) Approval of:
 - (a) installation of utilities along or across a transportation facility;
 - (b) grade separated crossings of highways by railroads or highway; or
 - (c) grading, commercial driveways, and other encroachments on the highway right-of-way;
- (2) Construction of bicycle and pedestrian lanes, paths, and facilities;
- (3) Construction of safety projects such as guardrails, grooving, glare screen, safety barriers, and energy attenuators;
- (4) Installation of noise barriers or alterations to existing public buildings to provide for noise reduction;
- (5) Landscaping of highway, railroad, and rest area projects;
- (6) Installation of fencing, signs, pavement markings, small passenger shelters, lighting, traffic signals, and railroad signal systems and warning devices;
- (7) Repair, rehabilitation, or replacement of a highway or railway facility in general conformance with the original design and alignment, which is commenced immediately after the occurrence of a natural disaster or catastrophic failure, to restore the highway for the health, welfare, and safety of the public;

- (8) Highway or railway modernization by means of the following activities, which involves less than a total of 10 cumulative acres of ground surface previously undisturbed by highway or railway construction, limited to a single project, noncontiguous to any other project making use of this provision:
 - (a) resurfacing, restoration, or reconstruction;
 - (b) adding lanes for travel, parking, weaving, turning, or climbing;
 - (c) correcting substandard curves and intersections;
 - (d) adding shoulders or minor widening;
 - (e) adding or extending passing sidings;
 - (f) lengthening of railway spirals; or
 - (g) flattening of railway curves;
- (9) Reconstruction of existing crossroad or railroad separations and existing stream crossings, including, but not limited to, pipes, culverts, and bridges;
- (10) Approval of oversized and overweight permits;
- (11) Approval of outdoor advertising permits;
- (12) Maintenance of the state highway or railway system to include work such as:
 - (a) Grading and stabilizing unpaved roads;
 - (b) Maintaining unpaved shoulders;
 - (c) Cleaning ditches and culverts;
 - (d) Patching paved surfaces;
 - (e) Maintaining bridges;
 - (f) Removing snow and ice;
 - (g) Controlling erosion and vegetation growth;
 - (h) Manufacturing and stockpiling material;
 - (i) Paving secondary roads; and
 - (j) Timber and surfacing of rail lines;
- (13) Assumption of maintenance of roads constructed by others;
- (14) Making capital improvements constructed at an existing DOT facility that:
 - (a) Require less than one acre of exposed, erodible ground surface; and
 - (b) Require the use of structures which do not involve handling or storing hazardous materials which exceed the threshold planning limits of Title 3 of the Superfund Amendments and Reauthorization Act of 1986;
- (15) Construction of a new two-lane highway in accordance with accepted design practices and DOT standards and specifications involving less than a total of 25 cumulative acres of ground surface limited to a single project, noncontiguous to any other project making use of this provision;
- (16) Reconstructing, rehabilitating, resurfacing, or maintaining existing runways, taxiways,

- aircraft aprons, access roads, and automobile parking lots;
- (17) Constructing, reconstructing, rehabilitating, or upgrading of lighting associated with runways, taxiways, and apron edges; visual approach aids; instrument approach aids; wind indicators; rotating beacons; obstruction lights; area lights; security lights; and the electrical distribution systems and control systems for such facilities;
- (18) Construction of terminal buildings, railway stations, maintenance buildings, and hangars involving less than five acres of previously undisturbed ground;
- (19) Acquiring property to meet Federal or State standards, requirements, or recommendations directly relating to aviation safety;
- (20) Acquiring 10 acres or less of property for future airport development;
- (21) Construction on existing airport property which has previously been disturbed by clearing, grubbing, or grading on land involving less than 10 acres of exposed, erodible ground surface;
- (22) Planning airport projects to include master plans, noise and compatibility plans, preliminary construction project plans, and special planning studies such as economic impact studies;
- (23) Rehabilitating, maintaining, and improving airport drainage systems on airport property to include landscaping and erosion control facilities involving less than five acres of previously undisturbed ground;
- (24) Reconstructing or rehabilitating rail lines on existing alignment;
- (25) Purchasing vehicles for mass transportation purposes;
- (26) Maintaining and improving railroad track and bed in the existing right of way;
- (27) Implementation of any project which qualifies as a "categorical exclusion" under the National Environmental Policy Act by one of the Agencies of the U.S. Department of Transportation;
- (28) Acquisition and construction of wetland, stream, and endangered species mitigation sites; and
- (29) Remedial activities involving the removal, treatment or monitoring of soil or groundwater

contamination pursuant to state or federal remediation guidelines.

History Note: Authority G.S. 113A-9; 113A-11; 143B-10(j); Temporary Adoption Eff. January 11, 2002.

19A NCAC 02F .0103 EXCEPTIONS TO MINIMUM CRITERIA

Any activity falling within the parameters of the minimum criteria set out in Rule .0102 of this Section shall not routinely be required to have environmental documentation under the NCEPA. However, the Secretary of Transportation or his designee shall determine if environmental documents are required in any case where a Division Director or Branch Manager makes one of the following findings as to a proposed activity:

- (1) The proposed activity may have significant adverse effects on wetlands, parklands, prime or unique agricultural lands, or areas of recognized scenic, recreational, archaeological, or historical value; or would endanger the existence of a species identified on the Department of Interior's threatened and endangered species list.
- (2) The proposed activity could cause changes in industrial, commercial, residential, agricultural, or silvicultural land use concentrations or distributions which would be expected to create significant adverse water quality, air quality, or ground water impacts; or have a significant adverse effect on long-term recreational benefits or shellfish, finfish, wildlife, or their natural habitats.
- (3) The secondary or cumulative impacts of the proposed activity, which are not generally covered in the approval process, may result in a significant adverse impact to human health or the environment.
- (4) The proposed activity is of such an unusual nature or has such widespread implications that an uncommon concern for its environmental effects has been expressed to the agency.

History Note: Authority G.S. 113A-9; 113A-11; 143B-10(j); Temporary Adoption Eff. January 11, 2002.

APPROVED RULES

*This Section includes the Register Notice citation to Rules approved by the Rules Review Commission (RRC) at its meeting of December 20, 2001 pursuant to G.S. 150B-21.17(a)(1) and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules is published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

These rules, unless otherwise noted, will become effective on the 31st legislative day of the 2001 Session of the General Assembly or a later date if specified by the agency unless a bill is introduced before the 31st legislative day that specifically disapproves the rule. If a bill to disapprove a rule is not ratified, the rule will become effective either on the day the bill receives an unfavorable final action or the day the General Assembly adjourns. Statutory reference: G.S. 150B-21.3.

APPROVED RULE CITATION				REGISTER CITATION TO THE NOTICE OF TEXT
10	NCAC	03R	.1615-.1616*	16:03 NCR
10	NCAC	03R	.6336*	16:03 NCR
10	NCAC	45H	.0205*	15:22 NCR
12	NCAC	09G	.0307*	16:02 NCR
15A	NCAC	02D	.1420*	15:21 NCR
15A	NCAC	07H	.0311	16:07 NCR
15A	NCAC	07K	.0212*	16:07 NCR
15A	NCAC	18A	.2601*	not required (G.S. 150B-21.5), Eff. January 1, 2002
19A	NCAC	03G	.0205	16:05 NCR
21	NCAC	12	.0103*	16:05 NCR
21	NCAC	12	.0202*	16:05 NCR
21	NCAC	12	.0503*	16:05 NCR
21	NCAC	12	.0818*	16:05 NCR
21	NCAC	36	.0217*	15:23 NCR
21	NCAC	54	.2104*	14:16 NCR

**TITLE 10 – DEPARTMENT OF HEALTH AND
HUMAN SERVICES**

**10 NCAC 03R .1615 REQUIRED PERFORMANCE
STANDARDS**

(a) An applicant shall demonstrate that the project is capable of meeting the following standards:

- (1) each proposed item of cardiac catheterization equipment or cardiac angioplasty equipment, including mobile equipment shall be utilized at an annual rate of at least 60 percent of capacity excluding procedures not defined as cardiac catheterization procedures in 10 NCAC 03R .1613(5), measured during the fourth quarter of the third year following completion of the project;
- (2) if the applicant proposes to perform therapeutic cardiac catheterization procedures, each of the applicant's therapeutic cardiac catheterization teams shall be performing at an annual rate of at least 100 therapeutic cardiac catheterization procedures, during the third year of operation following completion of the project;
- (3) if the applicant proposes to perform diagnostic cardiac catheterization

procedures, each diagnostic cardiac catheterization team shall be performing at an annual rate of at least 200 diagnostic-equivalent cardiac catheterization procedures by the end of the third year following completion of the project;

- (4) at least 50 percent of the projected cardiac catheterization procedures shall be performed on patients residing within the primary cardiac catheterization service area.
- (b) An applicant proposing to acquire mobile cardiac catheterization or mobile cardiac angioplasty equipment shall:
 - (1) demonstrate that each existing item of cardiac catheterization equipment and cardiac angioplasty equipment, excluding mobile equipment, located in the proposed primary cardiac catheterization service area of each host facility shall have been operated at a level of at least 80 percent of capacity during the 12 month period reflected in the most recent licensure form on file with the Division of Facility Services;
 - (2) demonstrate that the utilization of each existing or approved item of cardiac catheterization equipment and cardiac angioplasty equipment, excluding mobile equipment, located in the proposed primary

cardiac catheterization service area of each host facility shall not be expected to fall below 60 percent of capacity due to the acquisition of the proposed cardiac catheterization, cardiac angioplasty, or mobile equipment;

- (3) demonstrate that each item of existing mobile equipment operating in the proposed primary cardiac catheterization service area of each host facility shall have been performing at least an average of four diagnostic-equivalent cardiac catheterization procedures per day per site in the proposed cardiac catheterization service area in the 12 month period preceding the submittal of the application;
- (4) demonstrate that each item of existing or approved mobile equipment to be operating in the proposed primary cardiac catheterization service area of each host facility shall be performing at least an average of four diagnostic-equivalent cardiac catheterization procedures per day per site in the proposed cardiac catheterization service area in the applicant's third year of operation; and
- (5) provide documentation of all assumptions and data used in the development of the projections required in this Rule.

(c) An applicant proposing to acquire cardiac catheterization or cardiac angioplasty equipment excluding shared fixed and mobile cardiac catheterization or cardiac angioplasty equipment shall:

- (1) demonstrate that its existing items of cardiac catheterization and cardiac angioplasty equipment, except mobile equipment, located in the proposed cardiac catheterization service area operated at an average of at least 80% of capacity during the twelve month period reflected in the most recent licensure renewal application form on file with the Division of Facility Services;
- (2) demonstrate that its existing items of cardiac catheterization equipment or cardiac angioplasty equipment, except mobile equipment, shall be utilized at an average annual rate of at least 60 percent of capacity, measured during the fourth quarter of the third year following completion of the project; and
- (3) provide documentation of all assumptions and data used in the development of the projections required in this Rule.

(d) An applicant proposing to acquire shared fixed cardiac catheterization or cardiac angioplasty equipment as defined in 10 NCAC 03R .6333(c) shall:

- (1) demonstrate that greater than 200 cardiac catheterization procedures were performed for every 416 hours a mobile cardiac catheterization unit that was operated at a

single mobile site in the hospital service system in which the proposed equipment will be located, during the 12 month period reflected in the 2000 Licensure Application or 1999 Inventory of Cardiac Catheterization Equipment on file with the Division of Facility Services;

- (2) provide documentation of all assumptions and data used in the development of the projections required in this Rule.

(e) If the applicant proposes to perform cardiac catheterization procedures on patients age 14 and under, the applicant shall demonstrate that it meets the following additional criteria:

- (1) the facility has the capability to perform diagnostic and therapeutic cardiac catheterization procedures and open heart surgery services on patients age 14 and under;
- (2) the proposed project shall be performing at an annual rate of at least 100 cardiac catheterization procedures on patients age 14 or under during the fourth quarter of the third year following initiation of the proposed cardiac catheterization procedures for patients age 14 and under.

History Note: Authority G.S. 131E-177(1); 131E-183; Eff. January 1, 1987; Filed as a Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. November 1, 1996; February 1, 1994; Temporary Amendment Eff. January 1, 1999; Temporary Eff. January 1, 1999 Expired on October 12, 1999; Temporary Amendment Eff. January 1, 2000; Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000; Temporary Amendment Eff. January 1, 2001; Temporary Amendment effective January 1, 2001 amends and replaces a permanent rulemaking originally proposed to be effective April 1, 2001; Amended Eff. August 1, 2002.

10 NCAC 03R .1616 REQUIRED SUPPORT SERVICES

(a) If the applicant proposes to perform therapeutic cardiac catheterization procedures, the applicant shall demonstrate that open heart surgery services are provided within the same facility.

(b) If the applicant proposes to perform diagnostic cardiac catheterization procedures, the applicant shall document that its patients will have access to a facility which provides open heart surgery services, and that the patients can be transported to that facility within 30 minutes and with no greater risk than if the procedure had been performed in a hospital which provides open heart surgery services; with the exception that the 30 minute transport requirement shall be waived for equipment that is identified as needed in 10 NCAC 03R .6312.

(c) The applicant shall provide documentation to demonstrate that the following services shall be available in the facility:

- (1) electrocardiography laboratory and testing services including stress testing and continuous cardiogram monitoring;
- (2) echocardiography service;
- (3) blood gas laboratory;
- (4) pulmonary function unit;
- (5) staffed blood bank;
- (6) hematology laboratory/coagulation laboratory;
- (7) microbiology laboratory;
- (8) clinical pathology laboratory with facilities for blood chemistry;
- (9) immediate endocardiac catheter pacemaking in case of cardiac arrest; and
- (10) nuclear medicine services including nuclear cardiology.

(c) For purposes of this Rule, beds in hospital-based long-term nursing care shall be certified as a "distinct part" as defined by the Health Care Financing Administration. Beds in a "distinct part" shall be converted from the existing licensed bed capacity of the hospital and shall not be reconverted to any other category or type of bed without a certificate of need. An application for a certificate of need for reconverting beds to acute care shall be evaluated against the hospital's service needs utilizing target occupancies shown in 10 NCAC 03R .6332(d), without regard to the acute care bed need shown in 10 NCAC 03R .6306.

(d) A certificate of need issued for a hospital-based long-term nursing care unit shall remain in force as long as the following conditions are met:

- (1) the beds shall be certified for participation in the Title XVIII (Medicare) and Title XIX (Medicaid) Programs;
- (2) the hospital discharges residents to other nursing facilities in the geographic area with available beds when such discharge is appropriate and permissible under applicable law; and
- (3) patients admitted shall have been acutely ill inpatients of an acute hospital or its satellites immediately preceding placement in the unit.

(e) The granting of beds for hospital-based long-term nursing care shall not allow a hospital to convert additional beds without first obtaining a certificate of need.

(f) Where any hospital, or the parent corporation or entity of such hospital, any subsidiary corporation or entity of such hospital, or any corporation or entity related to or affiliated with such hospital by common ownership, control or management:

- (1) applies for and receives a certificate of need for long-term care bed need determinations in 10 NCAC 03R .6322; or
- (2) currently has nursing home beds licensed as a part of the hospital under G.S. 131E, Article 5; or
- (3) currently operates long-term care beds under the Federal Swing Bed Program (P.L. 96-499),

such hospital shall not be eligible to apply for a certificate of need for hospital-based long-term care nursing beds under this Rule. Hospitals designated by the State of North Carolina as Critical Access Hospitals pursuant to Section 1820(f) of the Social Security Act, as amended, which have not been allocated long-term care beds under provisions of G.S. 131E-175 through 131E-190, may apply to develop beds under this Rule. However, such hospitals shall not develop long-term care beds both to meet needs determined in 10 NCAC 03R .6322 and this Rule.

(g) Beds certified as a "distinct part" under this Rule shall be counted in the inventory of existing long-term care beds and used in the calculation of unmet long-term care bed need for the general population of a planning area. Applications for certificates of need pursuant to this Rule shall be accepted only for the February 1 review cycle from counties in HSA I, II, III and only for the March 1 review cycle from counties in HSA IV, V and VI. Beds awarded under this Rule shall be

History Note: Authority G.S. 131E-177(1); 131E-183(b); Eff. January 1, 1987;

Filed as a Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Amended Eff. February 1, 1994;

Temporary Amendment Eff. February 2, 2001;

Amended Eff. August 1, 2002.

10 NCAC 03R .6336 POLICY FOR PROVISION OF HOSPITAL-BASED LONG-TERM CARE NURSING CARE

(a) A certificate of need may be issued to a hospital which is licensed under G.S. 131E, Article 5, and which meets the conditions set forth below and in 10 NCAC 03R .1100, to convert up to 10 beds from its licensed acute care bed capacity for use as hospital-based long-term nursing care beds without regard to determinations of need in 10 NCAC 03R .6322 if the hospital:

- (1) is located in a county which was designated as non-metropolitan by the U. S. Office of Management and Budget on January 1, 2001; and
- (2) on January 1, 2001, had a licensed acute care bed capacity of 150 beds or less.

The certificate of need shall remain in force as long as the Department of Health and Human Services determines that the hospital is meeting the conditions outlined in this Rule.

(b) "Hospital-based long-term nursing care" is defined as long-term nursing care provided to a patient who has been directly discharged from an acute care bed and cannot be immediately placed in a licensed nursing facility because of the unavailability of a bed appropriate for the individual's needs. Beds developed under this Rule are intended to provide placement for residents only when placement in other long-term care beds is unavailable in the geographic area. Hospitals which develop beds under this Rule shall discharge patients to other nursing facilities with available beds in the geographic area as soon as possible where appropriate and permissible under applicable law. Necessary documentation including copies of physician referral forms (FL 2) on all patients in hospital-based nursing units shall be made available for review upon request by duly authorized representatives of licensed nursing facilities.

deducted from need determinations for the county as shown in 10 NCAC 03R .6322. The Department of Health and Human Services shall monitor this program and ensure that patients affected by this Rule are receiving services, and that conditions under which the certificate of need was granted are being met.

History Note: Authority G.S. 131E-176(25); 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2001; Eff. August 1, 2002.

10 NCAC 45H .0205 SCHEDULE IV

(a) Schedule IV shall consist of the drugs and other substances by whatever official name, common or usual name, chemical name or brand name designated and as specified in G.S. 90-92. Each drug or substance has been assigned the Drug Enforcement Administration controlled substances code number set forth in the Code of Federal Regulations, Title 21, Section 1308.14.

(b) The Commission for MH/DD/SAS may add, delete or reschedule substances within Schedules I-VI as specified in G.S. 90-88.

History Note: Authority G.S. 90-88; 90-92; 143B-147; Eff. June 30, 1978; Amended Eff. July 1, 1993; January 1, 1989; December 1, 1987; August 1, 1987; Temporary Amendment Eff. May 28, 1998; Temporary Amendment Expired March 12, 1999; Amended Eff. August 1, 2000; Temporary Amendment Eff. February 15, 2001; Amended Eff. August 1, 2002.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 09G .0307 CERTIFICATION OF INSTRUCTORS

(a) Any person participating in a Commission-accredited corrections training course or program as an instructor, teacher, professor, lecturer, or other participant making presentations to the class shall first be certified by the Commission as an instructor.

(b) The Commission shall certify instructors under the following categories: General Instructor Certification or Specialized Instructor Certification as outlined in 12 NCAC 09G .0308 and .0310 of this Section. Such instructor certification shall be granted on the basis of documented qualifications of experience, education, and training in accord with the requirements of this Section and reflected on the applicant's Request for Instructor Certification Form.

(c) In addition to all other requirements of this Section, each instructor certified by the Commission to teach in a Commission-accredited course shall remain competent in his/her specific or specialty areas. Such competence includes remaining current in the instructor's area of expertise, which may be demonstrated by attending and successfully completing any instructor updates issued by the Commission.

(d) The Standards Division may notify an applicant for instructor certification or a certified instructor that a

deficiency appears to exist and attempt, in an advisory capacity, to assist the person in correcting the deficiency.

(e) When any person certified as an instructor by the Commission is found to have knowingly and willfully violated any provision or requirement of the Rules in this Subchapter, the Commission may take action to correct the violation and to ensure that the violation does not recur, including:

- (1) issuing an oral warning and request for compliance;
- (2) issuing a written warning and request for compliance;
- (3) issuing an official written reprimand;
- (4) suspending the individual's certification for a specified period of time or until acceptable corrective action is taken by the individual; or
- (5) revoking the individual's certification.

(f) The Commission may deny, suspend, or revoke an instructor's certification when the Commission finds that the person:

- (1) has failed to meet and maintain any of the requirements for qualification; or
- (2) has failed to remain currently knowledgeable in the person's areas of expertise; or
- (3) has failed to deliver training in a manner consistent with the instructor lesson plans outlined in the "Basic Instructor Training Manual" as found in 12 NCAC 09G .0414; or
- (4) has demonstrated unprofessional personal conduct in the delivery of Commission-mandated training; or
- (5) has demonstrated instructional incompetence; or
- (6) has knowingly and willfully obtained, or attempted to obtain instructor certification by deceit, fraud, or misrepresentation; or
- (7) has failed to meet or maintain good moral character as required to effectively discharge the duties of a corrections instructor, as evidenced by, but not limited to:
 - (A) not having been convicted of a felony;
 - (B) not having been convicted of a misdemeanor as defined in 12 NCAC 09G .0102(10) for five years since the date of conviction or the completion of any corrections supervision imposed by the courts whichever is later;
 - (C) having submitted to and produced a negative result on a drug test which meets the certification standards of the Department of Health and Human Services for Federal Workplace Drug Testing Programs, copies of which may be obtained from National Institute on Drug Abuse, 5600 Fisher Lane, Rockville, Maryland 20857 at no

- cost, to detect the illegal use of at least cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites;
- (D) submitting to a background investigation consisting of:
 - (i) verification of age;
 - (ii) verification of education;
 - (iii) criminal history check of local, state, and national files;
- (E) being truthful in providing all required information as prescribed by the application process; or
- (8) has failed to deliver training in a manner consistent with the curriculum outlines in the corrections officers' training manuals set out in 12 NCAC 09G .0411 through .0416.

History Note: Authority G.S. 17C-6; 17C-10; Temporary Adoption Eff. January 1, 2001; Eff. August 1, 2002.

(c) Posting of emission allocations. The Director shall post the new emission allocations once they are adopted on the Division's web page.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(5), (7), (10); Temporary Adoption Eff. November 1, 2000; Temporary Amendment Eff. August 1, 2001; Eff. July 18, 2002.

15A NCAC 07K .0212 INSTALLATION AND MAINTENANCE OF SAND FENCING

Sand fences that are installed and maintained subject to the following criteria are exempt from the permit requirements of the Coastal Area Management Act:

- (1) Sand fencing may only be installed for the purpose of: building sand dunes by trapping wind blown sand; the protection of the dune(s) and vegetation (planted or existing).
- (2) Sand fencing shall not impede existing public access to the beach, recreational use of the beach or emergency vehicle access. Sand fencing shall not be installed in a manner that impedes or restricts established common law and statutory rights of public access and use of public trust lands and waters.
- (3) Sand fencing shall not be installed in a manner that impedes, traps or otherwise endangers sea turtles, sea turtle nests or sea turtle hatchlings.
- (4) Non-functioning, damaged, or unsecured, sand fencing shall be immediately removed by the property owner.
- (5) Sand fencing shall be constructed from evenly spaced thin wooden vertical slats connected with twisted wire, no more than 5 feet in height. Wooden posts or stakes no larger than 2" X 4" or 3" diameter shall support sand fencing.
- (6) Location. Sand fencing shall be placed as far landward as possible to avoid interference with sea turtle nesting, existing public access, recreational use of the beach, and emergency vehicle access.
 - (a) Sand fencing shall not be placed on the wet sand beach area.
 - (b) Sand fencing installed parallel to the shoreline shall be located no farther waterward than the crest of the frontal or primary dune; or
 - (c) Sand fencing installed waterward of the crest of the frontal or primary dune shall be installed at an angle no less than 45 degrees to the shoreline. Individual sections of sand fence shall not exceed more than 10 feet in length (except for public accessways) and shall be spaced no less than seven feet apart, and shall not extend more

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 02D .1420 PERIODIC REVIEW AND REALLOCATIONS

(a) Periodic Review. In 2006 and every five years thereafter, the Environmental Management Commission shall review the emission allocations of sources covered under Rules .1416, .1417, or .1418 of this Section and decide if any revisions are needed. In making this decision the Environmental Management Commission shall consider the following:

- (1) the size of the allocation pool for new source growth under Rule .1421 of this Section;
- (2) the amount of emissions allocations requested under Rule .1421 of this Section;
- (3) the amount of emissions allocations available through nitrogen oxide budget trading program;
- (4) the impact of reallocation on existing sources;
- (5) the impact of reallocations on sources covered under Rule .1421 of this Section;
- (6) impact on future growth; and
- (7) other relevant information on the impacts of reallocation.

(b) If the Environmental Management Commission decides to revise emission allocations, it shall propose for each source that has been permitted for and has complied with an emission rate of 0.10 pounds per million Btu or less, emission allocations greater than or equal to the greater of:

- (1) the source's current allocation, or
- (2) an allocation calculated by multiplying the average of the source's two highest seasonal energy inputs for the four most recent years by 0.15 pounds per million Btu and dividing by 2000.

than 10 feet waterward of the following locations, whichever is most waterward, as defined in 15A NCAC 7H .0305: the first line of stable natural vegetation, the toe of the frontal or primary dune, or erosion escarpment of frontal or primary dune; and

- (d) Sand fencing along public accessways may equal the length of the accessway, and may include a 45 degree funnel on the waterward end. The waterward location of the funnel shall not exceed 10 feet waterward of the locations identified in Item (6)(c) of this Rule.

History Note: Authority G.S. 113A-103(5)c.; Eff. August 1, 2002.

15A NCAC 18A .2601 DEFINITIONS

The following definitions shall apply in the interpretation and enforcement of this Section:

- (1) "Approved" means procedures and equipment determined by the Department to be in compliance with this Section. Food service equipment which meets and is installed in accordance with National Sanitation Foundation Standards or equal shall be approved. National Sanitation Foundation standards are adopted by reference in accordance with G.S. 150B-14(c). These standards may be obtained from the National Sanitation Foundation, P.O. Box 130140, Ann Arbor, Michigan 48113-0140 and are also available for inspection at the Division of Environmental Health.
- (2) "Catered elderly nutrition site" means an establishment or operation where food is served, but not prepared on premises, operated under the guidelines of the N.C. Department of Human Resources, Division of Aging.
- (3) "Commissary" means a food stand that services mobile food units and pushcarts. The commissary may or may not serve customers at the food stand's location.
- (4) "Department of Environment and Natural Resources" or "Department" means the North Carolina Department of Environment and Natural Resources. The term also means the authorized representative of the Department. For purposes of any notices required pursuant to these Rules, notice shall be mailed to "Division of Environmental Health, Environmental Health Services Section, North Carolina Department of Environment and Natural Resources," 1632

Mail Service Center, Raleigh, NC 27699-1632.

- (5) "Drink stand" means those establishments in which only beverages are prepared on the premises and are served in multi-use containers, such as glasses or mugs.
- (6) "Employee" means any person who handles food or drink during preparation or serving, or who comes in contact with any eating or cooking utensils, or who is employed at any time in a room in which food or drink is prepared or served.
- (7) "Environmental Health Specialist" means a person authorized to represent the Department on the local or state level in making inspections pursuant to state laws and rules.
- (8) "Equipment" means refrigeration, including racks and shelving used in refrigeration, utensil cleaning and culinary sinks and drainboards, warewashing and dishwashing machines, food preparation tables, counters, stoves, ovens, and other food preparation and holding appliances.
- (9) "Food" means any raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption.
- (10) "Food stand" means those food service establishments which prepare or serve foods and which do not provide seating facilities for customers to use while eating or drinking. Establishments which only serve such items as dip ice cream, popcorn, candied apples, or cotton candy are not included.
- (11) "Good Repair" means that the item in question can be kept clean and used for its intended purpose.
- (12) "Hermetically sealed container" means a container designed and intended to be secure against the entry of micro-organisms and to maintain the commercial sterility of its contents after processing.
- (13) "Limited food service establishment" means a food service establishment as described in G.S. 130A-247(7).
- (14) "Local Health Director" means the administrative head of a local health department or his authorized representative.
- (15) "Mobile food unit" means a vehicle-mounted food service establishment designed to be readily moved.
- (16) "Person" means any individual, firm, association, organization, partnership, business trust, corporation, or company.
- (17) "Potentially hazardous food" means any food or ingredient, natural or synthetic, in a form capable of supporting the growth of infectious or toxigenic microorganisms,

- including *Clostridium botulinum*. This term includes raw or heat treated foods of animal origin, raw seed sprouts, and treated foods of plant origin. The term does not include foods which have a pH level of 4.6 or below or a water activity (Aw) value of 0.85 or less.
- (18) "Private club" means a private club as defined in G.S. 130A-247(2).
- (19) "Pushcart" means a mobile piece of equipment or vehicle which serves hot dogs or foods which have been prepared, pre-portioned, and individually pre-wrapped at a restaurant or commissary.
- (20) "Responsible person" means the individual present in a food service establishment who is the apparent supervisor of the food service establishment at the time of inspection. If no individual is the apparent supervisor, then any employee is the responsible person.
- (21) "Restaurant or food service establishment" means all establishments and operations where food is prepared or served at wholesale or retail for pay, or any other establishment or operation where food is prepared or served that is subject to the provisions of G.S. 130A-248. The term does not include establishments which only serve such items as dip ice cream, popcorn, candied apples, or cotton candy.
- (22) "Sanitize" means the approved bactericidal treatment by a process which meets the temperature and chemical concentration levels in 15A NCAC 18A .2619.
- (23) "Sewage" means the liquid and solid human body waste and liquid waste generated by water-using fixtures and appliances, including those associated with foodhandling. The term does not include industrial process wastewater or sewage that is combined with industrial process wastewater.
- (24) "Single service" means cups, containers, lids, closures, plates, knives, forks, spoons, stirrers, paddles, straws, napkins, wrapping materials, toothpicks, and similar articles intended for one-time, one person use and then discarded.
- (25) "Substantially similar" means similar in importance, degree, amount, placement or extent.
- (26) "Temporary food establishment" means those food or drink establishments which operate for a period of 15 days or less, in connection with a fair, carnival, circus, public exhibition, or other similar gathering.
- (27) "Threat to the Public Health" means circumstances which create a significant risk of serious physical injury or serious adverse health effect.

- (28) "Utensils" means any kitchenware, tableware, glassware, cutlery, containers and similar items with which food or drink comes in contact during storage, preparation, or serving.

History Note: Authority G.S. 130A-248; Eff. May 5, 1980; Amended Eff. January 1, 1996; July 1, 1994; January 4, 1994; July 1, 1993; Temporary Amendment Eff. April 8, 1996; Amended Eff. January 1, 2002; August 1, 1998; April 1, 1997.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 12 - LICENSING BOARD FOR GENERAL CONTRACTORS

21 NCAC 12 .0103 STRUCTURE OF BOARD

- (a) Organization. The Board consists of nine members who are appointed by the Governor of North Carolina, with its composition in terms of its members being specified in G.S. 87-2.
- (b) Officers. Annually, during the April meeting, the Board elects from its members a Chairman and Vice-Chairman. The Chairman shall preside over all meetings of the Board and perform such other duties as he may be directed to do by the Board. The Vice-Chairman shall function as Chairman in the absence of the Chairman.
- (c) Secretary-Treasurer. In addition to those duties and responsibilities required of him by the North Carolina General Statutes, the Secretary-Treasurer, as the Board's Chief Administrative Officer, specifically has the responsibility and power to:
- (1) employ the clerical and legal services necessary to assist the Board in carrying out the requirements of the North Carolina General Statutes;
 - (2) purchase or rent whatever office equipment, stationery, or other miscellaneous articles as are necessary to keep the records of the Board;
 - (3) make expenditures from the funds of the Board by signing checks, or authorizing the designee of the Secretary-Treasurer to sign checks, for expenditures after the checks are signed by the Chairman or Vice-Chairman; and
 - (4) do such other acts as may be required of him by the Board.
- (d) Meetings of the Board.
- (1) Regular meetings shall be held during January, April, July and October of each year at the main office of the Board or at any other place so designated by the Board.
 - (2) Special Meetings. Special meetings of the Board shall be held at the request of the Chairman or any two of the members at the main office of the Board or at any place

- fixed by the person or persons calling the meeting.
- (3) Notice of Meetings. Regular meetings of the Board shall be held after each Board member is duly notified by the Secretary-Treasurer of the date of the meeting. However, any person or persons requesting a special meeting of the Board shall, at least two days before the meeting, give notice to the other members of the Board of that meeting by any usual means of communication. Such notice must specify the purpose for which the meeting is called.
 - (4) Quorum. Any five members of the Board which includes either the Chairman or Vice-Chairman shall constitute a quorum.

History Note: Authority G.S. 87-1 to 87-8; Eff. February 1, 1976; Readopted Eff. September 26, 1977; Amended Eff. August 1, 2002; January 1, 1992; May 1, 1989; January 1, 1983.

21 NCAC 12 .0202 CLASSIFICATION

- (a) A general contractor must be certified in one of five classifications. These classifications are:
- (1) Building Contractor. This classification covers all types of building construction activity including but not limited to: commercial, industrial, institutional, and all types of residential building construction; covers parking decks; all site work, grading and paving of parking lots, driveways, sidewalks, curbs, gutters, and septic systems which are ancillary to the aforementioned types of construction; and covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Masonry Construction), S(Roofing), S(Metal Erection), and S(Swimming Pools).
 - (2) Residential Contractor. This classification covers all types of construction activity pertaining to the construction of residential units which are required to conform to the residential building code adopted by the Building Code Council pursuant to G.S. 143-138; covers all site work, driveways, sidewalks, and septic systems ancillary to the aforementioned construction; and covers the work done as part of such residential units under the specialty classifications of S(Insulation), S(Masonry Construction), S(Roofing), and S(Swimming Pools).
 - (3) Highway Contractor. This classification covers all types of highway construction activity including but not limited to: grading, paving of all types, installation of exterior artificial athletic surfaces, relocation of public and private utility lines ancillary to the principal project, bridge construction and

- repair, parking decks, sidewalks, curbs, gutters and storm drainage. Includes installation and erection of guard rails, fencing, signage and ancillary highway hardware; covers paving and grading of airport and airfield runways, taxiways, and aprons, including the installation of signage, runway lighting and marking; and covers work done under the specialty classifications of S(Boring and Tunneling), S(Concrete Construction), S(Marine Construction) and S(Railroad Construction). If the contractor limits his activity to grading and does no other work described herein, upon proper qualification the classification of H(Grading and Excavating) may be granted.
- (4) Public Utilities Contractor. This classification includes those whose operations are the performance of construction work on septic systems and on the subclassifications of facilities set forth in G.S. 87-10(3). The Board may issue a license to a public utilities contractor that is limited to any of the subclassifications set forth in G.S. 87-10(3) for which the contractor qualifies. Within appropriate subclassification, a public utilities contractor license covers work done under the specialty classifications of S(Boring and Tunneling), PU(Communications), PU(Fuel Distribution), PU(Electrical-Ahead of Point of Delivery), and S(Swimming Pools).
- (5) Specialty Contractor. This classification shall embrace that type of construction operation and performance of contract work outlined as follows:
 - (A) H(Grading and Excavating). Covers the digging, moving and placing of materials forming the surface of the earth, excluding air and water, in such a manner that the cut, fill, excavation, grade, trench, backfill, or any similar operation can be executed with the use of hand and power tools and machines commonly used for these types of digging, moving and material placing. Covers work on earthen dams and the use of explosives used in connection with all or any part of the activities described in this Subparagraph. Also includes clearing and grubbing, and erosion control activities.
 - (B) S(Boring and Tunneling). Covers the construction of underground or underwater passageways by digging or boring through and under the earth's surface including the bracing and compacting of such

- passageways to make them safe for the purpose intended. Includes preparation of the ground surfaces at points of ingress and egress.
- (C) PU(Communications). Covers the installation of the following:
- (i) All types of pole lines, and aerial and underground distribution cable for telephone systems;
 - (ii) Aerial and underground distribution cable for Cable TV and Master Antenna TV Systems capable of transmitting R.F. signals;
 - (iii) Underground conduit and communication cable including fiber optic cable; and
 - (iv) Microwave systems and towers, including foundations and excavations where required, when the microwave systems are being used for the purpose of transmitting R.F. signals; and installation of PCS or cellular telephone towers and sites.
- (D) S(Concrete Construction). Covers the construction and installation of foundations, pre-cast silos and other concrete tanks or receptacles, prestressed components, and guniting applications, but excludes bridges, streets, sidewalks, curbs, gutters, driveways, parking lots and highways.
- (E) PU(Electrical-Ahead of Point of Delivery). Covers the construction, installation, alteration, maintenance or repair of an electrical wiring system, including sub-stations or components thereof, which is or is intended to be owned, operated and maintained by an electric power supplier, such as a public or private utility, a utility cooperative, or any other franchised electric power supplier, for the purpose of furnishing electrical services to one or more customers.
- (F) PU(Fuel Distribution). Covers the construction, installation, alteration, maintenance or repair of systems for distribution of petroleum fuels, petroleum distillates, natural gas, chemicals and slurries through pipeline from one station to another. Includes all excavating, trenching and backfilling in connection therewith. Covers the installation, replacement and removal of above ground and below ground fuel storage tanks.
- (G) PU(Water Lines and Sewer Lines). Covers construction work on water and sewer mains, water service lines, and house and building sewer lines as defined in the North Carolina State Building Code, and covers water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations and pumping stations. Includes pavement patching, backfill and erosion control as part of such construction.
- (H) PU(Water Purification and Sewage Disposal). Covers the wastewater treatment facilities and covers all site work, grading, and paving of parking lots, driveways, sidewalks, and curbs and gutters which are ancillary to such construction of water and wastewater treatment facilities. Covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Masonry Construction), S(Roofing), and S(Metal Erection) as part of such work on water and wastewater treatment facilities.
- (I) S(Insulation). Covers the installation, alteration or repair of materials classified as insulating media used for the non-mechanical control of temperatures in the construction of residential and commercial buildings. Does not include the insulation of mechanical equipment and ancillary lines and piping.
- (J) S(Interior Construction). Covers the installation of acoustical ceiling systems and panels; drywall partitions (load bearing and non-load bearing), lathing and plastering, flooring and finishing, interior recreational surfaces, window and door installation, and installation of fixtures, cabinets and millwork. Includes the removal of asbestos and replacement with non-toxic substances.
- (K) S(Marine Construction). Covers all marine construction and repair activities and all types of marine

- construction in deep-water installations and in harbors, inlets, sounds, bays, and channels; covers dredging, construction and installation of pilings, piers, decks, slips, docks, and bulkheads. Does not include structures required on docks, slips and piers.
- (L) S(Masonry Construction). Covers the installation, with or without the use of mortar or adhesives, of the following:
- (i) Brick, concrete block, gypsum partition tile, pumice block or other lightweight and facsimile units and products common to the masonry industry;
 - (ii) Installation of fire clay products and refractory construction; and
 - (iii) Installation of rough cut and dressed stone, marble panels and slate units, and installation of structural glazed tile or block, glass brick or block, and solar screen tile or block.
- (M) S(Railroad Construction). Covers the building, construction and repair of railroad lines including:
- (i) The clearing and filling of rights-of-way;
 - (ii) Shaping, compacting, setting and stabilizing of road beds;
 - (iii) Setting ties, tie plates, rails, rail connectors, frogs, switch plates, switches, signal markers, retaining walls, dikes, fences and gates; and
 - (iv) Construction and repair of tool sheds and platforms.
- (N) S(Roofing). Covers the installation and repair of roofs and decks on residential, commercial, industrial, and institutional structures requiring materials that form a water-tight and weather-resistant surface. The term "materials" shall be defined for purposes of this Subparagraph to include, among other things, cedar, cement, asbestos, clay tile and composition shingles, all types of metal coverings, wood shakes, single ply and built-up roofing, protective and reflective roof and deck coatings, sheet metal valleys, flashings,
- gravel stops, gutters and downspouts, and bituminous waterproofing.
- (O) S(Metal Erection). Covers:
- (i) The field fabrication, erection, repair and alteration of architectural and structural shapes, plates, tubing, pipe and bars, not limited to steel or aluminum, that are or may be used as structural members for buildings, equipment and structure; and
 - (ii) The layout, assembly and erection by welding, bolting or riveting such metal products as, but not limited to, curtain walls, tanks of all types, hoppers, structural members for buildings, towers, stairs, conveyor frames, cranes and crane runways, canopies, carports, guard rails, signs, steel scaffolding as a permanent structure, rigging, flagpoles, fences, steel and aluminum siding, bleachers, fire escapes, and seating for stadiums, arenas, and auditoriums.
- (P) S(Swimming Pools). Covers the construction, service and repair of all swimming pools. Includes:
- (i) Excavation and grading;
 - (ii) Construction of concrete, gunite, and plastic-type pools, pool decks, and walkways, and tiling and coping; and
 - (iii) Installation of all equipment including pumps, filters and chemical feeders. Does not include direct connections to a sanitary sewer system or to potable water lines, nor the grounding and bonding of any metal surfaces or the making of any electrical connections.
- (Q) S(Asbestos). This classification covers renovation or demolition activities involving the repair, maintenance, removal, isolation, encapsulation, or enclosure of Regulated Asbestos Containing

Materials (RACM) for any commercial, industrial, or institutional building, whether public or private. It also covers all types of residential building construction involving RACM during renovation or demolition activities.

(b) An applicant may be licensed in more than one classification of general contracting provided the applicant meets the qualifications for the classifications, which includes passing the examination for the classifications in question. If an applicant passes the building, public utilities, and highway examinations, the license granted to the applicant will carry with it a designation of "unclassified."

History Note: Authority G.S. 87-1; 87-10; Eff. February 1, 1976; Readopted Eff. September 26, 1977; Amended Eff. June 1, 1994; June 1, 1992; May 1, 1989; January 1, 1983; Temporary Amendment Eff. February 18, 1997; Amended Eff. August 1, 2002; April 1, 2001; August 1, 2000; August 1, 1998.

21 NCAC 12 .0503 RENEWAL OF LICENSE

(a) Form. An application for renewal requires the holder of a valid license to set forth whether there were any changes made in the status of the licensee's business during the preceding year and also requires the holder to give a financial statement for the business in question. The financial statement need not be prepared by a certified public accountant or by a qualified independent accountant but may be completed by the holder of a license on the form itself. However, the Board may require a license holder to submit an audited financial statement if there is any evidence indicating that the license holder may be unable to meet his financial obligations. Except as provided herein, evidence of financial responsibility shall be subject to approval by the Board in accordance with the requirements of Rule .0204 of this Chapter. A licensee may be required to provide evidence of continued financial responsibility satisfactory to the Board should circumstances render such evidence necessary, and shall provide the Board with a copy of any bankruptcy petition filed by the licensee within 30 days of its filing. A corporate licensee shall notify the Board of its dissolution or suspension of its corporate charter within 30 days of such dissolution or suspension.

(b) Display. The certificate of renewal of license granted by the Board, containing the signatures of the Chairman and the Secretary-Treasurer, must be displayed at all times by the licensee at its place of business.

History Note: Authority G.S. 87-1; 87-10; Eff. February 1, 1976; Readopted Eff. September 26, 1977; ARRC Objection March 19, 1987; Amended Eff. May 1, 1989, August 1, 1987; Filed as a Temporary Amendment Eff. June 28, 1989 for a Period of 155 Days to Expire on December 1, 1989; Amended Eff. December 1, 1989; RRC Removed Objection of March 19, 1987 Eff. August 20,

1992 based on subsequent amendment; Amended Eff. September 1, 1992; Temporary Amendment Eff. May 31, 1996; Amended Eff. August 1, 2002; April 1, 1997.

21 NCAC 12 .0818 REQUEST FOR HEARING

(a) Any time an individual believes their rights, duties, or privileges have been affected by the Board's administrative action, but has not received notice of a right to an administrative hearing pursuant to Rule .0817 of this Section, that individual may file a formal request for a hearing.

(b) Before an individual may file a request he must first exhaust all reasonable efforts to resolve the issue informally with the Board.

(c) Subsequent to such informal action, if still dissatisfied, the individual shall submit a request to the Board's office, with the request bearing the notation: **REQUEST FOR ADMINISTRATIVE HEARING**. The request shall contain the following information:

- (1) Name and address of the Petitioner,
- (2) A concise statement of the action taken by the Board which is challenged,
- (3) A concise statement of the way in which the Petitioner has been aggrieved, and
- (4) A clear and specific statement of request for a hearing.

(d) A request for administrative hearing must be submitted to the Board's office within 60 days of receipt of notice of the action taken by the Board which is challenged. The request will be acknowledged promptly and, if Petitioner is a person aggrieved, a hearing will be scheduled.

History Note: Authority G.S. 87-11 (b); 150B-11; 150B-38; Eff. September 1, 1988; Amended Eff. August 1, 2002.

CHAPTER 36 - BOARD OF NURSING

21 NCAC 36 .0217 REVOCATION, SUSPENSION, OR DENIAL OF LICENSE

(a) The definitions contained in G.S. 90-171.20 and G.S. 150B-2 (01), (2), (2b), (3), (4), (5), (8), (8a), and (8b) apply. In addition, the following definitions apply:

- (1) "Investigation" means a careful and detailed exploration of the events and circumstances related to reported information in an effort to determine if there is a violation of any provisions of this Act or any rule promulgated by the Board.
- (2) "Administrative Law Counsel" means an attorney whom the Board of Nursing has retained to serve as procedural officer for contested cases.
- (3) "Prosecuting Attorney" means the attorney retained by the Board of Nursing to prepare and prosecute contested cases.

(b) A nursing license which has been forfeited under G.S. 15A-1331A may not be reinstated until the licensee has successfully complied with the court's requirements, has petitioned the Board for reinstatement, has appeared before the

Licensure Committee, and has had reinstatement approved. The license may initially be reinstated with restrictions.

(c) Behaviors and activities which may result in disciplinary action by the Board include, but are not limited to, the following:

- (1) drug or alcohol abuse;
- (2) violence-related crime;
- (3) illegally obtaining, possessing or distributing drugs or alcohol for personal or other use, or other violations of G.S. 90-86 to 90-113.8;
- (4) commission of any crime which undermines the public trust;
- (5) failure to make available to another health care professional any client information crucial to the safety of the client's health care;
- (6) delegating responsibilities to a person when the licensee delegating knows or has reason to know that the competency of that person is impaired by physical or psychological ailments, or by alcohol or other pharmacological agents, prescribed or not;
- (7) practicing or offering to practice beyond the scope permitted by law;
- (8) accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform;
- (9) performing, without adequate supervision, professional services which the licensee is authorized to perform only under the supervision of a licensed professional, except in an emergency situation where a person's life or health is in danger;
- (10) abandoning or neglecting a client who is in need of nursing care, without making reasonable arrangements for the continuation of such care;
- (11) harassing, abusing, or intimidating a client either physically or verbally;
- (12) failure to maintain an accurate record for each client which records all pertinent health care information as defined in Rule .0224(f)(2) or .0225(f)(2);
- (13) failure to exercise supervision over persons who are authorized to practice only under the supervision of the licensed professional;
- (14) exercising undue influence on the client, including the promotion of the sale of services, appliances, or drugs for the financial gain of the practitioner or of a third party;
- (15) directly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a client, or other violations of G.S. 90-401;
- (16) failure to file a report, or filing a false report, required by law or by the Board, or

- (17) impeding or obstructing such filing or inducing another person to do so;
- (18) revealing identifiable data, or information obtained in a professional capacity, without prior consent of the client, except as authorized or required by law;
- (19) guaranteeing that a cure will result from the performance of professional services;
- (20) altering a license by changing the expiration date, certification number, or any other information appearing on the license;
- (21) using a license which has been altered;
- (22) permitting or allowing another person to use his or her license for the purpose of nursing;
- (23) delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such a person is not qualified by training, by experience, or by licensure;
- (24) violating any term of probation, condition, or limitation imposed on the licensee by the Board;
- (25) accepting responsibility for client care while impaired by alcohol or other pharmacological agents;
- (26) falsifying a client's record or the controlled substance records of the agency; or
- (27) engaging in any activities of a sexual nature with a client including kissing, fondling or touching while responsible for the care of that individual.

(d) When a person licensed to practice nursing as a licensed practical nurse or as a registered nurse is also licensed in another jurisdiction and that other jurisdiction takes disciplinary action against the licensee, the North Carolina Board of Nursing may summarily impose the same or lesser disciplinary action upon receipt of the other jurisdiction's action. The licensee may request a hearing. At the hearing the issues will be limited to:

- (1) whether the person against whom action was taken by the other jurisdiction and the North Carolina licensee are the same person;
- (2) whether the conduct found by the other jurisdiction also violates the North Carolina Nursing Practice Act; and
- (3) whether the sanction imposed by the other jurisdiction is lawful under North Carolina law.

(e) Before the North Carolina Board of Nursing makes a final decision in any contested case, the person, applicant or licensee affected by such decision shall be afforded an administrative hearing pursuant to the provisions of G.S.150B, Article 3A.

- (1) The Paragraphs contained in this Rule shall apply to conduct of all contested cases heard before or for the North Carolina Board of Nursing.
- (2) The following general statutes, rules, and procedures apply unless another specific statute or rule of the North Carolina Board of Nursing provides otherwise: Rules of

Civil Procedure as contained in G.S. 1A-1 and Rules of Evidence pursuant to G.S. Chapter 8C; G.S. 90-86 through 90-113.8; 21 NCAC 36 .0224 - .0225; Article 3A, Chapter 150B; and Rule 6 of the General Rules of Practice for Superior and District Court.

- (3) Every document filed with the Board of Nursing shall be signed by the person, applicant, licensee, or his attorney who prepares the document and shall contain his name, title/position, address, and telephone number. If the individual involved is a licensed nurse the nursing license certificate number shall appear on all correspondence with the Board of Nursing.

(f) In accordance with G.S. 150B-3(c) a license may be summarily suspended if the public health, safety, or welfare requires emergency action. This determination is delegated to the Chairman or Executive Director of the Board pursuant to G.S. 90-171.23(b)(3). Such a finding shall be incorporated with the order of the Board of Nursing and the order shall be effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and continues to be effective during the proceedings. Failure to receive the order because of refusal of service or unknown address does not invalidate the order. Proceedings shall be commenced in a timely manner.

(g) Board staff shall issue a Letter of Charges only upon completion of an investigation, by authorized Board staff, of a written or verbal complaint and review with legal counsel or prosecuting attorney or Executive Director.

- (1) Subsequent to an investigation and validation of a complaint, a Letter of Charges shall be sent on behalf of the Board of Nursing to the person who is the subject of the complaint.

(A) The Letter of Charges shall be served in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(B) The Letter of Charges serves as the Board's formal notification to the person that an allegation of possible violation(s) of the Nursing Practice Act has been initiated.

(C) The Letter of Charges does not in and of itself constitute a contested case.

- (2) The Letter of Charges shall include the following:

- (A) a short and plain statement of the factual allegations;
- (B) a citation of the relevant sections of the statutes or rules involved;
- (C) notification that a settlement conference shall be scheduled upon request;

(D) explanation of the procedure used to govern the settlement conference;

(E) notification that if a settlement conference is not requested, or if held, does not result in resolution of the case, an administrative hearing shall be scheduled; and

(F) if applicable, any sanction or remediation in accordance with Board-adopted policy may be included.

- (3) A case becomes a contested case after the person disputes the allegations contained in the Letter of Charges, requests an administrative hearing, or refuses to accept a settlement offer extended by the Board of Nursing.

(h) No Board member shall discuss with any person the merits of any case pending before the Board of Nursing. Any Board member who has direct knowledge about a case prior to the commencement of the proceeding shall disqualify himself from any participation with the majority of the Board of Nursing hearing the case.

(i) A settlement conference, if requested by the person, shall be held for the purpose of attempting to resolve a dispute through informal procedures prior to the commencement of formal administrative proceedings.

- (1) The conference shall be held in the offices of the Board of Nursing, unless another site is designated by mutual agreement of all involved parties.

- (2) All parties shall attend or be represented at the settlement conference. The parties shall be prepared to discuss the alleged violations and the incidents on which these are based.

- (3) Prior to the commencement of the settlement conference, a form shall be signed by the person which invalidates all previous offers made to the person by the Board.

- (4) At the conclusion of the day during which the settlement conference is held, a form shall be signed by all parties which indicates whether the settlement offer is accepted or rejected. Subsequent to this decision:

(A) if a settlement is reached, the Board of Nursing shall forward a written settlement agreement containing all conditions of the settlement to the other party(ies); or

(B) if a settlement cannot be reached, the case shall proceed to a formal administrative hearing.

(j) Disposition may be made of any contested case or an issue in a contested case by stipulation, agreement, or consent order at any time prior to or during the hearing of a contested case.

(k) The Board of Nursing shall give the parties in a contested case a Notice of Hearing not less than 15 calendar days before the hearing. The Notice shall be given in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure. The notice shall include:

- (1) Acknowledgment of service, or attempted service, of the Letter of Charges in compliance with Part (g)(1)(A) of this Rule;
- (2) Date, time, and place of the hearing;
- (3) Notification of the right of a party to represent himself or to be represented by an attorney;
- (4) A statement that, pursuant to Paragraph (n) of this Rule, subpoenas may be requested by the licensee to compel the attendance of witnesses or the production of documents;
- (5) A statement advising the licensee that a notice of representation, containing the name of licensee's counsel, if any, shall be filed with the Board of Nursing not less than 10 calendar days prior to the scheduled date of the hearing;
- (6) A statement advising the licensee that a list of all witnesses for the licensee shall be filed with the Board of Nursing not less than 10 calendar days prior to the scheduled date of the hearing; and
- (7) A statement advising the licensee that failure to appear at the hearing may result in the allegations of the Letter of Charges being taken as true and that the Board may proceed on that assumption.

(l) Pre-hearing conferences may be held to simplify the issues to be determined, to obtain stipulations in regards to testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing, and to consider such other matters that may be necessary or advisable for the efficient and expeditious conduct of the hearing.

- (1) The pre-hearing conference shall be conducted in the offices of the Board of Nursing, unless another site is designated by mutual agreement of all parties.
- (2) The pre-hearing conference shall be an informal proceeding and shall be conducted by a Board-designated administrative law counsel.
- (3) All agreements, stipulations, amendments, or other matters resulting from the pre-hearing conference shall be in writing, signed by all parties, and introduced into the record at the beginning of the formal administrative hearing.

(m) Administrative hearings conducted before a majority of Board members shall be held in Wake County or, by mutual consent in another location when a majority of the Board has convened in that location for the purpose of conducting business. For those proceedings conducted by an Administrative Law Judge the venue shall be determined in accordance with G. S. 150B-38(e). All hearings conducted by the Board of Nursing shall be open to the public.

(n) The Board of Nursing, through its Executive Director, may issue subpoenas for the Board or a licensee, in preparation for, or in the conduct of, a contested case.

- (1) Subpoenas may be issued for the appearance of witnesses or the production of documents or information, either at the hearing or for the purposes of discovery.
- (2) Requests by a licensee for subpoenas shall be made in writing to the Executive Director and shall include the following:
 - (A) the full name and home or business address of all persons to be subpoenaed; and
 - (B) the identification, with specificity, of any documents or information being sought.
- (3) Subpoenas shall include the date, time, and place of the hearing and the name and address of the party requesting the subpoena. In the case of subpoenas for the purpose of discovery, the subpoena shall include the date, time, and place for responding to the subpoena.
- (4) Subpoenas shall be served as provided by the Rules of Civil Procedure, G.S. 1A-1. The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid by the party requesting the witnesses.

(o) All motions related to a contested case, except motions for continuance and those made during the hearing, shall be in writing and submitted to the Board of Nursing at least 10 calendar days before the hearing. Pre-hearing motions shall be heard at a pre-hearing conference or at the contested case hearing prior to the commencement of testimony. The designated administrative law counsel shall hear the motions and the response from the non-moving party pursuant to Rule 6 of the General Rules of Practice for the Superior and District Courts and rule on such motions. If the pre-hearing motions are heard by an Administrative Law Judge from Office of Administrative Hearings the provisions of G.S. 150B-40(e) shall govern the proceedings.

(p) Motions for a continuance of a hearing may be granted upon a showing of good cause. Motions for a continuance must be in writing and received in the office of the Board of Nursing no less than seven calendar days before the hearing date. In determining whether good cause exists, consideration will be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven calendar days from the date of the hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of the hearing shall be ruled on by the Administrative Law Counsel of the Board. All other motions for continuance shall be ruled on by the majority of the Board members or Administrative Law Counsel sitting at hearing.

(q) All hearings by the Board of Nursing shall be conducted by a majority of members of the Board of Nursing, except as provided in Subparagraph (1) of this Paragraph. The Board of Nursing shall designate one of its members to preside at the hearing. The Board of Nursing shall designate an administrative law counsel who shall advise the presiding officer. The seated members of the Board of Nursing shall

hear all evidence, make findings of fact and conclusions of law, and issue an order reflecting a majority decision of the Board.

- (1) When a majority of the members of the Board of Nursing is unable or elects not to hear a contested case, the Board of Nursing shall request the designation of an administrative law judge from the Office of Administrative Hearings to preside at the hearing. The provisions of G.S. 150B, Article 3A and 21 NCAC 36 .0217 shall govern a contested case in which an administrative law judge is designated as the Hearing Officer.
- (2) In the event that any party or attorney or other representative of a party engages in conduct which obstructs the proceedings or would constitute contempt if done in the General Court of Justice, the Board may apply to the applicable superior court for an order to show cause why the person(s) should not be held in contempt of the Board and its processes.
- (3) During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the Board of Nursing may continue the hearing to a future date to allow for the additional testimony to be taken by deposition or to be presented orally. In such situations and to such extent as possible, the seated members of the Board of Nursing and the designated administrative law counsel shall receive the additional testimony. In the event that new members of the Board or a different administrative law counsel must participate, a copy of the transcript of the hearing shall be provided to them prior to the receipt of the additional testimony.
- (r) All parties have the right to present evidence, rebuttal testimony, and argument with respect to the issues of law, and to cross-examine witnesses. The North Carolina Rules of Evidence in G.S. 8C shall apply to contested case proceedings, except as provided otherwise in this Rule and G.S. 150B-41.
 - (1) Sworn affidavits may be introduced by mutual agreement from all parties.
 - (2) All oral testimony shall be under oath or affirmation and shall be recorded. Unless otherwise stipulated by all parties, witnesses are excluded from the hearing room until such time that they have completed their testimony and have been released.
- (s) Any form or Board-approved policy or procedure referenced in this Rule, or any rules applicable to a case, are available upon request from the Board of Nursing and shall be supplied at a reasonable cost.

History Note: Authority G.S. 14-208.5; 15A-1331A; 90-171.23(b)(3)(7); 90-171.37; 90-171.47; 90-401; 150B-3(c); 150B-11; 150B-14; 150B-38 through 150B-42;

*Eff. February 1, 1976;
Amended Eff. October 1, 1989; November 1, 1988; July 1, 1986; July 1, 1984;
Temporary Amendment Eff. December 7, 1990 for a period of 180 days to expire on June 5, 1991;
ARRC Objection Lodged December 20, 1990;
Amended Eff. January 1, 1991;
ARRC Objection Removed February 25, 1991;
Temporary Amendment Eff. February 26, 1991 for a period of 35 days to expire on April 1, 1991;
Amended Eff. January 1, 1996; February 1, 1995;
April 1, 1991;
Temporary Amendment Eff. March 5, 2001;
Amended Eff. August 2, 2002.*

CHAPTER 54 - NORTH CAROLINA PSYCHOLOGY BOARD

21 NCAC 54 .2104 CONTINUING EDUCATION

- (a) The purpose of continuing education is to provide for the continuing professional education of all psychologists licensed by the North Carolina Psychology Board consistent with the purpose of the Board which is to protect the public from the practice of psychology by unqualified persons and from unprofessional conduct by persons licensed to practice psychology.
- (b) Compliance with this Rule shall be a condition for license renewal. A license shall be suspended automatically by operation of law in accordance with G.S. 90-270.15(f) if a licensee fails to meet continuing education requirements specified in this Rule. This Rule shall apply to all individuals licensed by the North Carolina Psychology Board who choose to renew their licenses in North Carolina. Licensees who would otherwise be exempt from licensure, e.g., not practicing psychology in North Carolina, may relinquish their licenses if they do not wish to comply with the requirements specified in this Rule.
- (c) A continuing education hour is defined as one hour of instructional or contact time as defined in Paragraphs (d) and (e) of the Rule.
- (d) Category A requirements shall be met through attendance at formally organized courses, seminars, workshops, symposiums, and postdoctoral institutes; or through completion of on-line or correspondence courses. Programs shall relate to topics listed in Paragraph (g) of this Rule; be identified as offering continuing education for psychologists; and be sponsored or co-sponsored by the North Carolina Psychology Board, by the American Psychological Association, by American Psychological Association approved sponsors, or by North Carolina Area Health Education Centers. Contact hours shall be specified by the sponsor.
- (e) Category B requirements shall be met through attendance at colloquia, presentations of invited speakers, grand rounds, and in-house seminars; attendance at programs offered at meetings of professional or scientific organizations which are not approved for Category A credit; participation in formally organized study groups or journal clubs; and self study (e.g., reading articles or books for professional growth or in preparation for publishing, teaching, or making a

presentation). One continuing education hour shall be credited for each hour of participation in Category B activities.

(f) A licensee shall complete a minimum of 18 continuing education hours in each biennial renewal period which begins on the first day of October in each even numbered year. Continuing education hours shall not carry over from one renewal period to the next. At least nine continuing education hours shall be in Category A activities which shall include a minimum of three continuing education hours in the area of ethical and legal issues in the professional practice of psychology.

(g) Topics for Category A and Category B requirements shall fall within the following areas:

- (1) ethical and legal issues in the professional practice of psychology, and
- (2) the maintenance and upgrading of professional skills and competencies within the psychologist's scope of practice. This includes, but is not limited to, training in empirically supported treatments, the application of research to practice, and training in best practice standards and guidelines.

(h) Continuing education hours shall not be allowed for the following activities:

- (1) business meetings or presentations, professional committee meetings, and meetings or presentations concerned with the management of a professional practice;
- (2) membership, office in, or participation on boards and committees of professional organizations;
- (3) research;
- (4) teaching, presentations, and publication, except as allowed as self study in preparation for these activities as provided under Paragraph (e) of this Rule; and
- (5) personal psychotherapy or personal growth experience.

(i) An individual licensed on or before October 1, 2002, shall attest on the license renewal application for the 2004-2006 biennial renewal period, and on each subsequent biennial renewal application, to having met the mandatory continuing education requirements specified in this Rule during the two years preceding the October 1st renewal date. An individual licensed after October 1, 2002, shall attest on the second license renewal application following licensure, and on each subsequent biennial renewal application, to having met the mandatory continuing education requirements specified in this

Rule during the two years preceding the October 1st renewal date.

(j) An applicant for reinstatement of licensure shall document that he or she has completed a minimum of 18 continuing education hours as specified in this Rule within the two years preceding the date of application for reinstatement of licensure and shall attest on each subsequent biennial renewal application to having met the mandatory continuing education requirements specified in this Rule.

(k) For Category A, a licensee shall maintain certificates from Category A programs and written documentation of the following for a minimum of seven years:

- (1) date of program;
- (2) number of contact hours;
- (3) name of sponsor of program;
- (4) title of program; and
- (5) location of program.

(l) For Category B, a licensee shall maintain applicable written documentation of the following for Category B activities consistent with this Rule for a minimum of seven years:

- (1) date of program or activity;
- (2) number of instructional or contact hours as defined in Paragraphs (d) and (e) of this Rule;
- (3) description of activity;
- (4) name of presenter, facilitator, or leader;
- (5) name of sponsor;
- (6) location;
- (7) full citation of article; and
- (8) summary of content.

The nature of the Category B activity determines the applicable documentation. For example, name of presenter, facilitator, or leader; name of sponsor; and location are not required when a licensee documents reading a journal article.

(m) A licensee shall provide certificates, documentation, and a signed attestation form designed by the Board within 30 days after receiving written notification from the Board that proof of completion of continuing education hours is required. The Board may randomly verify the documentation of required continuing education hours for a percentage of licensees and may do so during the investigation of any complaints. A licensee shall not submit documentation of continuing education hours obtained unless directed to do so by the Board. The Board shall not serve as a depository for continuing education materials prior to its directing that documentation must be submitted.

History Note: Authority G.S. 90-270.9; 90-270.14(a)(2); Eff. August 1, 2002.

RULES REVIEW COMMISSION

Retirement	10 NCAC 19C .0310	Repeal
Moving Expenses	10 NCAC 19C .0311	Amend
Purpose	10 NCAC 19C .0408	Amend
Policy	10 NCAC 19C .0409	Amend
Procedure	10 NCAC 19C .0410	Amend
Election	10 NCAC 19C .0504	Amend
Nominations and Elections	10 NCAC 19C .0506	Amend
Organization and Operation	10 NCAC 19C .0509	Amend
Functions	10 NCAC 19C .0511	Amend
Subcommittees	10 NCAC 19C .0512	Amend
Committee Initiative	10 NCAC 19C .0514	Amend
Division Responsibility and Relationship with Comm	10 NCAC 19C .0515	Amend
General Responsibilities	10 NCAC 19C .0601	Amend
Hours of Operation	10 NCAC 19C .0602	Amend
Reports	10 NCAC 19C .0604	Amend
Repairs	10 NCAC 19C .0605	Amend
Equipment Merchandise Supplies Cash	10 NCAC 19C .0607	Amend
Insurance	10 NCAC 19C .0608	Amend
Pricing of Merchandise	10 NCAC 19C .0609	Amend
Minimum Fair Return and Definitions	10 NCAC 19C .0701	Amend
Set-Aside	10 NCAC 19C .0702	Amend
Distribution of Proceeds	10 NCAC 19C .0703	Amend
Income from Vending Machines on Federal Property	10 NCAC 19C .0704	Amend
Purpose and Procedure	10 NCAC 19D .0101	Repeal
Project Development	10 NCAC 19D .0102	Repeal
Eligibility Criteria	10 NCAC 19D .0103	Repeal
Proposal	10 NCAC 19D .0201	Repeal
Project Review	10 NCAC 19D .0202	Repeal
Eligibility	10 NCAC 19E .0101	Amend
Moving from North Carolina Temporary Absence	10 NCAC 19E .0105	Amend
Moving Among Counties	10 NCAC 19E .0106	Amend
Report of Eye Examination	10 NCAC 19E .0110	Amend
Applications	10 NCAC 19E .0112	Amend
Payment Standards	10 NCAC 19E .0202	Amend
Domiciliary Care	10 NCAC 19E .0203	Amend
Definition of Resources	10 NCAC 19E .0401	Amend
Dependents	10 NCAC 19E .0403	Repeal
Unearned Income	10 NCAC 19E .0405	Amend
Earned Income	10 NCAC 19E .0409	Amend
Resources for Reserve	10 NCAC 19E .0410	Amend
Real Property	10 NCAC 19E .0411	Amend
Sale or Transfer of Real Property	10 NCAC 19E .0412	Amend
Accrued Payments	10 NCAC 19E .0501	Amend
Payments to Others	10 NCAC 19E .0503	Amend
Checks	10 NCAC 19E .0601	Amend
Exception to Delivery	10 NCAC 19E .0602	Amend
Endorsement of Checks	10 NCAC 19E .0603	Amend
Lost Checks Duplicate Checks	10 NCAC 19E .0604	Amend
Over-Payment	10 NCAC 19E .0605	Repeal
Responsibilities of Agency	10 NCAC 19E .0701	Amend
Rights of Clients	10 NCAC 19E .0702	Repeal
Safeguarding Information	10 NCAC 19E .0704	Amend
Appeal of Division Action	10 NCAC 19E .0801	Amend
Acknowledgment of Request	10 NCAC 19E .0803	Repeal
Informal Conference	10 NCAC 19E .0804	Repeal
Summary of Informal Conference	10 NCAC 19E .0805	Amend
Notification of Distribution	10 NCAC 19E .0902	Amend
Basic Eligibility Criteria	10 NCAC 19F .0104	Amend
Eligibility Based on Vision Loss	10 NCAC 19F .0107	Amend
Goals	10 NCAC 19F .0401	Amend
Services	10 NCAC 19F .0402	Amend

RULES REVIEW COMMISSION

Delivery of Services	10 NCAC 19F .0501	Repeal
In-Home Aide Services Contract	10 NCAC 19F .0504	Repeal
Referral for Orientation and Mobility Training	10 NCAC 19F .0506	Repeal
Contracts for Services	10 NCAC 19F .0507	Repeal
Confidentiality	10 NCAC 19F .0601	Amend
Appeal to Designated Agency Representative	10 NCAC 19F .0602	Amend
Request for Fair Hearing	10 NCAC 19F .0603	Amend
Eligibility for And Authorization of Services	10 NCAC 19G .0101	Amend
Materials	10 NCAC 19G .0102	Amend
Restoration Services	10 NCAC 19G .0103	Amend
Transportation	10 NCAC 19G .0104	Amend
Maintenance	10 NCAC 19G .0105	Amend
Job Placement	10 NCAC 19G .0106	Amend
Establishment of Small Business Operations	10 NCAC 19G .0107	Amend
Reader Services	10 NCAC 19G .0108	Amend
Interpreter Services	10 NCAC 19G .0109	Amend
Services to Family Members	10 NCAC 19G .0110	Amend
Recruitment and Training	10 NCAC 19G .0111	Amend
Services to Groups of Individuals	10 NCAC 19G .0112	Amend
Other Services Medical Care	10 NCAC 19G .0113	Amend
Follow-Up Services	10 NCAC 19G .0114	Repeal
Rates of Payment	10 NCAC 19G .0115	Amend
Purpose	10 NCAC 19G .0201	Amend
Definitions	10 NCAC 19G .0202	Amend
Determination of Facility	10 NCAC 19G .0203	Repeal
Standards of Construction	10 NCAC 19G .0204	Repeal
Expenditure Requirements	10 NCAC 19G .0205	Repeal
Initial Staffing	10 NCAC 19G .0206	Repeal
Construction Proposals	10 NCAC 19G .0207	Repeal
Federal Financial	10 NCAC 19G .0208	Repeal
Private Contributions Proposals	10 NCAC 19G .0209	Repeal
Recovery	10 NCAC 19G .0210	Repeal
Purpose of Standards Facilities	10 NCAC 19G .0401	Repeal
Types of Facilities	10 NCAC 19G .0402	Amend
Maintenance of Standards	10 NCAC 19G .0403	Repeal
Benefits	10 NCAC 19G .0501	Amend
Economic Needs Policies	10 NCAC 19G .0502	Amend
Economic Needs Schedule	10 NCAC 19G .0503	Amend
Rehabilitation Counselors	10 NCAC 19G .0601	Repeal
Referrals	10 NCAC 19G .0602	Amend
Order of Selection for Services	10 NCAC 19G .0603	Amend
Confidentiality of Information	10 NCAC 19G .0604	Amend
Consultation	10 NCAC 19G .0605	Repeal
Implementation of Order of Selection	10 NCAC 19G .0606	Amend
Determination of order of Selection Priority	10 NCAC 19G .0607	Amend
Priority Categories	10 NCAC 19G .0608	Amend
Procedures	10 NCAC 19G .0609	Amend
Applicability of Rules	10 NCAC 19G .0801	Amend
Written Information for Applicants and Consumers	10 NCAC 19G .0802	Amend
Request for Administrative Review Mediation and	10 NCAC 19G .0803	Amend
Division Actions in Response to Request	10 NCAC 19G .0804	Amend
Scheduling and Notice of Administrative Review and	10 NCAC 19G .0805	Amend
Appointment of Hearing Officer and Mediator	10 NCAC 19G .0806	Amend
Scheduling and Notice of Impartial Due Process	10 NCAC 19G .0807	Amend
Administrative Review and Mediation	10 NCAC 19G .0808	Amend
Response to Administrative Review Decision and Med	10 NCAC 19G .0809	Amend
Administrative Review by Director	10 NCAC 19G .0810	Amend
Procedures governing Hearing	10 NCAC 19G .0811	Amend
Venue	10 NCAC 19G .0812	Amend
Discovery	10 NCAC 19G .0813	Amend
Pre-Hearing Conference	10 NCAC 19G .0814	Amend

RULES REVIEW COMMISSION

Evidence	10 NCAC 19G .0816	Amend
Disqualification of Hearing	10 NCAC 19G .0817	Amend
Ex Parte Communications	10 NCAC 19G .0818	Amend
Conduct of Hearing	10 NCAC 19G .0820	Amend
Failure to Appear	10 NCAC 19G .0821	Amend
Hearing Officer's Decision	10 NCAC 19G .0822	Amend
Secretary's Review and Final Decision	10 NCAC 19G .0823	Amend
Extensions of Time	10 NCAC 19G .0824	Amend
Record	10 NCAC 19G .0825	Amend
Transcripts	10 NCAC 19G .0826	Amend
Civil Rights	10 NCAC 19G .0901	Repeal
Hearing Procedures	10 NCAC 19G .0902	Repeal
Services	10 NCAC 19H .0101	Amend
Eligibility Criteria	10 NCAC 19H .0102	Amend
Application for Services	10 NCAC 19H .0103	Amend
Eligibility for Services	10 NCAC 19H .0104	Amend
Retroactive Eligibility	10 NCAC 19H .0105	Amend
Use of Authorization and Certification	10 NCAC 19H .0201	Amend
Claims	10 NCAC 19H .0202	Amend
Fraud Payment of Claim	10 NCAC 19H .0203	Amend
Freedom of Choice	10 NCAC 19H .0204	Amend
Examination Reports	10 NCAC 19H .0206	Amend
Confidentiality of Records	10 NCAC 19H .0207	Repeal
Emergency Authorization	10 NCAC 19H .0210	Repeal
Manual	10 NCAC 19H .0211	Repeal
Criteria for Conducting Clinic	10 NCAC 19H .0301	Repeal
Clinic Preparation	10 NCAC 19H .0306	Repeal
Optical Provider Contracts	10 NCAC 19H .0307	Repeal
Staffing Requirements	10 NCAC 19H .0308	Repeal
Follow-Up Care Records	10 NCAC 19H .0311	Repeal
Civil Rights	10 NCAC 19H .0401	Repeal
Appeal of Division Actions	10 NCAC 19H .0402	Amend
Request for Contested Case Hearing	10 NCAC 19H .0403	Amend
DEPARTMENT OF INSURANCE/NC DEPARTMENT OF INSURANCE		
Application	11 NCAC 20 .0404	Amend
Verification of Credentials	11 NCAC 20 .0405	Amend
Reverification of Provider Credentials	11 NCAC 20 .0407	Amend
DENR/ENVIRONMENTAL MANAGEMENT COMMISSION		
Purpose	15A NCAC 2H .0801	Amend
Scope	15A NCAC 2H .0802	Amend
Definitions	15A NCAC 2H .0803	Amend
Parameters for Which Certification May Be Request	15A NCAC 2H .0804	Amend
Certification and Renewal of Certification	15A NCAC 2H .0805	Amend
Fees Associated with Certification Program	15A NCAC 2H .0806	Amend
Decertification and Civil Penalties	15A NCAC 2H .0807	Amend
Recertification	15A NCAC 2H .0808	Amend
Administration	15A NCAC 2H .0810	Amend
DENR/COASTAL RESOURCES COMMISSION		
Public Hearing and Local Adoption Requirements	15A NCAC 7L .0510	Adopt
TRANSPORTATION, DEPARTMENT OF/DIVISION OF HIGHWAYS		
Toll Operations	19A NCAC 2D .0532	Amend
STATE BOARDS/NC ACUPUNCTURE LICENSING BOARD		
Standards for Continuing Education	21 NCAC 1 .0301	Amend
STATE BOARDS/NC BOARD OF DIETETICS/NUTRITION		
Fees	21 NCAC 17 .0113	Amend
STATE BOARDS/NC BOARD OF ELECTROLYSIS EXAMINERS		
Certification of Schools in Other States or Juris	21 NCAC 19 .0622	Amend
STATE BOARDS/NC RESPIRATORY CARE BOARD		
Purpose	21 NCAC 61 .0101	Adopt
Board Office	21 NCAC 61 .0102	Adopt
Definitions	21 NCAC 61 .0103	Adopt

RULES REVIEW COMMISSION

Application Process	21 NCAC 61 .0201	Adopt
Exemptions	21 NCAC 61 .0202	Adopt
Interviews	21 NCAC 61 .0203	Adopt
Fees	21 NCAC 61 .0204	Adopt
License Number Display of License	21 NCAC 61 .0301	Adopt
License Renewal	21 NCAC 61 .0302	Adopt
License with Provisional Endorsement	21 NCAC 61 .0303	Adopt
License with Temporary Endorsement	21 NCAC 61 .0304	Adopt
Inactive Status	21 NCAC 61 .0305	Adopt
License by Reciprocity	21 NCAC 61 .0306	Adopt
Grounds for License Denial or Discipline	21 NCAC 61 .0307	Adopt
Continuing Duty to Report Certain Crimes and Civil	21 NCAC 61 .0308	Adopt
Continuing Education Requirements	21 NCAC 61 .0401	Adopt
Change of Address or Business Name	21 NCAC 61 .0501	Adopt
Advertising	21 NCAC 61 .0502	Adopt
Petitions for Adoption, Amendment, or Repeal of	21 NCAC 61 .0601	Adopt
Procedure for Adoption of Rules	21 NCAC 61 .0602	Adopt
Temporary Rules	21 NCAC 61 .0603	Adopt
Declaratory Ruling	21 NCAC 61 .0604	Adopt
Applicable Hearing Rules	21 NCAC 61 .0701	Adopt
Right to Hearing	21 NCAC 61 .0702	Adopt
Request for Hearing	21 NCAC 61 .0703	Adopt
Granting or Denying Hearing Request	21 NCAC 61 .0704	Adopt
Notice of Hearing	21 NCAC 61 .0705	Adopt
Contested Cases	21 NCAC 61 .0706	Adopt
Prehearing Procedures	21 NCAC 61 .0707	Adopt
Petition for Intervention	21 NCAC 61 .0708	Adopt
Types of Intervention	21 NCAC 61 .0709	Adopt
Disqualification of Board Members	21 NCAC 61 .0710	Adopt
Subpoenas	21 NCAC 61 .0711	Adopt
Witnesses	21 NCAC 61 .0712	Adopt
Final Decision	21 NCAC 61 .0713	Adopt
Proposals for Decision	21 NCAC 61 .0714	Adopt

AGENDA
RULES REVIEW COMMISSION
February 21, 2002

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters
 - A. Department of Commerce/Division of Community Assistance – 4 NCAC 19L .0802; .0901; .0912; .2001 Objection on 1/17/02 (Bryan)
 - B. DHHS/Commission for MH/DD/SAS – 10 NCAC 14J .0201; .0204; .0205; .0207 Continued on request of agency 1/17/02 (DeLuca)
 - C. DHHS/ Commission for MH/DD/SAS – 10 NCAC 14P .0102 Continued on request of agency 1/17/02 (DeLuca)
 - D. DHHS/ Commission for MH/DD/SAS – 10 NCAC 14Q .0303 Continued on request of agency 1/17/02 (DeLuca)
 - E. DHHS/ Commission for MH/DD/SAS – 10 NCAC 14R .0101; .0105 Continued on request of agency 1/17/02 (DeLuca)
 - F. DHHS/ Commission for MH/DD/SAS – 10 NCAC 14V .0208; .0304; .0801; .0802; .0803; .6002 Continued on request of agency 1/17/02 (DeLuca)
 - G. NC Sheriffs' Education & Training Standards – 12 NCAC 10B 12 NCAC 10B .0301; .0304; .0305; .0307; .0401; .0406; .0408; .0409; .0505; .0601; .0603; .0606; .0705; .0706; .0707; .0708; .0710; .0711; .0712; .0905; .0907; .0908; .0909; .0915; .0917; .1004; .1005; .1204; .1205; .1307; .1404; .1405; .1604; .1605; .2104 Extend Period of Review 1/17/02 (Bryan)
 - H. DENR/Soil and Water Conservation Commission – 15A NCAC 6E .0103 Objection on 12/20/01 (Bryan)
 - I. DENR/Coastal Resources Commission – 15A NCAC 7B .0701; .0801 Objection on 1/17/02 (Bryan)
 - J. DENR/Commission for Health Services – 15A NCAC 18A .0618 Objection on 1/17/02 (DeLuca)
 - K. NC Board of Pharmacy – 21 NCAC 46 .1814 Objection and .2502 Request for technical change on 1/17/02 (DeLuca)

RULES REVIEW COMMISSION

- L. NC Appraisal Board – 21 NCAC 57A .0201; .0203; .0407; .0409 Objection on 1/17/02 (DeLuca)
- M. NC Appraisal Board – 21 NCAC 57B .0211; .0303; .0306; .0602 Objection on 1/17/02 (DeLuca)
- N. NC Real Estate Commission – 21 NCAC 58C .0304; .0603 Objection on 1/17/02 (DeLuca)
- IV. Review of rules (Log Report #184)
- V. Commission Business
- VI. Next meeting: Thursday, March 21, 2002

CONTESTED CASE DECISIONS

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. Also, the Contested Case Decisions are available on the Internet at the following address: <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge

JULIAN MANN, III

Senior Administrative Law Judge

FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Sammie Chess Jr.

Beecher R. Gray

Melissa Owens Lassiter

James L. Conner, II

Beryl E. Wade

A. B. Elkins II

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
C's Mini-Mart, Camille Stephens v. NC ABC Commission and City of Charlotte	00 ABC 1264	Lassiter	06/08/01	
NC ABC Commission v. Benjamin Franklin Black, B and M Convenience	01 ABC 0663	Morrison	07/23/01	
Deleon Christopher Izi v. NC Alcoholic Beverage Control Commission	01 ABC 0709	Gray	10/11/01	
NC Alcoholic Beverage Control Commission v. Henry Rudolph Brake T/A Horsin Around Country Club	01 ABC 0811	Lassiter	08/13/01	
<u>BOARD OF MORTUARY SCIENCE</u>				
NC Board of Mortuary Science v. Beasley's Funeral Home, Inc., Odell Beasley, Crystal Beasley-Walker	00 BMS 0469	Mann	07/17/01	
Board of Mortuary Science v. Hunter Funeral Home & Julius Hunter	00 BMS 0505	Reilly	11/01/00	
NC Board of Mortuary Science v. Robert Breece, Jr., and Osborne Owens and Rogers and Breece Funeral Home	00 BMS 1763	Morrison	08/22/01	
NC Board of Mortuary Science v. Kyle Garret Peacock, Philip Smoak and Peggy Peacock	01 BMS 0298	Lassiter	09/20/01	
<u>BOARD OF GEOLOGISTS</u>				
O. Phillip Kimbrell, P.G. v. NC Board for the Licensing of Geologists	99 BOG 1254	Conner	05/29/01	
<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
Georgina Joyner v. NC Crime Victims Compensation Commission	95 CPS 0359	Gray	10/23/01	
Jerry W. Taylor v. NC Victims Compensation Commission	00 CPS 1052	Gray	05/23/01	
Clarence Forney v. NC Crime Victims Compensation Commission	00 CPS 1994	Elkins	10/11/01	
Sheree D Sirotnak v. NC Crime Victims Compensation Commission	00 CPS 2209	Wade	06/14/01	
Eddie N McLaughlin v. NC Crime Victims Compensation Commission	01 CPS 0086	Elkins	06/05/01	
Bobby Holmes, Jr. v. NC Crime Victims Compensation Commission	01 CPS 1095	Gray	10/09/01	
John R. Ackerman v. NC State Highway Patrol	01 CPS 1327	Morrison	09/24/01	
Edna Hunt v. NC Crime Victims Compensation Commission	01 CPS 1434	Chess	01/10/02	
<u>HEALTH AND HUMAN SERVICES</u>				
Gregory Keith Millican v. NC DHHS, Div of Social Svcs, CSE Section	99 CRA 1008	Gray	10/12/01	
David P. Lemieux v. Department of Health & Human Services	01 CRA 0428	Gray	06/05/01	
Clayton E Reeves v. Department of Health & Human Services	01 CRA 0773 ²	Elkins	08/16/01	
Gerald Pelletier III v. Department of Health & Human Services	01 CRA 0882	Morrison	07/19/01	
Anthony B Smalling v. Department of Health & Human Services	01 CRA 0993	Conner	08/07/01	
Angelo Terry, Jr. v. NC DHHS, Div. of Social Svcs., CSE Section	01 CRA 1294	Wade	10/25/01	
Ronald A. Kaye v. NC DHHS, Div. of Social Svcs., CSE Section	01 CRA 1380	Lassiter	01/15/02	
Daryle M McLaughlin v. NC DHHS, Div. of Social Svcs., CSE Section	01 CRA 1726	Elkins	01/08/02	
James A Altizer v. NC DHHS, Div. of Social Svcs., CSE Section	01 CRA 1884	Morrison	01/08/02	
<i>Child Support Enforcement Section</i>				
Sandra Ferrell Miller v. Department of Health & Human Services	99 CSE 1390	Gray	10/24/01	
Asuncion I. Crawford v. Department of Health & Human Services	99 CSE 1398	Mann	11/16/01	
Rafael Leon Garcia v. Department of Health & Human Services	99 CSE 1460	Mann	10/31/01	
John F McCollum v. Department of Health & Human Services	00 CSE 0252	Gray	07/18/01	
James J. Murphy v. Department of Health & Human Services	00 CSE 0320	Morrison	09/28/01	

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Winston Shell v. Department of Health & Human Services	00 CSE 0340	Gray	12/21/01
Willie Montgomery v. Department of Health & Human Services	00 CSE 0379	Gray	10/11/01
Deidra Dawn Andrews v. Department of Health & Human Services	00 CSE 0382	Morrison	09/13/01
Steven D Hamrick v. Department of Health & Human Services	00 CSE 0383	Lassiter	09/17/01
Gregory Kent Cranford v. Department of Health & Human Services	00 CSE 0392	Chess	11/30/01
Thellie Paul Casper v. Department of Health & Human Services	00 CSE 0587	Mann	10/12/01
Leverette Lillington Knighten II v. Department of Health & Human Services	00 CSE 0612	Gray	08/24/01
Wade R Locklear v. Department of Health & Human Services	00 CSE 0872	Lassiter	01/08/02
Robert D Goodman v. Department of Health & Human Services	00 CSE 1083	Conner	11/26/01
Bickett Fort v. Department of Health & Human Services	00 CSE 1169	Mann	08/10/01
Gary E Ligon v. Department of Health & Human Services	00 CSE 1344	Morrison	09/20/01
Ronnie Chapman v. Department of Health & Human Services	00 CSE 1367	Conner	11/20/01
Gerald L. Coker v. Department of Health & Human Services	00 CSE 1396	Morrison	08/29/01
Sharon Tucker v. Department of Health & Human Services	00 CSE 1530	Morrison	11/27/01
William E Kurn v. Department of Health & Human Services	00 CSE 1544	Morrison	11/16/01
Marvin Gay Adams v. Department of Health & Human Services	00 CSE 1550	Wade	09/18/01
Marvin R Thorpe Sr v. Department of Health & Human Services	00 CSE 1570	Morrison	12/04/01
Dean E McCall v. Department of Health & Human Services	00 CSE 1575	Conner	10/04/01
Robert Boening v. Department of Health & Human Services	00 CSE 1583	Morrison	10/31/01
Edward Cozart v. Department of Health & Human Services	00 CSE 1594	Gray	09/14/01
Rita Caperoon v. Department of Health & Human Services	00 CSE 1597	Lassiter	08/27/01
Walter Chambers v. Department of Health & Human Services	00 CSE 1610	Conner	01/09/02
Trina Player v. Department of Health & Human Services	00 CSE 1611	Wade	10/22/01
Robert B McKay v. Department of Health & Human Services	00 CSE 1620	Gray	09/14/01
Thomas L Larison v. Department of Health & Human Services	00 CSE 1649	Mann	10/29/01
Gary E Barker v. Department of Health & Human Services	00 CSE 1659	Mann	09/26/01
Mettie Hansley v. Department of Health & Human Services	00 CSE 1673	Morrison	08/24/01
David K. Rose v. Department of Health & Human Services	00 CSE 1681	Gray	06/05/01
Bruce E Carpenter v. Department of Health & Human Services	00 CSE 1683	Morrison	10/31/01
John T McDonald v. Department of Health & Human Services	00 CSE 1687	Wade	06/08/01
Darren S Boyd v. Department of Health & Human Services	00 CSE 1697	Wade	08/29/01
Ilian Tourloukis v. Department of Health & Human Services	00 CSE 1701	Gray	09/14/01
Terry Antonio Leath v. Department of Health & Human Services	00 CSE 1709	Morrison	10/16/01
Jarvis Williams v. Department of Health & Human Services	00 CSE 1712	Wade	10/22/01
Jerry McLean v. Department of Health & Human Services	00 CSE 1725	Mann	09/13/01
Raymond Stevens v. Department of Health & Human Services	00 CSE 1730	Mann	10/31/01
David John Pehler v. Department of Health & Human Services	00 CSE 1733	Morrison	12/04/01
Mohammad E Ghafarian v. Department of Health & Human Services	00 CSE 1734	Wade	11/16/01
Richard Kevin Day v. Department of Health & Human Services	00 CSE 1735	Conner	08/20/01
Joe Louis Hall Jr. v. Department of Health & Human Services	00 CSE 1737	Morrison	11/16/01
Willie E Harris v. Department of Health & Human Services	00 CSE 1742	Morrison	07/26/01
Hugh Williams Jr v. Department of Health & Human Services	00 CSE 1753	Morrison	10/02/01
Michael Worthy v. Department of Health & Human Services	00 CSE 1756	Wade	09/18/01
Eduardo R Miranda v. Department of Health & Human Services	00 CSE 1768	Wade	09/18/01
Jacqueline Land v. Department of Health & Human Services	00 CSE 1773	Morrison	11/05/01
William Baxter v. Department of Health & Human Services	00 CSE 1776	Wade	05/30/01
Albert Hooks Jr. v. Department of Health & Human Services	00 CSE 1798	Lassiter	07/30/01
Jason Cline v. Department of Health & Human Services	00 CSE 1804	Gray	11/14/01
Larry J Thompson v. Department of Health & Human Services	00 CSE 1824	Morrison	12/18/01
John N. Pullium v. Department of Health & Human Services	00 CSE 1829	Chess	11/21/01
Walter Columbus Simmons v. Department of Health & Human Services	00 CSE 1831	Gray	10/10/01
Manargo Victor Boykin v. Department of Health & Human Services	00 CSE 1835 ¹	Wade	05/30/01
Manargo Victor Boykin v. Department of Health & Human Services	00 CSE 1837 ¹	Wade	05/30/01
Larry W Kiser v. Department of Health & Human Services	00 CSE 1840	Gray	06/08/01
Jason Parker v. Department of Health & Human Services	00 CSE 1853	Morrison	08/02/01
Michael A Gresham Sr. v. Department of Health & Human Services	00 CSE 1862	Gray	06/28/01
Allen K. Galloway v. Department of Health & Human Services	00 CSE 1883	Morrison	12/06/01
Jeffery W Sisk v. Department of Health & Human Services	00 CSE 1884	Lassiter	11/28/01
Barbara J Stacy v. Department of Health & Human Services	00 CSE 1903	Lassiter	09/17/01
Michael N Brack v. Department of Health & Human Services	00 CSE 1904	Lassiter	07/02/01
Gregory C McCauley v. Department of Health & Human Services	00 CSE 1915	Wade	08/03/01
Raymond N Strother v. Department of Health & Human Services	00 CSE 1910	Gray	07/18/01
Tamara J Mills-Cooper v. Department of Health & Human Services	00 CSE 1918	Gray	09/14/01
Donald E Scott v. Department of Health & Human Services	00 CSE 1919	Chess	08/08/01
Wayne DeRoss v. Department of Health & Human Services	00 CSE 1940	Conner	11/26/01
Paul Clayton Shepard v. Department of Health & Human Services	00 CSE 1945	Lassiter	09/20/01
Tammie Sawyer v. Department of Health & Human Services	00 CSE 1946	Gray	09/26/01
Paula Morrill v. Department of Health & Human Services	00 CSE 1948	Conner	10/16/01
Marcus Dontez Chavis v. Department of Health & Human Services	00 CSE 1955	Gray	10/15/01
Robert Steven Preston v. Department of Health & Human Services	00 CSE 1958	Lassiter	06/05/01
John R Pyron v. Department of Health & Human Services	00 CSE 1960	Wade	08/10/01
Richard Stevens Jr. v. Department of Health & Human Services	00 CSE 1965	Morrison	08/07/01
Angela Wells v. Department of Health & Human Services	00 CSE 1967	Morrison	08/21/01
Bobby R. Mayo v. Department of Health & Human Services	00 CSE 1969	Conner	07/09/01
Steven Gregory Hotz v. Department of Health & Human Services	00 CSE 1978	Chess	07/24/01
Scott S Jacobs v. Department of Health & Human Services	00 CSE 1977	Conner	01/08/02
Sylvia J Walter v. Department of Health & Human Services	00 CSE 1983	Wade	10/22/01
Eugene Little v. Department of Health & Human Services	00 CSE 1995	Gray	10/11/01
Howard Jacobs v. Department of Health & Human Services	00 CSE 1996	Morrison	11/05/01
April Cheeseman v. Department of Health & Human Services	00 CSE 2000	Wade	10/11/01
Terry Jacobs v. Department of Health & Human Services	00 CSE 2004	Lassiter	10/11/01
Robert Scot Pope v. Department of Health & Human Services	00 CSE 2014	Gray	11/14/01

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William Kay v. Department of Health & Human Services	00 CSE 2060	Conner	07/20/01
Patrick L Merrick v. Department of Health & Human Services	00 CSE 2061	Chess	07/12/01
Luther I Gore v. Department of Health & Human Services	00 CSE 2062	Gray	08/15/01
Jeffrey D Lain v. Department of Health & Human Services	00 CSE 2075	Lassiter	01/08/02
Darlene S Roush v. Department of Health & Human Services	00 CSE 2102	Gray	10/11/01
David Diaz v. Department of Health & Human Services	00 CSE 2149	Gray	09/21/01
Jerome Maddox v. Department of Health & Human Services	00 CSE 2153	Wade	08/07/01
Mario C Crank v. Department of Health & Human Services	00 CSE 2172	Conner	11/26/01
Dennis Cunningham v. Department of Health & Human Services	00 CSE 2183	Conner	11/26/01
Toney Cooper v. Department of Health & Human Services	00 CSE 2214	Gray	09/06/01
Winston H Powell v. Department of Health & Human Services	00 CSE 2274	Wade	05/30/01
Kendall L Taylor v. Department of Health & Human Services	00 CSE 0032	Conner	06/08/01
Toni M Rash v. Department of Health & Human Services	01 CSE 0040	Wade	10/02/01
Sue Diane Lambert v. Department of Health & Human Services	01 CSE 0069	Wade	07/13/01
Harlie J Turner v. Department of Health & Human Services	01 CSE 0095	Morrison	09/26/01
George A Snipes v. Department of Health & Human Services	01 CSE 0105	Lassiter	10/25/01
Michael Jarvis v. Department of Health & Human Services	01 CSE 0173	Wade	08/06/01
Samuel E Taylor v. Department of Health & Human Services	01 CSE 0181	Conner	06/08/01
Carlton Griffin Jr. v. Department of Health & Human Services	01 CSE 0211	Lassiter	08/20/01
Randall Blevins v. Department of Health & Human Services	01 CSE 0258	Gray	06/05/01
Jason O Smith v. Department of Health & Human Services	01 CSE 0266	Mann	07/19/01
Richard Brooks v. Department of Health & Human Services	01 CSE 0269	Wade	06/25/01
Carey Austin Spencer v. Department of Health & Human Services	01 CSE 0277	Conner	07/09/01
Ronnie William Foster v. Department of Health & Human Services	01 CSE 0280	Chess	07/09/01
Craig Darrell McLeod v. Department of Health & Human Services	01 CSE 0301	Gray	07/31/01
Nathaniel Gunter v. Department of Health & Human Services	01 CSE 0333	Morrison	06/25/01
Cantabile Jones v. Department of Health & Human Services	01 CSE 0357	Chess	07/06/01
Arlene Locklear v. Department of Health & Human Services	01 CSE 0358	Conner	07/20/01
Nolan D Schrader v. Department of Health & Human Services	01 CSE 0362	Elkins	08/07/01
Harvey L Hughes Sr. v. Department of Health & Human Services	01 CSE 0366	Gray	06/29/01
Denise Renee Nunn v. Department of Health & Human Services	01 CSE 0368	Morrison	06/05/01
Myhammad Ali Sabakada v. Department of Health & Human Services	01 CSE 0378	Elkins	09/13/01
Eric L Woody v. Department of Health & Human Services	01 CSE 0387	Wade	08/10/01
Gilbert Monk v. Department of Health & Human Services	01 CSE 0390	Lassiter	07/02/01
David L Trammel Jr. v. Department of Health & Human Services	01 CSE 0391	Chess	06/26/01
Ralph A Terry v. Department of Health & Human Services	01 CSE 0405	Gray	06/29/01
Johnny Caldwell v. Department of Health & Human Services	01 CSE 0415	Conner	07/09/01
Timothy Ray Ledford v. Department of Health & Human Services	01 CSE 0416	Elkins	06/29/01
Leon B Featherson v. Department of Health & Human Services	01 CSE 0423	Wade	08/10/01
Robert Griffin v. Department of Health & Human Services	01 CSE 0430	Morrison	07/02/01
Kimberly L Shull v. Department of Health & Human Services	01 CSE 0431	Gray	09/27/01
Dennis E Chardavoyne v. Department of Health & Human Services	01 CSE 0432	Elkins	06/05/01
Luther W Covington v. Department of Health & Human Services	01 CSE 0438	Conner	07/20/01
Carl Franklin Slemp v. Department of Health & Human Services	01 CSE 0449	Morrison	07/12/01
Tennis Lee Perry v. Department of Health & Human Services	01 CSE 0450	Chess	07/06/01
Richard E Roberts Jr. v. Department of Health & Human Services	01 CSE 0461	Wade	07/12/01
David Wilson v. Department of Health & Human Services	01 CSE 0463	Conner	07/20/01
Henry L Elliotte v. Department of Health & Human Services	01 CSE 0491	Lassiter	06/05/01
Gregory Morgan v. Department of Health & Human Services	01 CSE 0498	Elkins	05/24/01
Malik J Flamer v. Department of Health & Human Services	01 CSE 0501	Wade	07/12/01
Wade Freeman McPhatter Jr. v. Department of Health & Human Services	01 CSE 0504	Conner	10/17/01
Armenous Dobson III v. Department of Health & Human Services	01 CSE 0519	Morrison	09/06/01
George Foster Still v. Department of Health & Human Services	01 CSE 0526	Elkins	09/13/01
John Winstead v. Department of Health & Human Services	01 CSE 0562	Conner	06/08/01
Raymond A McDonald v. Department of Health & Human Services	01 CSE 0592	Gray	07/18/01
Carson C Clark Jr. v. Department of Health & Human Services	01 CSE 0600	Morrison	07/19/01
Paul Williams v. Department of Health & Human Services	01 CSE 0606	Lassiter	07/19/01
Thomas J Lipppa v. Department of Health & Human Services	01 CSE 0609	Elkins	06/27/01
Boyd H Tucker v. NC Child Support Centralized Collection	01 CSE 0618	Wade	05/31/01
Joseph E Rudd Jr. v. Department of Health & Human Services	01 CSE 0621	Gray	05/29/01
Shirley W Pendergrass v. Department of Health & Human Services	01 CSE 0622	Mann	09/11/01
Manuel Lee Thomas v. Department of Health & Human Services	01 CSE 0623	Morrison	07/19/01
Kirk M White v. Department of Health & Human Services	01 CSE 0625	Lassiter	06/05/01
Walter L Sloan Jr. v. Department of Health & Human Services	01 CSE 0626	Wade	08/03/01
Kevin R Ross v. Department of Health & Human Services	01 CSE 0631	Elkins	06/05/01
Kelvin R Leonard v. Department of Health & Human Services	01 CSE 0633	Elkins	06/05/01
Willie R Darden v. Department of Health & Human Services	01 CSE 0646	Conner	11/26/01
Steven Rodger Malysz v. Department of Health & Human Services	01 CSE 0649	Gray	06/05/01
Forrest W Crutchfield v. Department of Health & Human Services	01 CSE 0651	Morrison	08/02/01
Raul Villanueva v. Department of Health & Human Services	01 CSE 0652	Morrison	08/02/01
Allen Getzinger v. Department of Health & Human Services	01 CSE 0654	Lassiter	08/08/01
Robert Lee Scott Jr. v. Department of Health & Human Services	01 CSE 0656	Conner	07/20/01
Randy L Wade v. Department of Health & Human Services	01 CSE 0664	Elkins	10/02/01
James David McDaniels v. Department of Health & Human Services	01 CSE 0670	Wade	01/14/02
Christopher R Miller v. Department of Health & Human Services	01 CSE 0678	Lassiter	07/19/01
Larry O Anthony v. Department of Health & Human Services	01 CSE 0681	Lassiter	07/30/01
Dennis Green v. Department of Health & Human Services	01 CSE 0682	Gray	08/02/01
Tony Eugene Johnson v. Department of Health & Human Services	01 CSE 0684	Mann	09/11/01
Lynn S Jowers v. Department of Health & Human Services	01 CSE 0688	Elkins	06/25/01
Charles John DaBella v. Department of Health & Human Services	01 CSE 0690	Conner	07/20/01
Kou Yang v. Department of Health & Human Services	01 CSE 0692	Gray	08/02/01
George D Moore v. Department of Health & Human Services	01 CSE 0693	Wade	08/03/01

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Clayton E Reeves v. Department of Health & Human Services	01 CSE 0705 ²	Elkins	08/16/01
William E Smith v. Department of Health & Human Services	01 CSE 0713	Conner	11/26/01
James Balmer v. Department of Health & Human Services	01 CSE 0735	Elkins	08/16/01
Roger Dale Weaver v. Department of Health & Human Services	01 CSE 0739	Wade	09/18/01
Joshua V Harris v. Department of Health & Human Services	01 CSE 0757	Morrison	07/30/01
Nehemiah Patrick Holliday, Jr. v. Department of Health & Human Services	01 CSE 0764	Morrison	08/16/01
Ronald Rozzelle Mitchell v. Department of Health & Human Services	01 CSE 0765	Elkins	08/16/01
Steven G Adelman v. Department of Health & Human Services	01 CSE 0766	Wade	09/28/01
Jeffery D Bolton v. Department of Health & Human Services	01 CSE 0777	Gray	06/29/01
Leonard A Warren v. Department of Health & Human Services	01 CSE 0817	Morrison	07/13/01
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Dennis D Miller v. Department of Health & Human Services	01 CSE 0824	Elkins	07/31/01
William A Bell v. Department of Health & Human Services	01 CSE 0828	Wade	09/21/01
James D Wright Jr. v. Department of Health & Human Services	01 CSE 0834	Conner	08/30/01
Michelle Dalton Painter v. Department of Health & Human Services	01 CSE 0838	Chess	07/09/01
James D Jackson Jr. v. Department of Health & Human Services	01 CSE 0839	Gray	07/31/01
Henry Joseph v. Department of Health & Human Services	01 CSE 0843	Morrison	08/20/01
Linda N Dixon v. Department of Health & Human Services	01 CSE 0844	Lassiter	08/08/01
Arthur Jackson v. Department of Health & Human Services	01 CSE 0872	Chess	07/25/01
Calvin Laverne Johnson v. Department of Health & Human Services	01 CSE 0886	Lassiter	07/26/01
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Ronald Carl Ray v. Department of Health & Human Services	01 CSE 0927	Morrison	09/06/01
Larry Mims v. Department of Health & Human Services	01 CSE 0928	Elkins	09/06/01
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Robert & Shirley Harmon on behalf of Gary Harmon v. NC DMH/DD/SAS	01 DHR 0955	Chess	06/25/01
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Sadina Hall v. Carolina House & NC Nurse Aide Registry	01 DHR 1274	Conner	01/10/02
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Daniel Repert v. The Guilford Center (The State DMH/DD/SAS	01 DHR 1562	Mann	12/10/01
Sadio-Tene Lloyd (for client TiNesha Booker) v. The Guilford Center/Child Authorization Team/The State DMH/DD/SAS	01 DHR 1577	Mann	11/15/01
Anissa Burchette v. NC DHHS, Health Care Personnel Registry	01 DHR 2148	Mann	01/16/02
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Judy Woods Days Care v. DHHS, Div. of Child Development	01 DHR 0084	Wade	10/05/01
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Anna Daley v. DHHS, Div. of Child Development	01 DHR 0386	Morrison	11/07/01
Tiffany D. Lott v. Div. of Child Dev., NC DHHS	01 DHR 0538	Chess	12/10/01
Sarah L Thomas, Sarah's Child Care v. Division of Child Dev.	01 DHR 0818 ¹	Gray	12/28/01
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Debra Brown v. DHHS, Division of Facility Services	00 DHR 2009	Gray	06/28/01
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Candice J Smith v. DHHS, Division of Facility Services	01 DHR 0911	Lassiter	07/27/01
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Dorothy J. Gilmore v. DHHS, Division of Facility Services	01 DHR 1295	Gray	12/04/01
Henry Monroe v. NC DHHS, Division of Facility Services	01 DHR 1306	Wade	11/16/01
Antonio Ray v. NC DHHS, Division of Facility Services	01 DHR 1344	Gray	09/24/01
Michelle Peebles v. NC DHHS, Division of Facility Services	01 DHR 1345	Lassiter	10/19/01
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Alice G. Stevenson v. NC DHHS, Division of Facility Services	01 DHR 1567	Mann	12/13/01
Caroline Peck Whitaker v. NC DHHS, Division of Facility Services	01 DHR 1595	Gray	12/28/01
Desiree Scales v. DHHS, Division of Facility Services	01 DHR 1621	Conner	11/26/01
Courtrina Dawson v. NC DHHS Division of Facility Services	01 DHR 1623	Wade	11/14/01
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April Michelle McGuire v. NC DHHS, Division of Facility Services	01 DHR 1935	Elkins	12/13/01
Elizabeth Winter v. DHHS, Division of Facility Services	01 DHR 1954	Chess	01/17/02
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Division of Social Services

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Kishja Marlin v. NC DHHS, Social Svcs. Program Integrity Section	01 DHR 0634	Elkins	07/11/01
Judy P Miller v. Ashe Co. Dept. of Social Services, NC DHHS, Division of Facility Services, Health Care Personnel Registry	01 DHR 1363	Gray	09/18/01

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Fordion Packaging, Ltd., Bird Bailey v. Dept. of State Purchasing, J. Arthur Leaston	01 DOA 1001	Gray	08/24/01
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Deona Renna Hooper v. Co. Police Program, Co. Police Administrator	00 DOJ 2177	Wade	06/22/01
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Edward James Summers v. Alarm Systems Licensing Board	01 DOJ 0352	Morrison	06/13/01
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Stephen Wayne Farmer v. Alarm Systems Licensing Board	01 DOJ 0998	Lassiter	07/24/01
Lisa Nichols Caviness v. Alarm Systems Licensing Board	01 DOJ 1258	Conner	10/08/01
Benjamin Sabbath Krizon v. Alarm Systems Licensing Board	01 DOJ 1303	Conner	09/14/01
Michael Bullard v. Alarm Systems Licensing Board	01 DOJ 1310	Gray	10/30/01
James Kevin Hightower v. Alarm System Licensing Board	01 DOJ 1351	Gray	10/12/01
Telzy T. Porter v. Alarm System Licensing Board	01 DOJ 1496	Elkins	11/19/01
Francis Hoi Chan v. Alarm System Licensing Board	01 DOJ 1497	Chess	01/02/02
Julio Eduardo Riofrio v. Alarm System Licensing Board	01 DOJ 1814	Morrison	12/06/01
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Calvin McNair v. Private Protective Services Board	01 DOJ 1000	Lassiter	07/03/01
Michael David Faris v. Private Protective Services Board	01 DOJ 1271	Gray	10/12/01
Donald Walter Thompson, Jr. v. Private Protective Services Board	01 DOJ 1495	Elkins	11/14/01
Johnny Randolph Clark v. Private Protective Services Board	01 DOJ 1509	Wade	12/27/01
Ricky (Richard struck) Derrick Johnson v. Private Protective Services Bd.	01 DOJ 1550	Elkins	11/15/01
Tamera Ramelle Adams v. Private Protective Services Board	01 DOJ 1817	Morrison	12/06/01
Marsha Lynn Marshall v. Private Protective Services Board	01 DOJ 1856	Morrison	12/06/01
Lonnie Mack Maines, Jr. v. Private Protective Services Board	01 DOJ 1985	Morrison	12/11/01
Timothy Ray Robinson v. Private Protective Services Board	01 DOJ 2216	Wade	12/27/01

Sheriffs' Education & Training Standards Commission

Larry Russell Jackson v. NC Criminal Justice & Trng. Stds. Comm.	00 DOJ 0721	Gray	07/20/01
Joshua Craig Brothers v. NC Sheriffs' Educ. & Trng. Stds. Comm.	00 DOJ 1558	Elkins	06/12/01
Wardell R.K. Scott v. NC Sheriffs' Educ. & Trng. Stds. Comm.	00 DOJ 1577	Gray	08/27/01

⁹ Combined Cases

CONTESTED CASE DECISIONS

Darrick Harris v. NC Sheriffs' Educ. & Training Standards Comm.	00 DOJ 2267	Wade	10/17/01	
Anita Allen Coats v. NC Criminal Justice & Training Stds. Comm.	01 DOJ 0023	Morrison	09/07/01	
Alan Henry Roebuck v. NC Sheriffs' Educ. & Trng. Stds. Comm.	01 DOJ 0444	Gray	11/30/01	
Mark J Smith v. NC Sheriffs' Educ. & Training Stds. Comm.	01 DOJ 0470	Gray	10/11/01	
Gregory Rayvon Wood v. NC Criminal Justice Ed. & Trng. Stds. Comm.	01 DOJ 0478	Morrison	11/08/01	
Marcus O Clark v. NC Sheriffs' Educ. & Training Stds. Comm.	01 DOJ 0500	Gray	10/12/01	
Horace H. Lane v. NC Sheriffs' Educ. & Training Stds. Comm.	01 DOJ 0557	Conner	11/07/01	
James D. Panther v. NC Sheriffs' Educ. & Trng. Stds. Comm.	01 DOJ 0616	Wade	08/29/01	
Christina Hilliard Davis v. NC Criminal Justice & Trng. Stds. Comm.	01 DOJ 0650	Gray	09/28/01	
Gary C Daugherty v. NC Sheriffs' Educ. & Trng. Stds. Comm.	01 DOJ 1267	Chess	10/04/01	
Kevin Hoover v. NC Sheriffs' Educ. & Trng. Stds. Comm.	01 DOJ 1601	Elkins	12/04/01	

DEPARTMENT OF STATE TREASURER

Gwen A Lindsey v. Timothy S Bryan, State of NC, Dept. of State Treasurer, Retirement Systems	00 DST 0727	Mann	08/06/01	
Bruce E. Colvin v. Board of Trustees of the Local Governmental Employees' Retirement System	00 DST 0776	Gray	07/06/01	16:04 NCR 384

STATE BOARD OF EDUCATION

Phase Academy of Jacksonville, Inc., dba Phase Academy Public Charter School v. Public Schools of North Carolina, State Board of Education	00 EDC 2119	Elkins	11/07/01	16:12 NCR 1252
Carolyn H. Lancaster v. NC Department of Public Instruction	01 EDC 0054	Morrison	11/08/01	

ENVIRONMENT AND NATURAL RESOURCES

James W and Winnifred King v. Div. of Coastal Management	97 EHR 0791	Gray	11/29/01	16:14 NCR 1618
Leahman Coday, Jr. v. NC DENR	99 EHR 1651	Wade	06/21/01	
Hawley Farms, Inc. v. NC DENR, Div. of Water Quality	99 EHR 1740	Conner	10/25/01	
Holly Ridge Associates, LLC, v. NC DENR and its Div. of Land Resources, William P. Holman, Sec. of the DENR, in his official Capacity and Charles H. Gardner, Director of the Div. of Land Resources, in his official capacity	00 EHR 0423	Conner	12/20/01	16:16 NCR 1825
Roger M Oxindine Jr. v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0438	Conner	08/17/01	
Thomas E Graham v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0439	Conner	08/17/01	
Joe Fairlamb, Brenda Fairlamb v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0440	Conner	08/17/01	
Thomas M Graham v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0441	Conner	08/17/01	
Paul Blythe, Lori Blythe v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0448	Conner	08/17/01	
Rusty Eller v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0449	Conner	08/17/01	
Lisa Oxidine v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0450	Conner	08/17/01	
Linda M Hickle v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0501	Conner	08/17/01	
Shannon M Scharm, Alex F Schram v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0508	Conner	08/17/01	
Jacqueline Smith v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0509	Conner	08/17/01	
Gary Smith v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0510	Conner	08/17/01	
Wyatt A Gordon v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0554	Conner	08/17/01	
Chris Conder v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0555	Conner	08/17/01	
Angela & Larry Freeman v. Brunswick Co. Health Department	00 EHR 0635	Conner	11/29/01	
E Dennis Spring v. NC DENR, Div. of Water Quality & Mid South Water Systems, Inc.	00 EHR 0698	Conner	08/17/01	
David T. Stephenson, owner, John P. Williams, Agent, Lot 86 v. NC DENR (Brunswick County Health Department)	00 EHR 0769 ²	Gray	08/07/01	16:05 NCR 463
Anson County Citizens Against Chemical Toxins in Underground Storage, Blue Ridge Environmental Defense League, Inc., Mary Gaddy, Bobby Smith and Emma Smith v. DENR	00 EHR 0938	Conner	06/05/01	16:01 NCR 40
Larry Dale McKeel and Robert Morrison Getchell v. NC DENR, Division of Water Quality and NC Dept. of Transportation	00 EHR 1225	Conner	10/19/01	16:11 NCR 1043
Acreage Brokers, Inc., Doug Golightly, Officer, James T. Gullely Jr., (Agent) v. NC DENR (Brunswick County Health Department)	00 EHR 1214 ¹	Gray	08/07/01	16:05 NCR 463
Albert Galluzzo, James T. Gullely, Jr. (Agent) v. NC DENR	00 EHR 1245 ¹	Gray	08/07/01	16:05 NCR 463
David T. Stephenson, Lot 62 v. NC DENR (Brunswick County Health Department)	00 EHR 1249 ¹	Gray	08/07/01	16:05 NCR 463
David T. Stephenson, Lot 65 v. NC DENR (Brunswick County Health Department)	00 EHR 1250 ¹	Gray	08/07/01	16:05 NCR 463
David T. Stephenson, Lot 64 v. NC DENR (Brunswick County Health Department)	00 EHR 1251 ¹	Gray	08/07/01	16:05 NCR 463
David T. Stephenson, Lot 69 +½ 68 v. NC DENR, (Brunswick County Health Department)	00 EHR 1252 ¹	Gray	08/07/01	16:05 NCR 463

² Combined Cases

CONTESTED CASE DECISIONS

David T. Stephenson v. NC DENR, (Brunswick County Health Dept.)	00 EHR 1253 ¹	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 90 v. NC DENR, (Brunswick County Health Department)	00 EHR 1254 ¹	Gray	08/07/01	16:05 NCR	463
David T. Stephenson, Lot 66 v. NC DENR (Brunswick County Health Department)	00 EHR 1255 ¹	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR, Lot 66					
Sammie Williams and Williams Seafood, Inc. v. NC DENR, Division of Coastal Management	00 EHR 1288	Gray	08/02/01	16:05 NCR	484
Floyd Robertson d/b/a Parson's Well Drilling v. NC DENR, Division of Water Quality	00 EHR 1656	Conner	09/19/01		
Thomas Tilley, Trustee v. NC DENR	00 EHR 1668	Elkins	11/28/01		
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1876 ²	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1877 ²	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1878 ²	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1879 ²	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1880 ²	Gray	08/07/01	16:05 NCR	463
David T. Stephenson v. NC DENR (Brunswick County Health Dept.)	00 EHR 1881 ²	Gray	08/07/01	16:05 NCR	463
Martin Properties, Mr. David Martin v. Town of Cary, Development Services Dept. Erosion Control Office	01 EHR 0088	Morrison	09/06/01		
Barbara Barham, Angels at Play v. Alamance Co. Health Dept.	01 EHR 0142	Morrison	08/16/01		
Paul J Williams v. NC Dept.of Env. Man. Comm. and Keith Overcash, PE Deputy Director	01 EHR 0212	Lassiter	07/12/01		
Laura Walters v. Environmental Management Commission	01 EHR 0230	Lassiter	07/19/01		
Brandon H Clewis, Christy Swails Clewis v. Chatham County Health Dept., Office of Environmental Health	01 EHR 0305	Lassiter	06/04/01		
James L. Horton v. NC DENR, Division of Land Resources	01 EHR 0310	Conner	08/30/01		
Robin R Moore v. NC DENR	01 EHR 0441	Conner	09/17/01		
David R Wells v. NC DENR, Division of Air Quality	01 EHR 0555	Morrison	10/05/01		
Terry Peterson Residential Twenty, LLC v. County of Durham	01 EHR 0558	Conner	12/17/01	16:14 NCR	1624
M/I Homes, Donald Fraley v. Durham County	01 EHR 0687	Conner	07/10/01		
Country Lake Estates, by & through David T. Hawks, Manager v. Wm G Ross, Sec. NC Dept of Env. & Natural Resources	01 EHR 0697	Conner	08/17/01		
Earnest F.D. Collier v. Wilson Co. Dept. of Public Health	01 EHR 0699	Mann	10/05/01		
Marc P Walch v. Haywood Co. Health Dept. c/o Daniel F McLawhorn NC DENR	01 EHR 0730	Morrison	06/26/01		
Richard W Brannock v. NC DENR, Div. of Waste Management	01 EHR 0767	Elkins	07/30/01		
Billy James Miller, Jr., Peggy Matthews Miller v. NC Dept. of Health/ Environmental Health Inspections, John Stucky (Inspector)	01 EHR 0934	Elkins	08/02/01		
Mercer Glass v. NC DENR	01 EHR 0935	Conner	09/11/01		
Nancy D. Tuchscherer v. CAMA-Coastal Area Mgmt. Assoc.	01 EHR 0992	Gray	11/28/01	16:14 NCR	1634
James A Brown v. NC DENR	01 EHR 1197	Elkins	09/17/01		
Vickie Jacobs Little v. Brunswick County Health Department	01 EHR 1298	Mann	11/30/01		
Southside Mobile Home Park, Southside Trust v. NC DENR	01 EHR 1313	Chess	10/22/01		
John (Jack) W. Henry v. DENR, Env. Health Services Section	01 EHR 1322	Conner	12/14/01		
Albert Eric Pickett v. NC DENR	01 EHR 1332	Elkins	11/30/01		
Elfleda G. Shepard v. NC DENR, Division of Coastal Management	01 EHR 1390	Conner	11/28/01		
Town of Murfreesboro v. NC DENR, Div. of Waste Management	01 EHR 1424	Wade	01/10/02		
Peter Pallas v. New Hanover County Board of Health	01 EHR 1441	Conner	01/09/02		
NC Real Estate Services Corp, v. NC DENR, Div. of Air Quality	01 EHR 1503	Elkins	11/20/01		

ENGINEERS AND LAND SURVEYORS

NC Bd. of Examiners for Engineers and Surveyors v. C. Phil Wagoner	01 ELS 0078	Overby	07/11/01		
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OFFICE OF INFORMATION TECHNOLOGY

Spli-Con, LLC v. NC Office of Information Technology	01 GOV 1799	Chess	11/26/01		
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HUMAN RELATIONS COMMISSION

NC Human Relations Commission on behalf of Jeanette Guffey and Harvey Myers	99 HRC 1383	Wade	08/06/01		
NC Human Relations Commission on behalf of Janie Teele v. Wedco Enterprises, Inc., Quality Construction, Inc., The Apartment Group, Erin Banks, and Terry Taylor	00 HRC 1449	Gray	12/21/01		
Sara E. Parker v. NC Human Relations Commission	01 HRC 1284	Chess	10/04/01		

DEPARTMENT OF INSURANCE

Wellpath Select, Inc. v. NC Teachers' & State Employees' Comp.	01 INS 0388	Morrison	07/03/01		
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LICENSING BOARD FOR GENERAL CONTRACTORS

NC Licensing Bd. for Gen. Con. v. Alderman Brothers Construction, Inc. License No. 34455	01 LBC 1146	Elkins	10/10/01		
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MISCELLANEOUS

Tony L. Arnett v. Administrative Office of the Courts	00 MIS 0424	Wade	06/26/01		
Donald Jason Biles v. W-S/Forsyth Zoning Dept et.al., Forsyth Cty District Atty., et.al.	01 MIS 0905	Chess	10/04/01		
Sara E. Parker v. Medical Review of North Carolina	01 MIS 1607	Lassiter	12/03/01		
Sara E. Parker v. Administrative Office of the Courts	01 MIS 1608	Lassiter	12/03/01		
Sara Parker v. NC State Bar, Calvin E. Murphy	01 MIS 1714	Lassiter	11/06/01		

OFFICE OF ADMINISTRATIVE HEARINGS

CONTESTED CASE DECISIONS

James Spencer, Jr. v. Office of Administrative Hearings	01 OAH 1115	Chess	10/22/01	
OFFICE OF STATE PERSONNEL				
Debbie Whitley v. Wake County Department of Health	96 OSP 1997	Chess	05/22/01	
Larry R Lane v. NC DOT, G.F. Neal, Cty. Maintenance Engineer	99 OSP 0105	Lassiter	07/16/01	
Timothy Ramey v. NC Department of Correction	99 OSP 1085	Chess	06/27/01	
Richard W. Lee v. NC Department of Transportation	99 OSP 1145	Wade	08/29/01	
Miriam Dukes v. Albemarle Mental Health Center Bd. of Directors	00 OSP 0234	Wade	05/22/01	
Angela Ellen Jones v. Mr. Weldon Freeman, Personnel Director, NC Dept. of Crime Control & Public Safety	00 OSP 0345	Lassiter	07/03/01	
Tina C. Lowery v. NC DOC/Craven Correctional Institution	00 OSP 0767	Conner	11/28/01	
Ivan Williams v. DOC, Division of Prisons	00 OSP 0877	Wade	09/17/01	
Ricky N Faircloth v. NC Department of Transportation	00 OSP 0994	Wade	11/14/01	
Andreas K. Dietrich v. NC Highway Patrol; NC Department of Crime Control & Public Safety	00 OSP 1039	Gray	08/13/01	16:06 NCR 550
Warren E. Pigott v. NC Department of Correction	00 OSP 1096	Gray	11/26/01	
Andora Taylor Hailey v. NC Department of Correction	00 OSP 1247 ⁵	Conner	11/26/01	
A. Mark Esposito v. Dept. of Transportation	00 OSP 1333	Gray	06/13/01	
Michael H. Vanderburg v. NC Department of Revenue	00 OSP 1702 ⁸	Gray	12/31/01	16:16 NCR 1853
Bobbie D Sanders v. UNC-CH	00 OSP 1806	Chess	06/21/01	16:03 NCR 271
Robert J Lane v. NC Department of Correction, Central Engineering	00 OSP 1841	Elkins	06/26/01	
Natalynn P. Tollison v. NCSU <i>et al</i>	00 OSP 1909	Wade	06/01/01	
Michael H. Vanderburg v. NC Department of Revenue	00 OSP 2117 ¹	Gray	12/31/01	16:16 NCR 1853
Andora Taylor Hailey v. NC Department of Correction	00 OSP 2180 ⁵	Conner	11/26/01	
Jerrelle B Jones v. DHHS, O'Berry Center	01 OSP 0003	Lassiter	06/26/01	
Kit Locklear v. NC Department of Correction	01 OSP 0106	Elkins	07/17/01	
Andrew E Chambers v. NC Department of Corrections	01 OSP 0172	Morrison	07/12/01	
Roy Kevin Tripp v. NC Department of Correction	01 OSP 0231	Morrison	10/04/01	16:09 NCR 864
Lonnie Sessions v. Columbus Correction Inst.	01 OSP 0240	Gray	05/23/01	
Lee Woodburn v. NC State University	01 OSP 0275	Lassiter	06/21/01	
Marsha A Early v. County of Durham, Dept. of Social Services	01 OSP 0279	Lassiter	10/26/01	
Valerie Thompson Enoch v. Alamance Co. Dept. of Social Services	01 OSP 0316	Lassiter	11/29/01	
Jamel O. Frazier v. NC Department of Transportation	01 OSP 0334	Anderson	07/06/01	
Arlene R. Burwell v. Warren Correctional Institute	01 OSP 0448	Mann	07/18/01	
Alecia M York v. Fayetteville State University	01 OSP 0598	Mann	10/04/01	
James H. Montayner v. NC Department of Correction	01 OSP 0637	Gray	08/16/01	
Leon Lewis, Jr. v. NC School of Science & Math	01 OSP 0639	Conner	08/17/01	
Lisa Scopee Lewis v. Carteret Correctional Facility	01 OSP 0801	Gray	07/17/01	
Antonio J Ballard Sr. v. Morrison Youth Institution (DOC)	01 OSP 0807	Elkins	10/05/01	
Margaret V Carroll v. Walter B Jones, Alcohol & Drug Treatment Center, Greenville, NC	01 OSP 0851	Conner	08/14/01	
Wanda Lou Mitchell v. Walter B Jones, Alcohol & Drug Treatment Center, Greenville, NC	01 OSP 0852	Conner	08/14/01	
William David Fox v. NC Department of Transportation	01 OSP 0853	Morrison	07/02/01	
Rita D Wilkins v. WNC Reg. Economic Dev. Commission	01 OSP 0857	Morrison	09/21/01	
Lisa M Franklin v. D.A.R.T. Program in DOC	01 OSP 0909	Gray	09/12/01	
Nancy T. Rimmer v. UNC School of Medicine	01 OSP 0952	Gray	08/24/01	
Jeffrey Scott Zaccari v. NC Department of Transportation	01 OSP 0970	Conner	08/17/01	
John A Smith v. Department of Corrections, State of NC	01 OSP 0984	Chess	07/25/01	
Faith J Jackson v. NC Department of Correction	01 OSP 0986	Lassiter	07/12/01	
Sharon Locklear Dean v. Dept. of Juvenile Justice & Delinquency Prevention	01 OSP 1063	Mann	09/17/01	
Steven Swearingen v. NC Department of Correction	01 OSP 1066	Wade	10/17/01	
Lisa C. Wells v. Hyde County	01 OSP 1113	Gray	09/04/01	
Earla Kate Simmons v. WIC Nutrition Program, Brunswick County Health Department, Bolivia, NC	01 OSP 1114	Lassiter	10/30/01	
William S T Young v. NC DOC, Pamlico Correctional Institution	01 OSP 1169	Lassiter	11/02/01	
William S T Young v. NC DOC, Pamlico Correctional Institution	01 OSP 1169	Lassiter	12/19/01	
Calvia Lynn Hill v. Lumberton Correctional Inst., DOC	01 OSP 1205	Conner	08/07/01	
Craig B Hilliard v. NC Department of Correction	01 OSP 1214	Morrison	12/18/01	
Rose Beam v. Cabarrus County Board of Education	01 OSP 1233	Elkins	09/27/01	
Darryl Burr v. NC Department of Correction	01 OSP 1282	Morrison	11/13/01	16:12 NCR 1263
Dennis Damon Foster v. NC Department of Correction	01 OSP 1283	Chess	12/07/01	
Thomas H Glendinning v. Chatham County	01 OSP 1287	Chess	09/07/01	
James L Ragland v. The Harnett Co. Board of Education	01 OSP 1337	Gray	10/15/01	
Dorothy L. Stinson v. Gaston-Lincoln Area Mental Health "Pathways"	01 OSP 1400	Chess	12/12/01	
Gloria E. Morrow v. NC Division of Social Services	01 OSP 1439	Elkins	12/18/01	
Walter Daniel Giese v. George O' Daniel & the Onslow Co. Health Dept.	01 OSP 1445	Conner	12/17/01	
Annie Karamatsos v. UNC at Charlotte	01 OSP 1456	Mann	11/20/01	
Ronnie McCoy v. Michael Munns, Polk Youth Inst.	01 OSP 1469	Morrison	11/14/01	
Michael T. Bingham v. Harold Seegars, Skilled Trade, NCA&T St. Univ.	01 OSP 1476	Mann	11/20/01	
Larry S Height v. NC Utilities Comm. of the NC Dept. of Commerce	01 OSP 1487	Morrison	12/28/01	
Alvin Earl Williams v. NC DHHS, Division of Facility Services	01 OSP 1491	Mann	12/17/01	
Larry T. Strickland v. Jennifer Heath and the Dept. of Corrections	01 OSP 1537	Mann	11/30/01	
Gregory S. Harmon v. NC Department of Revenue	01 OSP 1575	Mann	01/18/02	
Tammy M. Snipes v. DHHS, (Broughton Hospital)	01 OSP 1873	Chess	01/16/02	
Lillie Joyce Blount v. Caswell Center, Human Resources Employee, Clifton Jones, Supervisor	01 OSP 1898	Lassiter	12/04/01	
Sheila Nickerson v. UNC-CH	01 OSP 2016	Lassiter	01/02/02	
Mary Hood Fletcher v. The University of North Carolina at Charlotte	01 OSP 2210	Lassiter	01/15/02	

5 Combined Cases
8 Combined Cases

CONTESTED CASE DECISIONS

DEPARTMENT OF REVENUE

George T. Brower, Phillip J. Taylor v. NC Dept. of Revenue	01 REV 1779	Gray	01/10/02
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SECRETARY OF STATE

Moab Tiara Cherokee Kituwah Nation Anewa Tiari-El, Empress v. Secretary of State, Elaine Marshall	01 SOS 1798	Morrison	12/11/01
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UNIVERSITY OF NORTH CAROLINA

Tammie Davis v. UNC Hospitals & UNC Physicians	01 UNC 0506	Mann	07/13/01
Jerelle L Perry v. UNC Hospital	01 UNC 0800	Conner	09/18/01
Lonnie D Watson v. UNC Hospitals	01 UNC 0837	Conner	09/18/01
Susan Coan v. Secretary of Revenue	01 UNC 0977	Conner	11/08/01
Phyllis Green v. The UNC Hospitals at Chapel Hill	01 UNC 1354	Gray	11/26/01

WELL CONTRACTORS

Floyd V. Robertson v. Well Contractor's Certification Commission	01 WCC 0147	Conner	09/19/01
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CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
00 EHR 0423

HOLLY RIDGE ASSOCIATES, LLC,)
)
 Petitioner,)
)
 v.)
)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES AND ITS DIVISION)
OF LAND RESOURCES,)
WILLIAM P. HOLMAN, Secretary)
of the Department of Environment)
And Natural Resources, in his official)
Capacity and CHARLES H. GARDNER,)
Director of the Division of Land)
Resources, in his official capacity,)
)
 Respondents,)
)
and NORTH CAROLINA SHELLFISH)
GROWERS ASSOCIATION and)
NORTH CAROLINA COASTAL)
FEDERATION,)
)
 Intervenor-Respondents.)

RECOMMENDED DECISION

This contested case was heard by the Honorable James L. Conner, II, Administrative Law Judge, on July 31, August 1 and 2 in Carolina Beach, North Carolina, and on August 8, 9, and 21, and September 4, 5, 6, and 20 in Raleigh, North Carolina. The parties filed proposed Recommended Decisions and Memoranda of Law on October 15, 2001, and presented closing arguments on October 18, 2001.

APPEARANCES

For Petitioners: Craig Bromby and Jason Thomas, Hunton & Williams, One Hannover Square, Suite 1400, Fayetteville Street Mall, Raleigh, NC 27601 or P.O. Box 109, Raleigh, NC 27602; George House and Randall Tinsley, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., 2000 Renaissance Plaza, 230 North Elm Street, P.O. Box 26000, Greensboro, NC 27420-6000

For Respondents: Mary Penny Thompson and Ryke Longest, North Carolina Department of Justice, 114 W. Edenton Street, P.O. Box 629, Raleigh, NC 27602

For Respondent-Intervenors: Donnell Van Noppen, III, Southern Environmental Law Center, 200 W. Franklin Street, Suite 330, Chapel Hill, NC 27516

ISSUES

This matter is an appeal by Petitioner of a Civil Penalty Assessment issued by the North Carolina Department of Environment and Natural Resources, Division of Land Resources, assessed against the Petitioner for violations of the North Carolina Sediment Pollution Control Act ("SPCA"). The Civil Penalty Assessment was issued on March 5, 2000, and encompassed violations beginning April 24, 1999 and ending on December 14, 1999.

The parties submitted a PreTrial Order that included the parties' contentions regarding the issues to be decided. The undersigned determines that the issues to be decided are:

1. Whether Petitioner has met its burden in proving that its land-disturbing activities covered in the March 5, 2000 Civil Penalty Assessment are exempt from regulation under the SPCA.

CONTESTED CASE DECISIONS

2. Whether Respondents and Respondent-Intervenors have met their burden in proving that Petitioner violated the SPCA as determined in the Civil Penalty Assessment?

3. Whether Petitioner has met its burden of proving that DLR erred in calculating the amount of the penalty assessed.

WITNESSES

For Petitioner: Lionel Yow, Russell Lea, Gary Mitchell

For Respondents and Respondent-Intervenors: Daniel E. Sams, Janet Paith, Charles Hollis, Charles A. Gardner, John Wesley Parker, Linda Lewis, Kelli Blackwelder, Moreland Gueth

EXHIBITS RECEIVED INTO EVIDENCE

Petitioner:

P-1. 12/16/99 Sedimentation Inspection Report

Note: The document was admitted over Respondents' objection (Tr. 2059).

P-2. 12/28/99 Handwritten Notes by Janet Paith

Note: This document was admitted over Respondents' objection (Tr. 2059).

P-3. Forest Water Quality Program - Policy 4808

P-4. 15A NCAC II

P-5. 10/24/86 Joint Venture Agreement

P-6. 11/1/89 Partnership Authorization of Holly Ridge Associates

P-7. Holly Ridge - Proposed Timber Sale

P-10. 1/97-11/97 Corbett Lumber Receipts

P-11. Dr. Russ Lea c.v.

P-13. 1999 Forest Statistics for the Southern Coastal Plain of North Carolina, 1999

Note: This document was admitted over Respondents' and Respondent-Intervenors' objections (Tr. 1329).

P-14. Best Management Practices for Forestry in the Wetlands of North Carolina, DENR, June 1990

P-15. Forestry Best Management Practices Manual, NC Division of Forest Resources, September 1989

P-16. Wetlands/401 Certification Unit Wetlands Ditching and Draining Policy, July 9, 1999

Note: This document was admitted over Respondents' and Respondent-Intervenors' objections (Tr. 1399)

P-17. 3/4/99 Letter from Linda Lewis to Lionel Yow

P-19. 9/13/99 Ditch/spoils grassing program from Parker & Associates to Lionel Yow

P-20. Morton Trucking Receipts

P-22. Parker & Associates invoice for work performed from 8-17-99 through 10-27-99

P-23. 1/3/00 Invoice from Charlie Hollis

P-24. Gary Mitchell photographs (consisting of photographs separately Numbered 1-4 and 6-9)

P-25. 1998 Receipts

CONTESTED CASE DECISIONS

- P-26. 1999 Receipts
- P-27. 1/19/01 Respondent-Intervenor NCCF Discovery
Note: This document was admitted over Respondents' and Respondent-Intervenors' objections (Tr. 1852-57).
- P-28. 1/19/01 Respondent-Intervenor NCSGA Discovery
Note: This document was admitted over Respondents' and Respondent-Intervenors' objections (Tr. 1852-57).
- P-29. 6/8/01 Respondent-Intervenor Joint Supplemental Discovery
Note: This document was admitted over Respondents' and Respondent-Intervenors' objections (Tr. 1852-57).
- P-31. 8/18/00 Letter from Robin Smith of NCDENR to Derb Carter of SELC
Note: This document was admitted over Respondent and Respondent-Intervenors' objections (Tr. 1972).
- P-32. 4/20/00 Email correspondence with NCFS regarding EPA Ditching

Respondents and Respondent-Intervenors:

- R-1. 5/29/99 Aerial photograph of Morris Landing Tract
- R-2. undated Sketch of ditches shown on aerial photograph
Note: This document was admitted over Petitioner's objection that it is representative and not to scale (Tr. 109).
- R-3 10/24/86 Joint Venture Agreement between Westminter Company, Henry E. Miller, Jr., and Lionel L. Yow
Note: This document was admitted as Petitioner's Exhibit 5 (Tr. 1132).
- R-4. 5/12/95 Letter of Transmittal from John Parker to Jim Hughes
- R-5. 5/12/95 Letter of Transmittal
- R-6. 1995 Development Plans for Morris Landing Tract
- R-7. 1995 Development Plans for Morris Landing Tract
- R-9. 5/27/97 Letter conveying Mr. Hollis' proposal for the work to be done
- R-10. 1/19/01 Summary of work performed by Mr. Hollis
- R-11. 8/97 Wetland map of Morris Landing Tract by Mitchell & Assoc.
- R-12. 8/97 Wetland map of Morris Landing Tract by Mitchell & Assoc.
- R-13. 8/97 Wetland map of Morris Landing Tract by Mitchell & Assoc.
- R-14. Wetland map of Morris Landing Tract by Mitchell & Assoc.
Note: This document was admitted over Petitioner's objection (Tr. 823-24).
- R-15. 6/3/98 Letters of Transmittal and Project Schedule by Parker & Assoc.
- R-16. 2/16/99 Preliminary Planning Layout #2
- R-17. 2/16/99 Letter of Transmittal by Parker & Assoc. sending layout plans
- R-18. 2/16/99 Preliminary Planning Layout #1
- R-19. 2/5/99 Fax transmission from Mr. Yow to Mr. Parker
- R-20. 2/26/99 Sedimentation Inspection Report
Note: This document was admitted subject to an objection, which will be referred to hereafter as the "conclusion of law objection" in which the undersigned that statements in the exhibit regarding matters of law are not determinations of the larger issue in question. (Tr. 155)

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- R-21. 2/26/99 Photographs taken during inspection (consisting of photographs separately numbered A & B)
- R-22. 3/3/99 Notice of Violations from NCDENR (signed by Daniel Sams) to Holly Ridge Associates
Note: This document was admitted subject to the conclusion of law objection (Tr. 162).
- R-23. 3/4/99 Fax sent by Charles Hollis to Lionel Yow
- R-24. 4/23/99 Sedimentation Inspection Report
Note: This document was admitted subject to the conclusion of law objection (Tr. 489).
- R-25. 4/28/99 Notice of Continuing Violation(s) from NCDENR (signed by Daniel Sams) to Holly Ridge Associates
Note: This document was admitted subject to the conclusion of law objection (Tr. 173).
- R-26. 7/9/99 Civil Penalty Assessment (LQS 99-044)
Note: This document was admitted subject to the conclusion of law objection (Tr. 176).
- R-27. 7/15/99 Letter sending Civil Penalty Assessment
Note: This document was admitted subject to the conclusion of law objection (Tr. 178).
- R-28. 7/21/99 Postal Return Receipt documenting Civil Penalty received
- R-29. 7/15/99 Erosion Control Permit Application
- R-30. 7/15/99 Map submitted with Erosion Control Permit Application
- R-31. 7/15/99 Map submitted with Erosion Control Permit Application
- R-32. 7/20/99 Notice of Receipt of Erosion Control Plan
- R-33. 8/12/99 Letter to Janet Paith from Parker & Assoc.
- R-34. 8/13/99 Letter of Disapproval
- R-35. 9/10/99 Inspection Report
Note: This document was admitted subject to the conclusion of law objection (Tr. 202).
- R-36. 9/10/99 Photographs taken during inspection (consisting of photographs separately numbered 1-8 and 11-16)
- R-37. 10/21/99 Sedimentation Inspection Report
Note: This document was admitted subject to the conclusion of law objection (Tr. 202).
- R-38. 10/21/99 Photographs taken during inspection (consisting of photographs separately numbered 1-18)
- R-39. 11/10/99 Notice of Additional Violations of the SPCA
Note: This document was admitted subject to the conclusion of law objection (Tr. 203).
- R-40. 11/19/99 Letter from Mr. Parker to LQS
- R-41. 12/8/99 Letter from David Scibetta to John Parker
- R-42. 12/16/99 Sedimentation Inspection Report
Note: This document was admitted subject to the conclusion of law objection (Tr. 215).
- R-43. 12/16/99 Photographs taken during inspection (consisting of photographs separately numbered 1-2)
- R-44. 1/5/00 Notice of Continuing Violation of the SPCA
Note: This document was admitted subject to the conclusion of law objection (Tr. 216).
- R-45. 3/5/00 Second Civil Penalty Assessment LQS 99-098
Note: This document was admitted subject to the conclusion of law objection (Tr. 900).

- R-46. 3/8/00 Letter sending Second Civil Penalty Assessment
Note: This document was admitted subject to the conclusion of law objection (Tr. 901).
- R-47. 7/28/00 Letter from C. Moreland Gueth to Brian McGinn
- R-48. Draft letter from C. Moreland Gueth
Note: This document was admitted over Petitioner's objection (Tr. 1907-08).
- R-49. Draft letter from C. Moreland Gueth
Note: This document was admitted over Petitioner's objection (Tr. 1910).
- R-50. 8/30/00 Letter from Kelli Blackwelder of DFR to Mell Nevils
Note: This document was admitted subject to the conclusion of law objection (Tr. 2054).
- R-51. 4/25/00 Handwritten notes by Kelli Blackwelder
- R-54. 10/3/00 Inspection Report
Note: This document was admitted subject to the conclusion of law objection (Tr. 393).
- R-55. 10/3/00 Photographs taken during inspection
- R-56. 8/89 Memorandum of Agreement between DLR and DFR
- R-57. 5/5/92 Memorandum Re: Referral Procedures for Land-Disturbances
- R-58. 4/22/99 Aerial Photo of Forestry Site
Note: This document was admitted over Petitioner's objection (Tr. 121-124)
- R-59. 4/22/99 Aerial Photo of Development Site
Note: This document was admitted over Petitioner's objection (Tr. 125-126).
- R-60. 5/7&6/23/99 Guidelines on 1st Civil Penalty Assessment - both Dan Sams and David Ward's signatures
- R-62. 3/30/99 Letter from John W. Parker to Dan Sams
- R-63. Undated Historical Chronology (Case 2 NOAV)
Note: Only pages 1 and 2 of this document were admitted, page 3 was not admitted (Tr. 603).
- R-64. Undated Historical Chronology (1st Civil Penalty)
Note: This document was admitted over Petitioner's objection (Tr. 603).
- R-65. Undated SPCA Violations/Date Tracking (1st Civil Penalty)
- R-66. Undated SPCA Violations/Date Tracking (2nd Civil Penalty)
- R-67. 11/18/91 Wetland Mapping Plat certified by Corps of Engineers
- R-68. 11/18/91 Wetland Mapping Plat certified by Corps of Engineers
- R-69. 1/28/00 Guidelines for Assessing Civil Penalties (2nd Civil Penalty -Dan Sams and David Ward's signatures)
Note: This document was admitted subject to the conclusions of law objection (Tr. 908).
- R-70. 3/5/00 Worksheet (2nd Civil Penalty)
Note: This document was admitted subject to the conclusions of law objection (Tr. 909).
- R-71. North Carolina Coastal Boating Guide
- R-73. Mitchell & Associates, Inc. Brochure
- R-74. Various Invoices from Hollis to Holly Ridge Associates

- R-75. 9/99 Weather Data for September 1999
- R-76. 3/1/00 Photograph of Site on or about March 1, 2000
- R-77. 3/1/00 Photograph of Site on or about March 1, 2000
- R-78. 3/1/00 Photograph of Site on or about March 1, 2000
- R-79. List of permits held by either Lionel Yow or John Elmore, from stormwater database
- R-80. 4/28/00 Email correspondence within NCFS regarding ditching tract (consisting of email correspondence identified separately as A, B, and C)
Note: This document was admitted over Petitioner's objection (Tr. 1903-04).
- R-81 9/05/01 Letter from U.S. EPA to Holly Ridge Associates
Note: This document was not admitted and was offered as proof (Tr. 1903-04).
- R-82. 4/28/00 Email correspondence with NCFS regarding wetland drainage
Note: This document was admitted subject to Petitioner's objection of relevance for a portion of the document (Tr. 2020).
- R-83. 10/3/00 Handwritten notes by Kelli Blackwelder during site visit to tract
- R-84. Photograph of Site
- R-85. Photograph of Site
- R-86. Photograph of Site

Official Notice:

Sedimentation Pollution Control Act of 1973, N.C. Gen. Stat. § 113A-50 through 113A-82 (1999) (prior to amendments effective October 1, 1999).

Sedimentation Control regulations, N.C. Admin. Code tit. 15A, r. 4A.0001 through 4A.0005, r. 4B.0001 through .0030. r. 4C.0001 through .0011, r. 4D.0001 through .0003 (1999) (prior to amendments and recodification effective July 1, 2000).

Stormwater Management regulation, N.C. Admin. Code tit. 15A, r. 2H.1001 through 2H.1013 (1999).

STATUTES AND RULES IN ISSUE

The substantive statutes involved are North Carolina Sediment Pollution Control Act, N.C.G.S. §§ 113A-51 *et seq.* (1999), the Erosion and Sediment Control Rules and Sedimentation Control Civil Penalty Rules codified at subchapters 4B and 4C of Title 15A of the North Carolina Administrative Code (1999), and the North Carolina Forest Practices Guidelines Related to Water Quality, codified at subchapter 1I of Title 15A of the North Carolina Administrative Code. The procedural statute involved is the North Carolina Administrative Procedure Act. N.C. Gen. Stat. §§ 150B-1 *et seq.* (2000).

DISPOSITIVE MOTIONS

On July 18, 2001, Respondents and Respondent-Intervenors filed a Joint Motion for Partial Summary Judgment. In response, Petitioner opposed the motion and contended that summary judgment should be granted in Petitioner's favor. Oral argument was held on July 31, 2001. At the argument, the undersigned verbally granted Respondents and Respondent-Intervenors partial summary judgment on any challenge to the DLR's assessment of a prior Civil Penalty Assessment against the Petitioner, and denied Respondent and Respondent-Intervenors' Motion for Partial Summary Judgment concerning any issue related to the March 5, 2000 Civil Penalty Assessment. Summary judgment for the Petitioner was denied.

On August 9, 2001, at the conclusion of the Respondents and Respondent-Intervenors' evidence, Petitioner made an oral Motion for Involuntary and Summary Dismissal, which was followed by a written Motion filed August 15, 2001. The parties submitted briefs in support of and in opposition to that motion, and oral argument was heard on the motion on August 21, 2001. At the argument, the undersigned verbally denied the motion.

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Pursuant to N.C. Gen Stat. § 150B-34 and -36, these rulings on the Joint Motion for Partial Summary Judgment, for Summary Judgment, and for Involuntary and Summary Dismissal are parts of this Recommended Decision. All such rulings are hereby incorporated herein.

STIPULATIONS

In the Pretrial Order and during the hearing, the parties agreed to and the undersigned approved the following stipulations:

Procedural Stipulations from Pretrial Order:

1. Petitioner is a "party aggrieved," within the meaning of Chapter 150B of the General Statutes, by the March 5, 2000 Civil Penalty Assessment for Violations of the Sedimentation Pollution Control Act.
2. Petitioner timely filed its petition to challenged the imposition of the 5 March 2000 Civil Penalty Assessment.
3. Respondents and Respondent-Intervenors may present their evidence jointly.

Factual Stipulations from Pretrial Order:

1. The Petitioner, Holly Ridge Associates, L.L.C., ("HRA") is a North Carolina corporation that owns a two-thirds interest in a 1262-acre tract of land in Onslow County, North Carolina known as the Morris Landing Tract. Lionel L. Yow is the General Manager of HRA and Henry E. Miller, Jr. is a principal. John A. Elmore, II, owns a one-third interest in the Morris Landing tract.
2. The Morris Landing Tract fronts on and adjoins the Atlantic Intracoastal Waterway (AIWW). The tract drains to the AIWW and to Cypress Branch, a perennial stream that forms the southern boundary of much of the tract. Cypress Branch is a tributary of Batts Mill Creek, which flows into the AIWW. [Respondent's] Exhibit 1 is an aerial photograph of the tract taken in 1999. [Respondents'] Exhibit 2 is a sketch of the ditches shown on the aerial photograph and numbering them for ease of reference.
3. [Respondents'] Exhibit 3 is a joint venture agreement regarding the property between Westminster Company, a subsidiary of Weyerhaeuser, Mr. Miller and Mr. Yow.
4. [Respondents'] Exhibit 8 is a real estate appraisal of the property dated March 7, 1994.
5. From January through November of 1998, HRA carried out several activities on the Morris Landing tract, including excavating ditches. The excavation included clean-out of existing ditches, expansion of existing ditches, and creation of new ditches. Other activities included road opening and repair, wetlands assessment, and maintenance and repair of the large impoundment on the property. HRA engaged consultants, Charles Hollis and Mitchell and Associates, Inc., to plan and implement these activities.
6. [Respondents'] Exhibit 9 is a letter conveying Mr. Hollis' proposal for the work to be done to Mr. Yow. [Respondents'] Exhibit 10 is a summary of the work performed, prepared by Mr. Hollis.
7. [Respondents'] Exhibits 11-14 are copies of wetland maps of the tract prepared by Mitchell and Associates and a surveying firm, L.T. Green and Associates.
8. On June 20, 1999, Tropical Storm Arthur moved along the North Carolina coast.
9. On July 12, 1996, Hurricane Bertha struck the North Carolina coast in the area of Wilmington, North Carolina.
10. On September 5, 1996, Hurricane Fran struck the North Carolina coast in the area of Wilmington, North Carolina.
11. During 1997, Corbett Timber Company salvaged down and damaged trees from the Morris Landing tract and paid HRA for the timber value of those trees.
12. The area of land disturbed on the tract during the ditch excavation exceeded one acre in size.
13. HRA did not submit an Erosion and Sedimentation Control Plan before beginning the activity on the tract.
14. On August 26, 1998, Hurricane Bonnie struck the North Carolina coast in the area of Wilmington, North Carolina.
15. On February 26, 1999, Janet Paith and Dan Sams of the Land Quality Section ("LQS") of the Division of Land Resources ("DLR") of the North Carolina Department of Environment and Natural Resources ("NCDENR") inspected a portion of the excavation

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on the Morris Landing Tract and took photographs. [Respondents'] Exhibit 20 is a copy of the Inspection Report prepared on that date which was sent to and received by HRA. [Respondents'] Exhibits 21A - 21B are copies of photographs taken of the excavation on that date.

16. On March 3, 1999, LQS sent to Holly Ridge Associates ("HRA") a Notice of Violations of the Sedimentation Pollution Control Act of 1973, N.C.G.S. § 113A-50 et seq. ("SPCA") and Title 15A, North Carolina Administrative Code, Chapter 4. [Respondents'] Exhibit 22 is a copy of the Notice of Violations dated March 3, 1999. The Notice of Violations was received by HRA.
17. On March 4, 1999, Charles Hollis sent a fax to Lionel Yow regarding the requirement that an Erosion and Sedimentation Control Plan be submitted. [Respondents'] Exhibit 23 is a copy of the fax sent on that date. Thereafter, HRA engaged Parker and Associates to prepare an Erosion and Sedimentation Control Plan for the tract.
18. On April 23, 1999, Janet Paith of LQS inspected a portion of the Morris Landing Tract with John Parker of Parker and Associates. [Respondents'] Exhibit 24 is a copy of the Inspection Report prepared on that date, which was sent to and received by HRA.
19. On April 28, 1999, LQS sent to HRA a Notice of Continuing Violation(s) of the SPCA. [Respondents'] Exhibit 25 is a copy of the Notice of Continuing Violation(s) dated April 28, 1999, which was sent to and received by HRA.
20. On July 9, 1999, Charles Gardner, Division Director of DLR, assessed HRA with a civil penalty totaling \$32,100.00 for violations of the SPCA at the Morris Landing Tract. [Respondents'] Exhibit 26 is a copy of the Civil Penalty Assessment prepared on that date.
21. On July 15, 1999, DLR sent a letter to HRA notifying HRA of the Civil Penalty Assessment. [Respondents'] Exhibit 27 is a copy of the letter dated July 15, 1999. HRA received the letter and the Civil Penalty Assessment on July 21, 1999. HRA did not appeal the Civil Penalty Assessment. [Respondents'] Exhibit 28 is a copy of the postal return receipt documenting HRA's receipt of the Civil Penalty Assessment.
22. On July 15, 1999, Parker and Associates submitted an Erosion Control Permit Application to the DLR on behalf of HRA. [Respondents'] Exhibit 29 is a copy of the Erosion Control Permit application cover letter, application fee, and Financial Responsibility form sent to DLR on that date as part of the application package. [Respondents'] Exhibits 30-31 are copies of the maps submitted with the package.
23. On July 20, 1999, Janet Paith of DLR sent to HRA a Notice of Receipt of Erosion and Sedimentation Control Plan and an Erosion and Sedimentation Control Plan Checklist requesting additional information. [Respondents'] Exhibit 32 is a copy of the Notice of Receipt and Checklist dated July 20, 1999, which was received by HRA.
24. On August 12, 1999, Parker and Associates faxed and mailed a letter to Janet Paith in response to DLR's request for additional information. [Respondents'] Exhibit 33 is a copy of the letter dated August 12, 1999.
25. On August 13, 1999, LQS issued a Letter of Disapproval disapproving the sedimentation and erosion control plan submitted on behalf of HRA. [Respondents'] Exhibit 34 is a copy of the Letter of Disapproval and enclosed Reasons for Disapproval dated August 13, 1999, which was received by HRA.
26. On September 6, 1999, Hurricane Dennis moved along the North Carolina coast in the area of Wilmington, North Carolina.
27. On September 10, 1999, Janet Paith of LQS inspected a portion of the Morris Landing Tract and took photographs. [Respondents'] Exhibit 35 is a copy of the Inspection Report prepared on that date, which was sent to and received by HRA. [Respondents'] Exhibit 36 is copies of photographs taken of the site on that date.
28. On September 16, 1999, Hurricane Floyd struck the North Carolina coast in the area of Wilmington, North Carolina.
29. On October 17, 1999, Hurricane Irene struck the North Carolina coast in the area of Wilmington, North Carolina.
30. On October 21, 1999, Janet Paith of LQS inspected a portion of the Morris Landing Tract and took photographs. Ex. 37 is a copy of the Inspection Report prepared on that date, which was sent to and received by HRA. Ex. 38 is copies of photographs taken of the site on that date.
31. On November 10, 1999, LQS sent to HRA a Notice of Additional Violations of the SPCA. Ex. 39 is a copy of the Notice of Additional Violations dated November 10, 1999, which was received by HRA.

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32. On November 19, 1999, Mr. Parker responded to LQS regarding the Notice of November 10, 1999 on behalf of HRA. [Respondents'] Exhibit 40 is a copy of Mr. Parker's letter.
33. On December 8, 1999, David Scibetta of Mitchell and Associates inspected ditch outfalls on the tract that empty near Cypress Branch. On December 10, 1999, Mr. Scibetta sent John Parker a letter describing additional check dams and other erosion control measures needed on the tract. [Respondents'] Exhibit 41 is a copy of Mr. Scibetta's letter of that date, which was received by Mr. Parker and Mr. Hollis.
34. On or about December 16, 1999, Janet Paith of LQS inspected a portion of the Morris Landing Tract. [Respondents'] Exhibit 42 is a copy of the Inspection Report prepared on that date, which was sent to and received by HRA. [Respondents'] Exhibit 43 is copies of photographs taken of the site on that date.
35. On January 5, 2000, LQS sent to HRA a Notice of Continuing Violation(s) for Notice of Additional Violations of the SPCA. [Respondents'] Exhibit 44 is a copy of the Notice of Continuing Violation(s) dated January 5, 2000, which was received by HRA.
36. On March 5, 2000, DLR Director Charles Gardner assessed a second civil penalty totaling \$118,000.00 for violations of the SPCA. [Respondents'] Exhibit 45 is a copy of the Second Civil Penalty Assessment prepared on that date.
37. On March 8, 2000, DLR sent a letter to HRA notifying HRA of the Second Civil Penalty Assessment. [Respondents'] Exhibit 46 is a copy of the letter dated March 8, 2000.
38. Kelli Blackwelder, a Water Quality Forester with NCDENR's Division of Forest Resources, visited a portion of the tract on April 25, 2000, and again on August 24, 2000.
39. On July 28, 2000, C. Moreland Gueth of the Division of Forest Resources ("DFR") of NCDENR sent a letter to Brian McGinn at the NC Department of Justice regarding the tract. [Respondents'] Exhibit 47 is a copy of Mr. Gueth's letter dated July 28, 2000.
40. Each of the [Respondents'] Exhibits identified above and listed on Petitioner's List of [Respondents'] Exhibits is an authentic copy of the original.

Factual Stipulation Entered Into During Hearing:

1. On November 16, 1999, Holly Ridge Associates faxed to its attorney, Ken Kirkman, the November 1999 Notice of Violation or a document related to that Notice of Violation. (Tr. 1599).

FINDINGS OF FACT

Parties

1. Petitioner Holly Ridge Associates, LLC ("HRA") is a North Carolina corporation that owns a two-thirds interest in the Morris Landing tract of land in Onslow County, North Carolina. Lionel L. Yow is the General Manager of HRA, Henry E. Miller, Jr. is a principal, and John A. Elmore, II owns a one-third interest in the Morris Landing tract.
2. The Respondent is the North Carolina Department of Environment and Natural Resources ("NCDENR"), Division of Land Resources ("DLR"), and is the state agency authorized to prosecute violations of the Sedimentation Pollution Control Act ("SPCA"). The Petition for Contested Case Hearing also named as Respondents William P. Holman, then Secretary of DENR, and Charles H. Gardner, Director of DLR, in their official capacities.
3. The Respondent-Intervenor North Carolina Shellfish Growers Association ("NCSGA") is a private, non-profit association founded in 1995 to represent the interests of the many North Carolinians involved in the shellfish industry. NCSGA has 82 members who include shellfish farmers, hatchery operators, seafood dealers, educators, and researchers. Members of NCSGA own and maintain shellfish production leases in Stump Sound and surrounding coastal waters, including in the vicinity of the Holly Ridge tract. Jim Swartzenberg, President of NCSGA, along with his wife, Bonnie, leases 37 acres of waters in Stump Sound for oyster production and assists in management and production of oysters from over 100 additional acres in Stump Sound. (Affidavit of Jim Swartzenberg, submitted with Motion to Intervene). NCSGA is a plaintiff in a federal lawsuit against HRA arising out of the same facts and circumstances as this matter. NCSGA was allowed to intervene as a party in this matter by Order dated November 14, 2000.
4. Respondent-Intervenor North Carolina Coastal Federation is a non-profit tax-exempt organization dedicated to the promotion of better stewardship of coastal resources. The Coastal Federation was founded in 1982 and has approximately 5,000 members who live near, shellfish or fish in, or regularly visit, Stump Sound and nearby coastal waters. The Coastal Federation has worked to protect

water quality in Stump Sound and in the vicinity of the Holly Ridge tract and has investigated, documented, publicized, and sought government enforcement of violations of state and federal sedimentation, stormwater, water quality, and wetlands laws in connection with ditch excavation which occurred in southeastern North Carolina during 1998 and 1999, including at the Morris Landing tract. (Affidavit of Todd Miller). NCCF is a plaintiff in a federal lawsuit against HRA arising out of the same facts and circumstances as this matter. NCCF was allowed to intervene as a party in this matter by Order dated November 14, 2000.

Background

5. Morris Landing tract (also referred to during the hearing as the Holly Ridge tract) consists of 1,262 acres and fronts on and adjoins the Atlantic Intracoastal Waterway ("AIWW") in the vicinity of Stump Sound. The tract drains directly to the AIWW and to Cypress Branch, a stream that forms the southern boundary of much of the tract. Cypress Branch is a perennial stream that is a tributary of Batts Mill Creek, which flows into the AIWW. (PTO Stip. 2). The AIWW in the vicinity of the tract, Batts Mill Creek, and Cypress Branch are classified as "SA" waters by the North Carolina Environmental Management Commission. (Tr. 1060-61). The tract is on the mainland across the AIWW and Stump Sound from Topsail Island, North Carolina, a beachfront resort community.

6. The tract is largely forested, consisting of several forest types, and contains substantial wetland acreage.

7. During the 1950's, Lionel Yow's father assembled the Morris Landing tract and owned a 50% interest in that tract, the remaining interest being divided equally between two other individuals. During the 1960's and 70's, the owners arranged for the construction of a lake on the property and converted some of the property from agricultural fields to forest. Through those years, small amounts of timber were cut, including to clear land for the lake. Proceeds from timber harvesting were used to pay for the lake and dam construction and to pay property taxes and other expenses connected with owning and maintaining the property. (Tr. 1124-25, 1143).

8. In 1983, Lionel Yow's father passed away and his partners sold their interest in the land to the Westminster Company. Westminster Company was a Weyerhaeuser subsidiary that specifically worked to develop residential subdivisions and was not the timber harvesting arm of Weyerhaeuser. (Tr. 1128, 1580-81). In 1986, Mr. Yow, Henry E. Miller, Jr., and the Westminster Company entered into a Joint Venture Agreement for the purpose of acquiring the Morris Landing tract and "maintaining, operating, and developing thereon a resort residential community? ." (Ex. P-5, at p. 1; Tr. 1130). The joint venturers established a partnership known as Holly Ridge Associates "to acquire, own, manage, maintain and develop" the Morris Landing tract. In 1989, the partnership borrowed \$500,000 from a revolving line of credit for those purposes. (Ex. P-6, at p. 1; Tr. 1131). In 1986, HRA had development layouts prepared for the property, depicting potential development of the entire tract with residential units, golf courses, and other amenities. Those layouts which were used as a sales tool with prospective buyers of the property. Mr. Yow participated in attempting to sell the property for residential development. (Exs. R-6 and R-7; Tr. 1581-53; Tr. 1587-88). To Mr. Yow's knowledge, no attempt was made to sell the property for its timber production value.

9. In 1991, HRA had wetland mapping performed on the waterfront portion of the tract, using groundwater-monitoring wells, which is a more costly method of mapping jurisdictional wetlands. (Exs. R-14, R-67, R-68; Tr. 821-23, 830-32).

10. Mr. Yow is an attorney licensed to practice in North Carolina. During the late 1980's and early 1990's, he transitioned out of law practice and into full-time residential real estate development work. (Tr. 1567-70). He participated in the development of numerous projects on or near the water in the Wilmington and Topsail Island areas, including: Porter's Neck, a golf course residential development near the AIWW in the Wilmington vicinity; Masonboro Forest, a residential subdivision in Wilmington; North Shore, a golf course residential development near Topsail Island; Island Cay, a residential development in Surf City on Topsail Island; Village of Stump Sound, a residential subdivision of Topsail Island; Beach House Marina, a marina on Topsail Island; and Ashton-at-Echo Farms, a residential townhome project in Wilmington. (Ex. R-71; Tr. 1570-77).

11. In 1993, HRA sold timber from the tract. (Ex. P-7).

12. In 1995, Mr. Yow asked John Parker of Parker & Associates, an engineering and surveying firm, to send copies of the 1986 development drawings to a prospective buyer of the property. (Exs. R-4, R-5; Tr. 1035-41).

13. In 1996, Weyerhaeuser sold its interest in the tract and Mr. Elmore purchased an interest in the tract. Mr. Yow, Mr. Miller and Mr. Elmore planned to continue to market the property for real estate development. Mr. Elmore invested in the property in a tax-saving transaction, intending a short-term investment because the property was expected to be sold for development, at which time "he would have probably flipped it into another investment." (Tr. 1586-87).

14. In 1996, Hurricanes Bertha and Fran struck the North Carolina coast in the Wilmington vicinity, damaging timber and washing out unpaved roads on the Morris Landing property. (Tr. 1147-48). At the suggestion of Corbett Lumber Company, Petitioner engaged Corbett to remove damaged timber from the property during 1997. (Ex. P-10; Tr. 1149-58).

The 1998 Ditch Excavation Project

15. In May 1997, HRA engaged Charles Hollis, a regulatory consultant, and Gary Mitchell of Mitchell and Associates, environmental consultants, to plan and carry out a ditch excavation project on the property. (Ex. R-9; Tr. 1160). Mr. Hollis, formerly an official with the U.S. Army Corps of Engineers specializing in regulatory issues concerning wetlands, is in the business of assisting coastal property owners in applying and obtaining permits from the Corps of Engineers and the North Carolina Division of Coastal Management necessary for developing property. His typical clients include small landowners and shoreline property owners who need assistance in evaluating wetlands, determining what sort of development activity can be done on their property, what permits are needed, and assisting those landowners in obtaining permits. Mr. Hollis does not have forestry experience and does not provide clients with advice or expertise concerning timber management. (Tr. 784-87, 843).

16. Gary Mitchell is also formerly an official with the U.S. Army Corps of Engineers responsible for wetlands permitting and enforcement. Since 1994, he has engaged in an environmental consulting practice, providing wetland delineation services to establish the regulatory boundaries of wetlands, provide assistance in wetland permitting, and assisting clients in their dealings with the Corps of Engineers, the North Carolina Division of Coastal Management, the North Carolina Division of Water Quality, and North Carolina Division of Land Resources during land development. Neither Mr. Mitchell nor anyone on his staff is a forester, and Mitchell & Associates does not provide its clients with advice or expertise concerning timber management. (Ex. R-73; Tr. 1799, 1800).

17. Mr. Mitchell and Mr. Hollis were engaged by HRA to determine the location of wetlands subject to federal or state regulation on the tract, examine existing drainage ditches on the tract, develop plans to improve existing drainage and to introduce new drainage ditches, and to supervise all ditch construction and maintenance. (Ex. R-9; Tr. 792). HRA did not tell Mr. Hollis that any of the excavation was for a forestry purpose and did not ask him if he was knowledgeable about forestry projects. (Tr. 793).

18. Areas of the tract that are not wetlands may be developed without a Clean Water Act Section 404 permit from the Corps of Engineers. Jurisdictional wetlands would require a Section 404 permit for any filling activity associated with development. Containing or reducing the acreage of wetlands onsite improves the value and marketability of the property. (Tr. 840). Mr. Hollis testified without contradiction that it is "difficult to get lots approved in wetlands" and that "if an area is a wetland it is virtually worthless." (Tr. 844, 865).

19. During the summer and fall of 1997, the wetlands on the entire tract were flagged, surveyed, and mapped. (Exs. R-11, R-12, R-13, R-14). In January 1998, an excavation contractor began the clean out of existing ditches and the construction of new "rim" ditches. In general, clean out of existing ditches included excavating and enlarging the existing ditches. (Ex. R-10; Tr. 795-98).

20. A "rim" ditch is a ditch constructed to follow the contour, or rim, of wetlands. A rim ditch is excavated just outside of the edge of the wetland and the spoil material from the excavation is deposited on the upland side of the ditch. The purpose of a "rim" ditch is to intercept the flow of water from the upland into the wetland adjoining in order to prevent the wetland from expanding and perhaps to shrink the adjoining wetland. (Tr. 806-08). In Mr. Hollis' experience, landowners excavating rim ditches are generally seeking to develop the property. (Tr. 875).

21. In July 1998, HRA decided to begin excavation of an additional type of new ditch, known as a "Tulloch" ditch. A Tulloch ditch is excavated in wetlands, with the spoil material being hauled out of the wetland for deposit in an upland area. Tulloch ditching is slower, requires more equipment than ordinary ditching, and increases the cost of the excavation several times over. HRA decided to add Tulloch ditches to the project because a court decision in July 1998 overturned a federal regulation which had been adopted to restrict the Tulloch ditching, thus opening an opportunity to perform Tulloch ditching in order to add new drainage in wetlands on the tract. (Tr. 799-804).

22. After the excavation project, the Holly Ridge tract had 17 major ditches or systems of ditches which, for ease of reference, the parties have numbered and identified as ditches 1-17. Exhibits R-30 and R-31 depict the numbering and general layout of the ditches. Based upon the depiction of the ditches on Exhibits R-30 and R-31, the descriptions of numerous witnesses, and photographs received in evidence, the 17 ditches may be described as follows:

- a. Ditch 1 is at the northwesternmost end of the Morris Landing tract, closest to the Town of Holly Ridge, and flows in a meandering fashion from north to south. The ditch was newly constructed in 1998 and is a rim ditch excavated along the western edge of a wetland, draining toward and terminating near Cypress Branch at the southern boundary of the tract. The ditch as depicted on Exhibit R-30 is approximately 1,500 feet long.
- b. Ditch 2 is a newly constructed rim ditch along the eastern rim of the same wetland bounded on the west by Ditch 1. Ditch 2 is strikingly meandering in form, exceeds 2,500 feet in length, and also terminates near Cypress Branch at the southern edge of the tract.

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- c. Ditch 3 is a newly constructed rim ditch, is also strikingly meandering in form, exceeds 2,500 feet in length, and also terminates near Cypress Branch at the southern edge of the tract.
- d. East of Ditch 3, the property is crossed by an electric transmission line right-of-way. Ditch 4 was excavated from the eastern edge of the power right-of-way traveling south approximately 1,200 feet and also including 3 branches. The ditch runs partially through wetlands and partially through uplands. The first 600 to 700 feet of this ditch existed prior to 1998, and the remainder was excavated by Petitioner as part of the 1998 excavation project.
- e. Ditch 5 is a meandering rim ditch excavated to drain to the south toward the outlet of Ditch 4 and exceeds 1,200 feet in length. Ditch 5 follows the western contour of a wetland area on the tract.
- f. Ditch 6 is a ditch running from Morris Landing Road which forms the northern boundary of the tract and flows southwest. No evidence was presented of any excavation of Ditch 6 during 1998.
- g. Ditch 7 travels in a southern direction and is a newly constructed rim ditch parallel to Ditch 5 on the eastern side of the wetland rimmed on the west by Ditch 5. Ditch 7 exceeds 1,500 feet in length.
- h. Ditch 8 is approximately 1,000 feet long and is a newly constructed rim ditch in meandering form, roughly parallel to an unpaved state road identified as Bishops Road, crossing the property from north to south. Ditch 8 terminates near the southern edge of the tract, and near where Cypress Branch crosses under Bishops Road.
- i. An unpaved road identified as the "logging road" travels east from Bishops Road for approximately one and one-half miles to an intersection with SR 1537, a paved road also referred to as Johnson Road. Ditches 9 and 10 are a connected system of ditches consisting of pre-existing ditches that were cleaned out and enlarged during 1998, plus new Tulloch ditches. North of the logging road, ditches 9 and 10 consist of approximately 7,800 feet of ditch draining to a culvert under the logging road. After passing under the logging road, the combined Ditches 9 and 10, referred to as the 9/10-convergence ditch, was excavated or re-excavated in 1998 for approximately 700 feet to the southwest, terminating in a wetland area near Cypress Branch at the southern edge of the property.
- j. Ditches 11 and 12 are similarly an interconnected system of pre-existing ditches that were maintained and enlarged, plus new Tulloch ditches, draining from the northeastern edge of the property toward the logging road. Ditches 11 and 12 consist of over 7,000 feet of newly excavated or enlarged ditches draining to a culvert under the logging road. After passing under the logging road, the 11/12-convergence ditch was excavated in the channel of a pre-existing intermittent stream draining to the west of Cypress Branch. The length of the 11/12-convergence ditch segment is approximately 1,500 feet and terminates in a wetland area near Cypress Branch.
- k. Ditch 13 consists of an existing triangular system of ditches that was re-excavated and was connected by means of new excavation to Ditch 14 alongside the logging road. Ditch 13 totals approximately 2,000 feet in length.
- l. Ditches 14 and 15 were excavated along each side of the logging road for approximately 2,000 feet of the road's length. Ditches 14 and 15 drain into Ditch 16, which was excavated to transport water from the roadside ditches into the lake on the property. Ditch 16 is approximately 1,000 feet in length.
- m. East of the lake, the tract is traversed by SR 1573. The segment of the tract east of SR 1573, extending to the AIWW, is referred to as the waterfront portion of the property. Ditch 17 was excavated in the waterfront portion of the property, at its southern edge. Ditch 17 consists of a rim ditch in meandering form draining to the south, to the property boundary, and then to the east along the property boundary to a terminus at the edge of the coastal marsh. Connected to the meandering rim ditch are 11 Tulloch ditches referred to as "finger" ditches, that drain a wetland area east of the rim ditch. The components of Ditch 17 total approximately 5,000 feet in length.

23. The ditch excavation work was completed in November 1998. (Ex. R-10). The land-disturbing activity covered approximately 34 acres. (Ex. R-45). Based on the above approximations, the 1998 excavation consisted of approximately 40,000 feet, or 8 miles, of ditches.

Additional Facts Bearing on Contested Issue No. 2 - Violations of the SPCA

24. On February 26, 1999, Janet Paith and Dan Sams of DLR visited the Holly Ridge tract for the first time, having received a report of potential violations from the North Carolina Division of Water Quality. They visited only a portion of the site, viewing portions of the excavation of Ditches 7, 8, 14, 15, 16, and 17. (Tr. 130, 143, 481). They observed that land-disturbance greater than

one acre had occurred without submission of an Erosion and Sedimentation Control Plan. They observed ditches with slopes too steep to retain vegetation and restrain erosion, did not observe erosion and sedimentation control measures such as sediment traps or check dams in place, observed unvegetated spoil piles beside ditches, and noted that ditches were, in some areas, at least ten feet deep and forty to sixty feet wide. (Ex. R-20; Tr. 134-36, 139-43, 226-28, 482-91). Exhibit R-21A, a photograph taken by Ms. Paith during that visit, depicts unvegetated spoil piles and unvegetated ditch slopes along Ditch 16. (Tr. 487-88). As a result of the February 26 site visit, Ms. Paith prepared an inspection report citing the violations occurring on the site which was sent to and received by the Petitioner. (Ex. R-20; PTO Stip. 15; Tr. 156-57).

25. Both Mr. Sams and Ms. Paith considered the nature of the excavation activity they observed on February 26, 1999, to be consistent with site preparation for development activities, and not consistent with what they typically observed as forestry-related drainage excavation. (Tr. 163).

26. As a result of that inspection, Respondent issued a Notice of Violation ("NOV") of the Sedimentation Pollution Control Act on March 3, 1999, notifying the Petitioner of violations at the site including:

- a. Failure to submit an Erosion and Sedimentation Control Plan for the project. In regards to this violation, the NOV stated "the outline and construction of the ditches appear to be consistent with the type of construction associated with future site development." (Ex. R-22 at p. 1).
- b. Failure to take all reasonable measures to protect all public and private property from damage by land-disturbing activities in that measures to control erosion and retain sediment on the site were not observed.
- c. Exposed slopes too steep to maintain ground cover, and there were no other adequate erosion control devices, in violation of N.C.G.S. § 113A-57(2).
- d. Failure within fifteen days of completion of grading to have ground cover or other erosion control devices sufficient to restrain erosion, in violation of N.C.G.S. § 113A-57(2).

27. The March 3, 1999 NOV was sent to and received by the Petitioner including a copy of the February 26, 1999 inspection report and a Sedimentation Erosion Control Plan application package. (Tr. 161). After citing the violations that were occurring on the site, the NOV listed specifically the corrective actions necessary to bring the site into compliance. (Tr. 166) The NOV also stated that civil penalties might be assessed if the violations were not corrected within thirty days of receipt of the Notice, but that if violations were corrected within the time period specified for compliance, no further legal action would be pursued. The NOV further stated that DLR solicited Petitioner's cooperation and would like to avoid taking further enforcement action, stated that it is Petitioner's responsibility to understand and comply with the requirements of the Act, and stated that copies of the relevant statute and administrative rules would be sent to Petitioner upon request. (Ex. R-22; Tr. 168-69, 247). Mr. Sams testified that, as with "any package for an unpermitted site," a copy of the SPCA statute and rules were sent to Petitioner as part of the Erosion and Sedimentation Control Plan application packet along with the March 3 NOV. (Tr. 168). Finally, the NOV stated that the Petitioner should contact Mr. Sams or Ms. Paith at its earliest convenience should it have any questions concerning the Notice or the requirements of the Act. (Ex. R-22 at 3).

28. Following receipt of the March 3, 1999 NOV, Mr. Hollis recommended to Mr. Yow that an Erosion and Sedimentation Control Plan be prepared and submitted for the site and recommended John Parker be engaged for the plan preparation work. (Ex. R-23). Mr. Hollis noted that the requirement to submit a plan was "an issue we have been aware of from the start." (Id.; Tr. 832-35). Mr. Hollis testified that the Petitioner knew of the requirement to obtain approval of an Erosion and Sedimentation Control Plan before beginning work on the site (Tr. 835, 855), and Mr. Yow testified during his deposition in the case that he knew of the requirement that a plan be submitted and approval be obtained before commencing excavation. (Tr. 1498). Mr. Yow's testimony at the hearing that he did not know of the requirement to submit a plan is contradicted in Mr. Hollis' testimony and by Mr. Yow's deposition testimony, and is not credited.

29. Before working on the Holly Ridge tract, Mr. Hollis had worked for Mr. Elmore and Mr. Yow at the Echo Farms site in Wilmington, where Mr. Elmore and Mr. Yow were cited by New Hanover County for beginning work without an approved plan. (Tr. 789, 1503).

30. After the March 3, 1999 NOV, Petitioner hired Ken Kirkman, an attorney specializing in regulatory issues involved in land development in coastal North Carolina, to represent Petitioner with regards to the DLR enforcement activities. Mr. Kirkman communicated with the Office of the Attorney General about the NOV, and remained involved through at least November, 1999. (Tr. 1501, 1593-99; Hearing Stip. No. 1).

31. After the deadline for compliance outlined in the NOV had passed, Ms. Paith returned to the site for a follow-up inspection on April 23, 1999. A copy of her inspection report, Exhibit R-24, was sent to and received by Petitioner. Ms. Paith observed the same violations as had been observed in the first inspection. She visited the site with Mr. Parker, observed the absence of visible erosion and sedimentation control measures in the areas of the site that she visited, and the absence of vegetative stabilization of ditches, slopes, fills, and stockpiles, and noted that conditions at the property were similar to those observed at the previous visit. She noted that ditches are or will erode where velocities are greater than two feet per second and advised Petitioner to be sure that sediment was not escaping into the creek. (Ex. R-24, Tr. 490-92).

32. Following that inspection, Respondent prepared a Notice of Continuing Violations ("NOCV") dated April 28, 1999, which was sent to and received by Petitioner. The NOCV stated that the follow-up inspection indicated that the violations had still not been corrected, again urged corrective activity, warned that because of the continuing violations the matter had been referred to the Director of Land Resources for "further enforcement action," and again solicited any questions about the matter that Petitioner might have. (Ex. R-25, Tr. 172-74).

33. On July 9, 1999, having still received no submission of an Erosion and Sedimentation Control Plan and no notice from Petitioner that the other violations had been corrected, Respondent issued a Civil Penalty Assessment, assessing a penalty of \$32,100.00 for the following violations:

- a. N.C.G.S. § 113A-54(d)(4) and -57(4), and 15A N.C.A.C. 4B.0007(c) - Failure to submit an Erosion and Sedimentation Control Plan at least thirty days before beginning land-disturbing activity and beginning that activity prior to a plan approval.
- b. 15A N.C.A.C. 4B-0005 - Failure to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity.
- c. N.C.G.S. § 113A-57(2) - Failure to maintain on graded slopes and fills an angle which can be retained by vegetative cover or other adequate erosion control devices or structures.
- d. N.C.G.S. § 113A-57(2) - Failure on exposed slopes within thirty working days of completion of any phase of grading to plant or otherwise provide ground cover, devices or structure sufficient to restrain erosion.

(Ex. R-26, Tr. 175, 894-95). The Civil Penalty Assessment was sent to and received by the Petitioner. Petitioner did not appeal the Civil Penalty Assessment. (Tr. 895).

34. On July 15, 1999, Parker and Associates submitted an Erosion Control Permit Application to DLR on behalf of the Petitioner. Exhibit R-29 is a copy of the Erosion Control Permit Application cover letter, and Exhibits R-30 and R-31 are copies of the maps submitted with the package. On July 20, 1999, Ms. Paith sent Petitioner a Notice of Receipt of Erosion and Sedimentation Control Plan requesting additional information regarding existing and proposed contours on the site, geologic features such as streams, lakes, dams, wetlands, seeps, springs, etc. on the site; soils information for the site, name and classification of receiving watercourses, and construction details of temporary and permanent erosion control measures. (Ex. R-32, Tr. 182-83, 498-99, 649-57, 659-65, 1085-86). The Notice stated that the additional information needed to be received by August 6 and failure to do so by this deadline may result in disapproval of the plan.

35. Mr. Sams testified that in order to determine whether the proposed erosion control measures are appropriate, it is essential to have information on geologic features, clearly delineated wetlands, contours. (Tr. 182-84, 233-34, 498-99) In addition, soils information, groundwater, and topographic or elevation information are necessary to determine how erosive a ditch may be and whether the proposed construction details of erosion control measures are adequate for the site. (Tr. 185-87, 499). Mr. Parker testified that topographical information would have been helpful in determining direction of sheet flow across the site, velocities of water in the watercourses, and the necessary design specifications for control structures in the ditches and watercourses. (Tr. 1090).

36. On behalf of Petitioner, Parker and Associates responded on August 12, 1999. The response did not provide topographic or wetland information, but did provide general soil information, identified receiving watercourses, and revised ditch details. (Ex. R-32; Tr. 1086-90). On August 13, 1999, Respondent sent Petitioner a Letter of Disapproval, disapproving the submitted plan for failure to supply adequately specific proposed cross-sections of ditch reconstruction, failure to include velocity calculations of the proposed ditches, inclusion of "V" shaped ditches in the plan, failure to provide comprehensive information concerning wetlands on the site, failure to provide adequate sediment storage above wetlands rather than in wetlands, and failure to adequately explain the calculation of the land-disturbance acreage. (Ex. R-34; Tr. 194, 502). Disapproval of the plan was not appealed and no further revision to the plan was submitted during the period of time relevant to this proceeding.

37. Janet Paith of DLR next visited the site on September 10, 1999. This site visit occurred several days after Hurricane Dennis. Erosion and sedimentation control measures are designed to meet a 10-year storm event standard. (Tr. 197). Hurricane Dennis did

not cause seven or more inches of rain in a 24-hour period and was therefore not a 10-year storm. (Ex. R-75; Tr. 197, 283). Ms. Paith noted severe erosion problems, with swiftly flowing muddy water in the ditches and sediment plumes. The ditches on "sheet 1" (meaning the erosion control plan map identified as Exhibit R-31), had not been sloped or seeded. Ms. Paith noted that there was still no evidence of equipment or mechanized compliance work occurring on the site, and that ditch erosion was obvious and sedimentation of the creek on the property was very likely. (Ex. R-35). Photographs taken by Ms. Paith during this inspection show steep, highly eroded ditch banks, absence of vegetation on spoil piles and ditch banks, and sediment deposits in the ditches. (Ex. R-36(1), (2), (3), (4), (5), (13); Tr. 547-59, 695). None of the ditches visited by Ms. Paith had visible erosion control measures in place such as checkdams or sediment traps which would have slowed the velocity of the water and reduced the erosive effects of the water. (Tr. 504-10).

38. The September 10, 1999 inspection report again instructed Petitioner to submit an approvable Erosion and Sedimentation Control Plan, install erosion and sediment control structures, grade slopes to an angle sufficient to restrain erosion and retain vegetation, and stabilize all exposed slopes with vegetation. (Ex. R-35). Petitioner received the inspection report. (PTO Stip. 27). Because the inspection had occurred relatively soon after the hurricane, DLR did not issue an additional Notice of Violations at that time, giving Petitioner time to recover from the bad weather events. (Tr. 197). Mr. Gardner, who has worked for DLR for over 24 years, testified that it is the often the practice of DLR not to take enforcement action with problems that happen as a result of a storm or hurricane and to give landowners "a break" to recover from these events. (Tr. 1008)

39. Ms. Paith next visited the site on October 21, 1999. In the interim, Hurricane Floyd had struck the North Carolina coast on September 16, 1999 and was a storm in excess of the 10-year storm. During the October 21, 1999 visit, Ms. Paith for the first time walked the 11/12 ditch to its terminus and followed the flow of water and sediment deposits from the terminus to Cypress Branch. Severely eroded and near vertical ditch banks were evident at Ditches 14 and 15. The 11/12 and 9/10 convergence ditches had not been shaped nor seeded after the hurricanes. Sediment trap number 9, as numbered on the Erosion and Sedimentation Control Plan, which is located at the terminus of the 11/12-convergence ditch, was not evident, and there was a large sediment deposit at the end of the ditch, over one foot deep and fifty feet wide, emptying into a stream that was either Cypress Branch or a tributary of Cypress Branch. Muddy water was entering the stream at this point. At Ditch 17, she noted that the sediment trap and buffer between the ditch outfall and the coastal marsh were functioning. Along the bugging road, one side of Ditches 14 and 15 had been freshly hydroseeded, but other necessary erosion and sediment control measures were still not present. Overall, the site was in a worse condition than at the September 10 inspection. (Ex. R-37; Tr. 561-76).

40. As a result of the October 21, 1999 inspection, Ms. Paith noted that HRA continued to be in violation of the SPCA for having no approved plan, failing to have an adequate ground cover, taking insufficient measures to retain sediment onsite, failing to take all reasonable measures, having graded slopes and fills that were too steep to restrain erosion, and having unprotected exposed slopes. She also noted additional Ms. Paith took photographs during the October 21, 1999 inspection. The photographs of Ditches 14 and 15 depict steep, eroded ditch banks with fresh hydroseed material on one side of the ditch bank, and steep eroded ditch banks without hydroseed material on the other side of the ditch bank. (Exs. R-38(3), (4), (5), (6), (7)). The photographs also depict large sediment deposits in lowlands or wetlands downstream of the terminus of ditch 11/12, deposited in the direction of Cypress Branch, and deposited up to the bank of Cypress Branch, with sediment having traveled into Cypress Branch. (Exs. R-38(13), (14), (15), (16), (17), (18); Tr. 561-76).

41. As a result of the October 21, 1999 inspection, Ms. Paith noted that HRA continued to be in violation of the SPCA for having no approved plan, failing to have an adequate ground cover, taking insufficient measures to retain sediment onsite, failing to take all reasonable measures, having graded slopes and fills that were too steep to restrain erosion, and having unprotected exposed slopes. She also noted additional violations: that sedimentation damage had occurred off the tract since the last inspection and there was an inadequate buffer zone. (Ex. R-37; Tr. 200, 577). The inspection report, which was sent to and received by Petitioner, again directed Petitioner to submit an approvable Erosion and Sedimentation Control Plan, to slope all excavated drainage ditches, to keep sediment onsite and out of wetlands and natural watercourses, to install erosion and sedimentation control measures, to restore buffer zones, to grade slopes and fills that were too steep to maintain vegetation, and to protect all exposed slopes with vegetation. (Id.; PTO Stip. 30).

42. Following the October 21, 1999 inspection, Respondent issued a Notice of Additional Violations ("NOAV") of the SPCA to Petitioner on November 10, 1999, which was received by Petitioner. (Ex. R-39; PTO Stip. 31; Tr. 203, 578). The violations noted were those stated in the preceding paragraph. (Tr. 579). The NOAV also stated that Respondent would like to avoid taking further enforcement action, requested notice when corrective actions were complete, and again solicited any questions.

43. Petitioner asked Mr. Parker to respond to DLR regarding the November 10, 1999 Notice of Additional Violations ("NOAV"). The response stated that Petitioner was pursuing an erosion and sedimentation control program and attempting to establish vegetation throughout the site, and that actions would be taken in the near future to address the items included in the NOAV. Petitioner did not question, dispute, or challenge the specific observations or provisions of the NOAV. (Ex. R-40).

44. By November 19, 1999, Mr. Parker had been on the site several times. He testified that, based on his observations, he does not dispute the grounds for the NOAV. (Tr. 1071).

45. On December 8, 1999, a staff member of Mitchell and Associates visited the site to inspect all ditch outfalls emptying near Cypress Branch to determine the need for checkdams and silt basin restructuring. On December 10, 1999, Mitchell and Associates sent to Mr. Parker a letter describing work that needed to be done at many of the ditch locations. (Ex. R-41). The letter refers to outfalls by number as shown on the disapproved Erosion and Sedimentation Control Plan, (Exs. R-30 and R-31). At Dam 9, located at the outfall of the Ditch 11/12-confluence, the silt basin needed cleaning, an outfall checkdam was needed, and numerous checkdams were needed upstream of the outfall to slow water velocity. At Dam 12, the outfall of the Ditch 9/10-confluence, a silt basin needed to be cleaned out, an outfall checkdam constructed, and upstream checkdams constructed. At Dam 14, the terminus of Ditch 8, an outfall checkdam was needed and a checkdam was needed upstream. At Dam 19, the terminus of Ditch 5, nothing was needed. At Dam 20, the terminus of Ditch 4, the outfall needed to be relocated, an outfall checkdam needed to be constructed, and two checkdams were needed upstream. At Dam 21, the terminus of Ditch 3, an outfall checkdam might be needed, but the terminus looked to be in good shape. At Dam 22, the terminus of Ditch 2, the silt basin needed cleaning out, an outfall checkdam needed to be constructed, and one or two checkdams were needed upstream. At Dam 23, the terminus of Ditch 1, the silt basin was determined to be in very good shape and working perfectly. The observations of Mitchell and Associates, expressed in Exhibit R-41, confirmed that as late as December 10, 1999, few if any checkdams had been constructed at the site, outfalls generally did not have checkdams, and erosion control measures had still not been taken by that time to slow water velocity in the ditches and thereby reduce the erosive power of the flow. (Tr. 1072-76).

46. On December 16, 1999, Ms. Paith returned to the property for another inspection. (Tr. 581). This visit included her first inspection of areas to the west of Bishops Road, and she saw for the first time any of Ditches 1 through 8, which are depicted on "sheet 2" of the disapproved Erosion and Sedimentation Control Plan. (Ex. R-30). At Ditch 4, she observed that the ditch was caving in and enlarging at the power right-of-way with water dropping four feet from ground level into the ditch. The ditch has vertical cut slopes that were actively eroding, and erosion and sedimentation control structures were not present. She then visited Ditches 1, 2, and 3. She did not see a sediment trap at the terminus of Ditch 3 (sediment trap 21), meaning that if such a trap existed at all it had filled in with sediment and not been cleaned out. The lowlands at the terminus of the ditch held "several feet of accumulated sediment," sediment plumes were "obvious," with one plume being 18 inches deep. She then inspected Ditch 8, which had sediment filling the ditch, and she saw no sediment trap at the end of the ditch. The slopes of the ditch were actively eroding. She then viewed new ditches cut by the North Carolina Department of Transportation from Morris Landing Road. (Ex. R-42; Tr. 587-97).

47. Photographs taken by Ms. Paith on the December 15, 1999 inspection showed active erosion at Ditch 4 (Ex. R-43(1), (2)) and at Ditch 8 (Ex. R-43(3)).

48. On the December 15, 1999 inspection report, which was sent to and received by Petitioner, Ms. Paith noted violations of no approved plan, failure to provide adequate ground cover, insufficient measures to retain sediment onsite, failure to take all reasonable measures, inadequate buffer zone, excessive slopes on ditches and fills, and unprotected exposed slopes. She noted that sedimentation damage had again occurred since the last inspection. (Ex. R-42).

49. As a result of the November 10, 1999 Notice of Additional Violations and the December 15, 1999 inspection report indicating that the violations had still not been corrected, the DLR sent to Petitioner a "Notice of Continuing Violations for Notice of Additional Violations" on January 5, 2000, noting that the additional violations from the November 10, 1999 Notice had still not been corrected, that progress toward compliance had not begun in the areas west of Bishops Road, that off-site sediment conditions were documented again in wetlands, and that buffer zones were not being maintained. (Ex. R-44; Tr. 215-18, 606).

50. On March 5, 2000, DLR Director Charles Gardner assessed a Second Civil Penalty totaling \$118,000.00 for the following violations of the SPCA:

- a. From April 24, 1999 through December 15, 1999, violations of one or more of the requirements of the SPCA or the rules adopted thereunder, as outlined in the NOV, continued to exist on the subject property as follows:
 1. 15A N.C.A.C. 4b.0005 was violated for failure to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity.
 2. N.C.G.S. § 113A-57(2) was violated for failure to maintain on graded slopes and fills an angle which can be retained by vegetative cover or other adequate erosion control devices or structures.
 3. N.C.G.S. § 113A-57(2) was violated for failure on exposed slopes within 30 working days of completion of any phase of grading to plant or otherwise provide ground cover, devices, or structures to restrain erosion.
- b. From November 12, 1999 through December 15, 1999, violations of one or more of the requirements of the SPCA or the rules adopted thereunder, as was outlined in the NOAV, existed on the subject property as follows:

1. N.C.G.S. 113A -57(3) was violated for failure on a tract of more than one acre, where more than one acre is uncovered, to install such sedimentation and erosion control devices and practices as are sufficient to retain sediment generated by land-disturbing activity within the boundaries of the tract during construction.
2. N.C.G.S. 113A-57(1) was violated for failure to provide in proximity to a lake or natural watercourse, a buffer zone as defined in 15A N.C.A.C. 4A.0005(4).

(Ex. R-45; Tr. 896, 904-05, 987-89, 1013-19).

51. The parties have submitted into evidence the invoices paid by Petitioner during 1998 and 1999 for the excavation and related work at the tract. The invoices reflect the work of Mr. Hollis, Mitchell and Associates, Parker and Associates, and the several other contractors involved in carrying out the excavation work. The invoices generally depict charges for time of various personnel, charges for the use of heavy equipment, and charges for materials used at the site. (Ex. P-25, P-26, R-74; Tr. 1511-15, 1543). The invoices show no charges incurred for hydroseeding or other work, equipment, or materials designed to establish vegetation on the ditch slopes and spoil piles at any time during 1998. The 1999 invoices show no expenses paid for vegetation-related activities before October 1999. On September 13, 1999, Mr. Parker proposed to Petitioner a "grassing program of hydroseeding ditch banks and spoil piles." (Ex. P-19). Petitioner commenced hydroseeding work in October following this proposal, and during the October 21, 1999 inspection, Ms. Paith observed hydroseeding equipment and a hydroseed operator present at the site with some hydroseeding work having been done along roadside ditches. During October and early November, some hydroseeding was performed. (Ex. P-20). As late as December 16, 1999, however, no apparent effort had been made to establish vegetation on ditches west of Bishops Road. Even as late as the first site visit by Dr. Lea, Petitioner's expert witness, in April 2000, Dr. Lea observed large areas of unvegetated sediment deposits at the outfalls of Ditches 2, 9/10-convergence, and 11/12-convergence, which needed planting to restrain sediment. (Tr. 1441-48, 1456-58). At the same visit, Kelli Blackwelder of the Division of Forest Resources observed that neither Ditch 4 nor Ditch 2 had sufficient vegetation to restrain erosion, and that spoil piles along Ditch 4 were not sufficiently vegetated to restrain erosion. (Ex. R-76, R-78; Tr. 2033-35).

52. Before the hurricanes of September 1999, Petitioner failed to plant or otherwise provide vegetative cover sufficient to restrain erosion on exposed ditch slopes and spoil piles. While the hurricanes of September 1999 undoubtedly scoured away some naturally-recurring vegetation on ditch slopes and spoil piles, Petitioner failed within thirty days or within a reasonable time after those hurricanes to plant or otherwise provide ground cover on ditch slopes and spoil piles across the site. The only evidence of hydroseeding after the hurricanes is along Ditches 14 and 15, and on spoil piles being regraded alongside the 11/12-convergence ditch.

53. Mr. Sams and Mr. Parker both testified without contradiction that sedimentation control structures at the outfalls of the ditches on the tract should have been constructed with rock checkdams at the outfall structure in addition to a sediment basin. Except possibly at the 11/12-confluence ditch, Petitioner constructed no rock checkdams in association with sediment basins at the terminus of any of the ditches when they were excavated in 1998. The 1998 invoices show no delivery of rock material to the site. At some point, marl, a lightweight stone, may have been used to construct a sediment checkdam at the outfall of the 11/12-confluence ditch, and may have been used after Hurricane Bonnie in August 1998 to armor culverts under the logging road at Ditches 9/10 or 11/12, but otherwise was not used. During Mr. Parker's visits to the site before the hurricanes in 1999, he observed no use of rock for checkdams. (Tr. 1066). No invoices for the delivery of rock for the construction of checkdams were identified for 1999, and Mitchell and Associates as late as December 10, 1999 recommended the construction of checkdams at the various outfall dams as well as along the course of many of the ditches. Petitioner, therefore, failed to install such sedimentation and erosion control devices and practices as would be sufficient to restrain erosion.

54. Slopes of many of the ditches when excavated were excessively steep and in some cases practically vertical. (Tr. 139). During 1999, after the initial inspections and NOV's, and before the hurricanes, Petitioner failed to regrade ditch slopes to establish angles on which vegetative cover could be retained. While the hurricanes of September 1999 undoubtedly scoured the bottom of ditches and may have steepened ditch slopes in some locations, there is no evidence that Petitioner had established suitable ditch slopes prior to those hurricanes, nor any evidence of regrading of slopes within a reasonable time after the hurricanes, and no evidence of regrading of slopes before the end of the period covered by this penalty assessment, December 16, 1999.

55. At the outfalls of Ditches 2, the 9/10-convergence, and the 11/12-convergence, large sediment plumes were deposited into wetlands extending from the outfall of the ditch to the banks of Cypress Branch. At the outfall of the 11/12-confluence, the sediment completely filled a stream that flowed across the outfall and toward Cypress Branch. After those sediment plumes were deposited (some time prior to their first being documented on October 21, 1999 by Ms. Paith) Petitioner did not take timely and adequate measure to restrain further sediment transport from those deposits into Cypress Branch, and did not maintain an adequate buffer zone along Cypress Branch and along its tributaries. The buffer zone protecting Cypress Branch and its tributaries had not been repaired and maintained by the last date covered by the penalty assessment, December 16, 1999, nor by the date of the subsequent observations of Dr. Lea and Ms. Blackwelder in April 2000. Dr. Lea observed at Ditch 2 and the 9/10-convergence ditch that sediment that had moved from the terminus of the ditches, through the sediment basins and streamside management zone to deposit into Cypress Branch. (Tr. 1472-74).

56. Had Petitioner installed adequate erosion control structures, ditch slopes, buffer zones, and vegetative cover before the hurricanes of September 1999, the sedimentation impacts of the hurricanes, both onsite and offsite, would have been substantially reduced. (Tr. 978, 1009).

Additional Facts Bearing on Contested Issue No. 1. - Applicability of the SPCA Forestry Exemption

57. In 1998, while the ditching was occurring on the Morris Landing tract, the property remained for sale. With Mr. Yow's consent and cooperation, John Parker was asked by a prospective purchaser to prepare a development schedule showing a projected timeline and expenses for developing a golf course residential development on the entire tract. (Ex. P-15; Tr. 1042-47). In order to prepare the development schedule, Mr. Parker visited the site with Mr. Yow. (Tr. 1043-44). Mr. Parker provided Mr. Yow a copy of the schedule sent to the prospective buyer. (Ex. R-15; Tr. 1045).

58. In December 1998, as the Holly Ridge ditch excavation was concluding, the North Carolina Coastal Resources Commission was considering a change in its estuarine buffer rules, which if adopted would create a larger buffer zone along the Holly Ridge tract's estuarine shoreline. Mr. Yow asked Mr. Parker to prepare design layouts of potential residential development of the estuarine waterfront portion of the Holly Ridge tract because the Petitioner had the "concern that the setbacks of buffers may extend so far into the property that it would render it basically unusable." (Tr. 1050). When Mr. Parker had not prepared the development layouts by February 5, 1999, Mr. Yow sent Mr. Parker a memo by fax stating that Mr. Yow was "nervous" and asking that the layouts be prepared. (Ex. R-19; Tr. 1051).

59. In February 1999, Mr. Parker prepared and submitted to Mr. Yow two drawings of potential development layouts of the waterfront property showing single-family and multi-family residential units on the waterfront area of the property. (Ex. R-16, R-17, R-18, Tr. 1052-54). This work was performed after the excavation of the ditches was complete and over a year before Petitioner, through counsel, first claimed to be engaged in ditching for forestry purposes.

60. Several witnesses described observations concerning the excavation activity that bear on the determination of the purpose of the activity. Kelli Blackwelder, a Registered Forester with 15 years of experience with the North Carolina Forest Service, visited the site on April 25, August 24, and October 3, 2000, and observed that several of the ditches were very large and meandering. Based on her experience, she did not view the ditches as typical forestry drainage because of the sinuosity (or meandering nature) and excessive depth and width of the ditches. (Ex. R-82; Tr. 2020). Moreland Gueth, the State's Watershed Protection Forester with 20 years work experience in forestry, visited the site on October 3, 2000. According to Mr. Gueth, logging in itself would not have persuaded the Division of Forest Resources ("DFR") in one way or the other to determine whether the site was being used for forestry. In his experience as a forester, logging is often "the first step to development." (Tr. 1962). During his visit, he "saw an awful lot of ditching that we felt threw up red flags, based on our experience with forestry - [regarding] the amount and extent [of ditching]." (Tr. 1965)

61. Dan Sams, Regional Engineer in the Wilmington regional office for the Respondent Division of Land Resources, who has visited hundreds of sites on the coastal plain of North Carolina, described the grid layout of ditches that he typically sees on forestry sites. In his experience, ditches on sites which are being excavated as a prelude to future development typically follow the contours of the land. He compared aerial photographs of typical grid-like forestry drainage with meandering ditches associated with residential development practices. (Exs. R-58, R-59; Tr. 120-28). According to Mr. Sams, throughout the entire penalty period, no one associated with Petitioner ever mentioned that the land-disturbing activity was conducted for a forestry purpose. (Tr. 221).

62. Several witnesses testified concerning what was said, and what was not said, by Mr. Yow or the other owners of the property regarding the purpose of the ditching activity. Mr. Yow testified that the ditching was undertaken to restore the property to the condition it was in prior to the damage from Hurricanes Bertha and Fran. The property had been for sale, and it was not marketable in its post-Fran condition: "You couldn't sell the property in the shape it was in if you were going to sell it." (Tr. 1585). The property remained for sale after Hurricane Fran, and during the excavation.

63. Dr. Lea, Petitioner's expert witness, testified that in a drainage project, it was important for those who were deciding where to dig the ditches to know the reasons for the ditching activity. (Tr. 1462). During his first visit to the site in April 2000, even Dr. Lea could not understand why Ditch 4 had been constructed through a "fairly large sandy upland? flanked near a wetland," observing sloughing of the headwall and erosion through the ditch. (Tr. 1341, 1343, 1350). While inspecting the Ditch 17 system, he also observed that even though he understood the purpose of the ditching to be to remove water from the wetlands [around Ditch 17], it was impossible to access that area for any timber harvesting because it was too wet and had no access road. (Tr. 1438-39). Mr. Hollis testified that the landowners' purpose, as communicated to him, was to restore hurricane damage and to contain and reduce wetlands, and that no mention was made of a forestry-related purpose. (Tr. 793).

64. In 1989, the General Assembly amended the Sedimentation Pollution Control Act to place restrictions on the availability of the forestry exemption under that Act. (Tr. 1894). Prior to the 1989 Amendment, the exemption was unconditional: land-disturbing activities conducted on forestland and for the production and harvesting of timber and timber products were exempt from the Act's

requirements. The 1989 Amendment limited the availability of the exemption to those sites which otherwise met the test for the exemption and on which the activities were conducted in compliance with the Forest Practice Guidelines Related to Water Quality ("FPGs"), which were rules that the amendment required DFR to promulgate. (Ex. R-56; Tr. 93, 916-18, 1894).

65. Following the amendment, DLR and DFR entered into a Memorandum of Agreement ("MOA") to address their respective agencies' roles in evaluating sites and implementing the new SPCA provision. (Ex. R-56). In the 1989 MOA, DFR agreed to make members of the forestry and logging communities and the general public become, as much as possible, aware of the required performance standards for water quality necessary to retain the forestry exemption, and DFR has published the FPGs on its website and otherwise educated the public and the forestry community about them. On forestry operations, DFR agreed to make an effort to mitigate and correct FPG and SPCA violations. (Tr. 919-20, 1895). When DFR discovered violations of the SPCA, DFR agreed to "make a written referral to the Division of Land Resources," the enforcing agency. (Ex. R-56 at 1). Division of Land Resources agreed to provide technical assistance to DFR on SPCA issues, to refer to DFR those forestry activities on which potential violations were observed, and to take responsibility for forestry activities that failed to follow BMPs. (Id. at 2; Tr. 920, 1895). If a forestry site in DFR's jurisdiction did not come into compliance with the FPGs in a reasonable period of time, DFR would refer it to DLR or back to DLR for enforcement under the SPCA. (Tr. 920, 1897). This agreement was entered into prior to the effective date of the FPGs, in anticipation of the fact that the two agencies would have a need to coordinate their activities in the future.

66. After some experience implementing the new, restricted forestry exemption, DLR and DFR Division Directors drafted and distributed to their staffs an internal memorandum dated May 5, 1992, addressing the need for further clarification of the inter-agency referral procedures for land disturbances associated with forestry activities. (Ex. R-57). In the memorandum, the two Division Directors identified as one problem area determining whether activities on some sites were for forestry purposes or for development purposes. The memorandum stated that in the future, staff "should" follow procedures set out in the memorandum. (Ex. R-57 at 1).

67. In 1993, DFR adopted internal policies more specifically outlining steps to be taken by its staff in carrying out the forest water quality program, which includes administration of the FPGs. (Ex. P-3).

68. The 1989 MOA, the 1992 internal memorandum, and the 1993 DFR policies are all internal agency documents, not disseminated widely to the public. The FPGs and BMPs, in contrast, are disseminated widely to the public and are the subject of a great deal of public education activity by DFR.

69. At no time during the DLR enforcement activities at the Holly Ridge tract through the date of issuance of the Civil Penalty Assessment on 5 March 2000 did Petitioner ever claim to DLR or to DFR that its activities were for timbering or logging, or for the production and harvesting of timber or timber products, or that Petitioner was claiming to be exempt from the SPCA. (Tr. 916-20).

70. When Petitioner filed a Petition for Contested Case Hearing on 3 April 2000, to appeal the second Civil Penalty Assessment, Petitioner claimed for the first time that its activities were for the production of forest products, and that Petitioner was therefore claiming the forestry exemption in the SPCA. When this claim was made, DLR stopped its continuing inspections and compliance efforts to enable DFR to assess the claim for the forestry exemption and visit the site. (Tr. 362-63, 1933).

71. DFR sent Kelli Blackwelder to visit the site, which she did on April 25, 2000. She visited Ditch 4 and Ditch 2, observed excessive erosion, large amounts of silt and sediment, and meandering, deep and wide ditches. (Tr. 2012-17, 2032-35). She saw sediment entering the stream where the sediment plume from Ditch 2 traveled to Cypress Branch. She testified that if she had been assessing the site for violations of FPGs, Ditch 2 would have been in violation for not maintaining an adequate streamside management zone performance standard. (Tr. 1978, 2015-17, 2052-53).

72. She also noted in her first visit that the soils at the site, primarily sands, are not very productive types of soils for timber purposes. If evaluating the site for timber management, she would not recommend spending much money to manage the site for timber purposes. (Tr. 2018, 2050-52). She did ask Petitioner's consultant and counsel at the site what the landowners' objectives were and they said they were unsure; they did not describe a forestry purpose. (Tr. 2017).

73. Based upon Ms. Blackwelder's observation, Moreland Gueth, the DFR Water Quality Forester, drafted a letter noting that the site "does not resemble any forestry operation [Blackwelder] has ever dealt with." The ditches were noted to be deep, wide and meandering. "They do not follow the typical pattern drainage of a forestry operation? . The ditches will impede forest management operations. Typically, access is needed over a rotation for thinning, prescribed burning, fire control and final harvest. The size and number of ditches will severely limit access to the tract for any of these purposes." (Ex. R-48; Tr. 1908-09). Based upon these observations, Mr. Gueth's draft letter stated that the Division of Forest Resources declined to accept that the work on the tract was a forestry operation and as such qualified for the forestry exemption under the SPCA. (Ex. R-48).

74. After a period of intra-agency consideration, Division of Forest Resources decided that because there was some history of forest activity on the site, the letter would be revised to state that "we accept that [the tract] is currently being managed for forestry purposes," despite the agency's concern that the ditching was "beyond what was needed for forestry" (Ex. R-47 at 1; Tr. 926, 1912).

The letter also went on to state that "this acceptance does not in any way address the legality of the ditching that has taken place." (Ex. R-47). Mr. Gueth testified that at the time of his July 28, 2000 letter, he was not aware of specific information concerning the landowner's intentions, or of the facts regarding various development plans that had been prepared for the tract in the past. (Tr. 1934-36, 1940).

75. On her return visit on August 24, 2000, Ms. Blackwelder observed similar conditions noting that at Ditch 2 the sediment was still flowing down the hill from the ditch into Cypress Branch and still violating the streamside management zone performance standard of the FPGs. (Exs. R-50, R-51; Tr. 2023).

76. Moreland Gueth visited the site on October 3, 2000. During that visit, he observed conditions similar to what Ms. Blackwelder had described in her previous visits including the sediment plumes into Cypress Branch at the 11/12-convergence ditch and the 9/10-convergence ditch. (Tr. 1917-20). During the same visit, Kelli Blackwelder, who was also present, observed that in terms of sediment movement and amounts, the site had not improved since her previous visit. (Ex. R-83; Tr. 2024-31). At the 9/10-convergence ditch, she observed water flowing through a silt fence into Cypress Branch and sediment being deposited into the stream. (Tr. 2027-2030).

77. Ms. Blackwelder and Mr. Gueth both determined on their visits that the site was not being managed in compliance with the FPGs. (Tr. 1987, 1990, 2015, 2023-24).

78. As result of the existing DLR penalty assessments and ongoing litigation, the long period of time between the excavation activities and the first claim of any forestry purpose, the indications from the nature of the ditching activity that the ditches were not constructed for the purpose of producing or harvesting timber and timber products, and the observations of non-compliance with the FPGs, DFR declined to take "jurisdiction" of the site. (Tr. 1933). Mr. Gueth testified that it was DFR's "position that until it [Morris Landing tract] was resolved with Land Resources and the erosion and sedimentation control plan had been submitted that we [DFR] would not get involved. But once that was settled, then we would deal with it under Forest Practice Guidelines from that point following." (Tr. 1933, 1989).

79. Based on all the evidence, the undersigned finds that Petitioner did not conduct the ditch excavation for the production and harvesting of timber and timber products. In the face of all of the evidence indicating that the excavation was to improve drainage generally and to restore and improve the marketability of the property for development purposes, the undersigned does not credit Mr. Yow's testimony that the excavation was for a forestry purpose.

80. The undersigned finds that Petitioner would not have taken prompt and reasonable steps to comply with FPG compliance instructions from DFR even if DFR had been involved at an early stage of the Respondents' activities related to the Morris Landing Tract. This is apparent from the following facts, among others:

- (a) According to Petitioner and its consultants, Petitioner did not know of the forestry exemption to the SPCA. Therefore, Petitioner believed that its land disturbing activities were subject to the SPCA. Petitioner, per its consultant Mr. Hollis, knew about the requirements of the SPCA from the beginning. Neither before, nor during, nor for months after the land disturbing activity did Petitioner take substantial steps to comply with the SPCA.
- (b) Once Respondent began its activities intended to have Petitioner bring the site into compliance with the SPCA, Petitioner failed to follow the compliance instructions from DLR (expressed first in Inspection Reports, then in Notices of Violation, and then confirmed in the first Civil Penalty Assessment) in a timely way, even though Petitioner believed the SPCA applied to it and did not challenge the instructions.
- (c) The compliance instructions issued by DLR were similar in many respects to instructions that would have been given by DFR regarding compliance with the FPGs. Compliance with both the SPCA and the FPGs involves prompt rehabilitation of excavated areas sufficient to prevent sedimentation of adjoining waterbodies by insuring revegetation and by maintaining effective buffer zones (or Streamside Management Zones ("SMZs")). Petitioner failed to take sufficient action to follow such instructions from DLR at least through December 15, 1999, and there is no reason to believe that the outcome would have been different had the instructions come from DFR.

Additional Facts Bearing On Contested Issue No. 3 - Penalty Amount

81. After the Notice of Continuing Violations of Additional Violation was sent to Petitioner informing it of its continuing violations and a potential civil penalty, Dan Sams, the Regional Engineer, sent an enforcement referral to the Director through the Assistant State Sediment Specialist. The enforcement referral contained a chronology and draft guidelines providing information which corresponded to the civil penalty assessment statutory criteria. (Ex. R-61, R-63, R-69, Tr. 266-67, 293). It also contained inspection reports, pertinent correspondence, phone logs and photographs. (Tr. 888).

82. Upon reviewing the enforcement file, the prepared guidelines, a violation chart and his own worksheet, the Director assessed a civil penalty of \$118,000. (Tr. 891, 910, 915). The Director determined that several violations were continuing: failing to obtain an approved erosion and sedimentation control plan, failing to take all reasonable measures, graded slopes and fills too steep, and unprotected, exposed slopes. (Ex. R-65, R-66, Tr. 904-905). He also determined that several violations were additional violations: failing to provide adequate ground cover, insufficient measures to retain sediment on site, and an inadequate buffer zone. (Ex. R-66, Tr. 904-905). Since the continuing violations and additional violations had differing time periods, the Director used separate worksheets to calculate the components of the penalty. (Ex. R-70).

83. The Director assessed a nominal \$5/day civil penalty for three of the continuing violations: failure to take all reasonable measures, graded slopes and fills too steep, and unprotected, exposed slopes. The assessment of a nominal \$5/day civil penalty for each type of violation was the Director's usual practice. (Tr. 911). He used the nominal \$5/day amount to document the types of violations and to make some assessment for the presence of a number of different types. (Tr. 911).

84. The Director did not assess for Petitioner's continuing failure to obtain an approved plan although there was no approved plan at the time of the second assessment. (Ex. R-69, R-70, Tr. 911, 934). If he had not already reached the maximum daily penalty on the other violations, he could also have assessed for not having an approved plan. (Tr. 1017). If he had, he might have assessed similarly to the first civil penalty assessment which equaled \$100/day. (Tr. 934, 1016).

85. The Director assessed \$400/day for the degree and extent of harm caused by the violations. The Director relied on the information provided in the guidelines and all the other material in the file. (Tr. 911). He specifically noted that the degree of off-site damage was severe and the quantity of off-site sedimentation was in the third order of magnitude from 100 to 999 cubic yards. (Tr. 911, 935). In considering the damage to be severe, the Director relied upon the judgment of the Regional Engineer and the on-site inspector. (Tr. 936, 956). The Director's own definition of severe impact to an on-site stream would be a "large amount of sediment going into an area that could be damaged by sedimentation." (Tr. 936). He also takes the position that sedimentation that goes into any bodies of water, if they are waters of the State, could be interpreted as off-site sedimentation. (Tr. 957, 988). Similarly, the "resource" refers to any water bodies, whether on-site or off-site. (Tr. 960). The worksheet indicated a range of assessment between \$300 and \$500 for severe damage. (Ex. R-70). The Director felt an appropriate assessment was \$400/day. (Ex. R-70, Tr. 911).

86. This portion of the assessment is problematic in that it is based upon the District Engineer's report that between 100 and 999 cubic yards of sediment were deposited off site. The evidence made very clear that vast quantities of soil eroded from the miles of steep, unprotected ditch banks and spoil piles. Logically, that soil must have gone somewhere, and the direction in which it flowed was toward Cypress Branch and the Atlantic Intercoastal Waterway and the adjacent marshes. To the good fortune of all involved, large amounts of this eroded soil settled out in ditch bottoms and forest floors on-site. Some of it certainly reached Cypress Branch and the marshes, per the above findings of fact, and there is a reasonable inference that the amount was substantial. However, there is no clear evidence that the amount was 100 to 999 cubic yards.

87. Given the information presented to him, the Director's determination regarding extent of harm was reasonable. However, the purpose of this contested case is to review the overall action of the agency, not just its ultimate conclusion with the Director.

88. Given the totality of the evidence regarding off-site harm and harm to waters of the State, a daily assessment of \$125.00 is reasonable and supported by the evidence. It is manifest that off-site sedimentation occurred. Setting the penalty amount at the lower end of the "moderate" range keeps the penalty well within the evidence.

89. The Director assessed \$100/day for the plan effectiveness. DLR interprets plan effectiveness as the steps taken to correct the violations. (Tr. 912). The Director acknowledged that some efforts were made, "but pretty inadequate efforts out there to make corrections. Basically, there was certainly insufficient efforts." (Tr. 912). The Director recalled that there were some grassing attempts and an effort toward developing an erosion and sediment control plan, but that was all. (Tr. 972). Although there were storms in September and October which would have made corrective actions difficult, the penalty period extended from late April through mid-December. (Tr. 973-977). The site was out of compliance for four to five months during the second civil penalty assessment period and nine months from the time of the initial inspection. (Tr. 1008). If the vegetation had been established prior to the storms, then it would have made a significant difference in the impact of the hurricanes on the sedimentation problem at the site. (Tr. 978, 1009). In any case, hydroseeding steep slopes would have been ineffective as seeding will not hold on vertical slopes or even two horizontal to one vertical slopes for the sandy soils and groundwater seepage present on the site. (Tr. 1009). The slopes remained too steep throughout both civil penalty assessment periods. (Tr. 1010).

90. The Director assessed \$200/day for Petitioner's prior record in not taking action on the site after earlier notices of violation and a civil penalty assessment. Petitioner received the March 3, 1999 Notice of Violation on March 4, 1999. (Ex. R-22). Petitioner received a Notice of Continuing Violation on May 3, 1999. Petitioner received the first Civil Penalty Assessment on July 21, 1999. (Ex. R.-28). The first Civil Penalty Assessment was not appealed. DLR continued to inspect the site and find it in non-compliance on

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September 10, October 21, and December 16, 1999. (Ex. R-35, R-37, R-42). The Director felt that the prior violation on the site did not get the message across so that it was necessary to assess \$200/day for Petitioner's prior record. (Tr. 912).

91. Although the Director considered the remaining criteria, as was his regular practice, he did not assess additional penalties for those criteria. (Ex. R-70, Tr. 912). If he had known Petitioner was aware of the requirement for an erosion and sedimentation control plan, but decided to wait for a notice of violation to file an as-built plan, as the evidence showed, he would have assessed an additional penalty amount for willfulness. (Tr. 1002). The undersigned specifically finds the violations to have been willful. However, the Director's failure to assess for willfulness is not challenged here, and no penalty for willfulness will be added here.

92. The penalties assessed on the first worksheet totaled \$715/day, so the Director reduced the daily penalty to the statutory maximum of \$500/day in effect during the majority of the violation time period. (Tr. 912). The daily penalty was multiplied by the days of violation which extended from the day after the earlier civil penalty through the date of the December 15, 1999 inspection, i.e., 236 days. (Ex. R-45, R-70, Tr. 913).

93. The civil penalties assessed for the continuing violations were consistent with other assessments for the worst sites the Director reviews. (Tr. 915).

94. The Director also considered the additional violations, but did not assess any penalties as he had already surpassed the maximum daily penalty. (Tr. 912-913, 1016). If he had not reached the maximum daily penalty, he would have assessed for the additional violations. (Tr. 1016). If he had assessed for the additional penalties, he would have followed a similar pattern and assessed \$5/day for each violation. (Tr. 913). He would not have considered one of the additional violations because of an incorrect citation in the notice of violation. (Tr. 912-913). The time period for additional violations extended from the November 12, 1999 date of receipt of the Notice of Additional Violations through the date of the December 15, 1999 inspection, i.e., 34 days. (Ex. R-70).

95. The Director's assessment is corroborated by Ms. Blackwelder's statement that this site was the most severe she had ever seen. (Tr. 2037).

96. The above reduction in the penalty for degree and extent of harm reduces the total penalty for violations f, h, and I from \$715 to \$440 per day. Over the penalty period of 236 days, this penalty amounts to \$103,840. The fact that the daily penalty is now less than \$500 per day allows the additional penalties assessed by the Director for violations e and g (NOAV) to be included. These totaled \$10 per day for 34 days, or \$340. Although the Director might have assessed additional penalties and neglected to do so only because the penalties he had already assessed exceeded \$500 per day, his failure to do so is not on appeal here and therefore will not be corrected here. The total assessed penalty should be \$104,180, rather than the \$118,000 assessed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law regarding the Contested Issues.

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.G.S. § 150A-23 and 113A-64(a)(2).
2. The Petitioner is a "party aggrieved" by the 5 March 2000 Civil Penalty Assessment within the meaning of Chapter 150B.
3. All parties have been correctly designated and are properly before the Office of Administrative Hearings. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter.
4. The Petitioner bears the burden of proof on the first and third contested issues: whether the land-disturbing activities covered by the 5 March 2000 Civil Penalty Assessment are exempt from regulation under the SPCA, and whether the Respondents erred in calculating the amount of the penalty assessed. Britthaven v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E. 2d 455, 461, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995). To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and 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 in determining that Petitioner's land-disturbing activities are not exempt from regulation under the SPCA and in calculating the amount of the penalty assessed.
5. Respondents bear the burden of proving that Petitioner violated the SPCA as determined in the Civil Penalty Assessment.
6. The applicable version of the Administrative Procedure Act directs that the decision in this contested case must be supported by substantial evidence admissible under N.C.G.S. 150B-29(a) ("Rules of Evidence"), 150B-30 ("Official Notice") or 150B-31 ("Stipulations"). N.C.G.S. § 150B-36(b) (2000).

7. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Rusher v. Tomlinson, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), aff'd, 343 N.C. 119, 468 S.E. 2d 57 (1996); Comm'r of Insurance v. Fire Insurance Rating Bureau, 292 N.C. 70, 80, 231 S.E.2d 882 (1977). "It is more than a scintilla or a permissible inference." Lackey v. Dept. of Human Resources, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982).

8. As agreed by the parties in the PreTrial Order, Respondents and Respondent-Intervenors have presented evidence jointly, and the undersigned has considered evidence presented by the Respondents and Respondent-Intervenors as having been presented jointly in evaluating whether the parties have met their respective burdens of proof on the contested issues.

Contested Issue No. 1 - Exemption from Regulation Under the SPCA

9. The SPCA exempts from its requirements certain land-disturbing activities, including "activities undertaken on forestland for the production and harvesting of timber and timber products and conducted in accordance with best management practices set out in Forest Practices Guidelines Related to Water Quality as adopted by the Department." N.C.G.S. § 113A-52.01(2). The exemption is available only when three requirements have been satisfied. First, the land-disturbing activities must have occurred on "forestland." Second, the land-disturbing activities must have been undertaken "for the production or harvesting of timber and timber products." Thus, the nature and purpose of the activities must be examined. Third, the land-disturbing activities must have been conducted in accordance with the Forest Practice Guidelines ("FPGs"), which are rules promulgated by DENR's Division of Forest Resources and codified at Subchapter II of Title 15A of the North Carolina Administrative Code. All of the requirements of the SPCA apply to any land-disturbing activity that is undertaken on forestland for the production and harvesting of timber and timber products but that is not conducted in accordance with the Forest Practice Guidelines Related to Water Quality. N.C.G.S. § 113A-52.1(b).

10. In construing statutes, "the basic rule is to ascertain and effectuate the intent of the legislative body. The best indicia of that intent are the language of the statute?the spirit of the act and what the act seeks to accomplish." Allen v. Ferrera, 141 N.C. App. 284, 288, 540 S.E.2d 761, 765 (2000); see also Multimedia Publishing of North Carolina, Inc. v. Henderson County, 136 N.C. App. 567, 570, 525 S.E.2d 786, 789 (2000) (legislative intent "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied") (quoting Milk Commission v. Food Stores, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)).

11. In particular, legislative intent in the creation of an exception to a statute is interpreted in favor of furthering the underlying purpose of the statute. "Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws, and those seeking to be excluded from the operation of the law must establish that the exception embraces them." News & Observer Publishing Co. v. Interim Bd. of Education, 29 N.C. App. 37, 47, S.E.2d 580, 586 (1976). When a statute provides for an exemption from a regulation deemed "vital to the public interest," uncertainties regarding the applicability of the exemption should be resolved in favor of the State and the public interest. See, e.g., In re North Carolina Inheritance Taxes, 303 N.C. 102, 106, 277 S.E.2d 403, 407 (1981) ("When the statute provides for exemption from taxation?any ambiguities are resolved in favor of taxation"); Aronov v. Secretary of Revenue, 323 N.C. 132, 140, 371 S.E.2d 468, 472 (1988) ("A statute providing exemption from taxation is strictly construed against the taxpayer and in favor of the State").

12. In enacting the SPCA, the North Carolina legislature recognized that the "sedimentation of streams, lakes, and other waters of this State constitutes a major pollution problem" and deemed control of erosion and sedimentation "vital to the public interest and necessary to the public health and welfare." N.C.G.S. § 113A-51. The legislative intent underlying the SPCA is to "protect against the sedimentation of our waterways." McHugh v. North Carolina Department of Environmental, Health, and Natural Resources, 126 N.C. App. 469, 476, 485 S.E.2d 861, 866 (1997). In light of this legislative intent, any exemption from the SPCA's operation should be strictly construed so as not to undermine the "spirit of the act." Allen, 141 N.C. at 288, 540 S.E.2d at 765.

13. Until 1989, the SPCA contained an unconditional exemption for land-disturbing activities on forestland for the production and harvesting of timber. In order to improve protection of water quality and reduce sedimentation from forestry operations, the General Assembly amended the SPCA in 1989 to restrict the exemption, leaving the exemption available only to those land-disturbing activities conducted in accordance with Forest Practice Guidelines Related to Water Quality. The amendment sharply limited the applicability of the forestry exemption so that it applies only when the land-disturbing activities are conducted in a manner consistent with the FPGs and therefore consistent with protecting water quality and with the overall purpose of the SPCA.

14. Petitioner's land-disturbing activities were conducted on "forestland" within the meaning of N.C.G.S. § 113A-52.01(2).

15. In assessing whether land-disturbing activities undertaken on forestland were undertaken "for the production and harvesting of timber and timber products," the purposes for which the activities were conducted and the objective nature of those activities must be evaluated. The fact that a landowner may have a history of management activities and uses of the land involving timber production is not by itself determinative, nor is the fact that timber may have been cut in connection with the land-disturbing activities. Land-disturbing activities undertaken on forestland to prepare the property for development, to improve the marketability of the

property for development, or to generally improve drainage of the property are not activities which qualify for the SPCA's forestry exemption.

16. Petitioner has not met its burden of proof to show that its land-disturbing activities on the Morris Landing tract were undertaken "for the production and harvesting of timber and timber products." This conclusion is supported by numerous Findings of Fact, which will not be recited again in detail here but which may be summarized as follows:

- a. Petitioner and its predecessors had a long history of evaluating and promoting the residential real estate development prospects of the tract, preparing development drawings of the tract, and marketing the tract for development purposes. Petitioner and its principals are extensively engaged in the business of residential real estate development and are not in the business of timber management.
- b. The consultants and contractors engaged by the Petitioner to plan and conduct the excavation activities are persons who assist landowners engaged in development. Petitioner's consultants do not have timber management expertise and offered no timber management expertise or services in planning and carrying out the excavation activities. At no time during the approximately year-long excavation project did any person with timber management experience or expertise evaluate, comment on, or assist in determining where or how to excavate the ditches to improve timber production, to enable timber harvesting, or to comply with the FPGs. The Petitioners did not inform their consultants that the work had a timber production purpose. The location and type of excavation was not guided by any timber management plan.
- c. No credible timber management purpose has been described for the highly meandering, deep and wide rim ditches designated as Ditches 1, 2, 3, 5, 7, 8, and 17, or for Ditch 4 through a "branch bottom." Ditches 14, 15, and 16 drain the onsite road which provides access to the site for any purpose.
- d. During and even after the excavation, Petitioner continued to participate in evaluating the property for development and for marketability, including in June 1998 and January 1999. During 1999, when DLR undertook enforcement activities related to the tract and issued Notices of Violation, Petitioner engaged additional consultants and experts in land development including Mr. Parker and attorney Ken Kirkman. Despite the sophistication, experience, and legal and regulatory expertise of the Petitioner, Petitioner's consultants, and Mr. Kirkman, at no time during 1999 and at no time prior to the imposition of the March 5, 2000 Civil Penalty Assessment did Petitioner notify anyone that its land-disturbing activities were for the purpose of production and harvesting of timber. Petitioner did not voice any objection or raise any question to the statement in Respondents' First Notice of Violations that "the outline and construction of the ditches appear to be consistent with the type of construction associated with future site development." (Ex. R-22).

17. Because the undersigned has concluded that Petitioner did not conduct land-disturbing activities "for the production and harvesting of timber and timber products," Petitioner is not exempt from the SPCA, and the issue of whether the Petitioner's land-disturbing activities were conducted in accordance with the FPGs need not be reached. However, in the event that this conclusion that Petitioner's activities were not undertaken for the production and harvesting of timber is not accepted, the undersigned will address the additional question of whether the activities were conducted in accordance with the FPGs.

18. Even if HRA had undertaken ditching activity for the production and harvesting of timber, the activity would still not be exempt from compliance with the SPCA unless conducted in accordance with the Forest Practice Guidelines. N.C.G.S. § 113A-52.1(b); Forest Practice Guidelines Related to Water Quality .0101(a) ("Persons must adhere to the standards related to land-disturbing activities in order to retain the forestry exemption provided" in the SPCA). The FPGs "establish performance standards for the protection of water quality." FPG .0101(a). The Forestry Best Management Practices Manual, published by the Division of Forest Resources in September, 1989, "contains specifications for a variety of practices which may be used to meet the performance standards" set out in the Forest Practice Guidelines. FPG .0101(c). Landowners must achieve the standards of the Forest Practice Guidelines, whereas best management practices are simply recommended methods that may be effective in getting the site into compliance with FPGs. Thus, a landowner may carry out the recommendations set forth in the Forestry Best Management Practices Manual but still not be in compliance with the mandatory standards established in the Forest Practice Guidelines.

19. The FPGs define "accelerated erosion" to mean "any increase over the rate of natural erosion as a result of land-disturbing activities." FPG .0102(1). The term "ground cover" is defined to mean "any natural vegetative growth or other natural or manmade material which renders the soil surface stable against accelerated erosion." *Id.* at (8). The term "visible sediment" is defined to mean "solid particulate matter, both mineral and organic, which can be seen with the unaided eye that has been or is being transported by water, air, gravity or ice from its site of origin? ." *Id.* at (19).

20. Although there is no FPG specifically addressing drainage activities, several of the FPGs apply to HRA's land-disturbing activities. One of the central requirements of the FPGs is that the site must be rehabilitated quickly and effectively: "Areas on the site

that have the potential for accelerated erosion, resulting in concentrated flow directly entering an intermittent or perennial stream or perennial waterbody, shall be provided with ground cover or other adequate sedimentation control within 30 working days, after ceasing any phase of the operation or beginning a period of inactivity." FPG .0209. As set out in more detail in the Findings of Fact, the excavated areas of the tract with potential for accelerated erosion, including steep ditch banks and spoil piles, were not provided with ground cover or other adequate sedimentation control within 30 working days of the excavation activities.

21. FPG .0209, requiring rehabilitation of the project site, also requires that "treatment and maintenance of those areas shall be sufficient to restrain accelerated erosion and prevent visible sediment from entering intermittent and perennial streams and perennial waterbodies until the site is permanently stabilized." FPG .0209. Again, as detailed in the Findings of Fact, Petitioner did not maintain the excavated areas sufficiently to restrain accelerated erosion and sufficient to prevent visible sediment from entering streams and waterbodies. As late as the first site visits by Dr. Lea and Ms. Blackwelder in spring of 2000, areas which had been affected by excavation or in which sediment deposits had accumulated had not been treated in a manner sufficient to restrain accelerated erosion. At Ditches 2, the 9/10-convergence ditch, and the 11/12-convergence ditch, sediment continued to reach intermittent or perennial streams due to the lack of vegetation or other stabilization of sediment deposits and ditch banks and the continued concentrated, unrestrained waterflow through the ditches.

22. The FPGs require establishment of a streamside management zone ("SMZ") along the margins of intermittent and perennial streams and perennial waterbodies. The SMZ must be of sufficient width to confine visible sediment within the zone, and the SMZ must be provided with ground cover or other means to restrain accelerated erosion. FPG .0201(a) and (b). As detailed in the Findings of Fact, Petitioner did not sufficiently protect the streamside management zone along the margins of intermittent and perennial streams and perennial waterbodies on the tract before the impact of hurricanes in the fall of 1999, and did not take sufficient measures after the hurricanes in September 1999 to restore an effective streamside management zone within the period of time encompassed by this Civil Penalty Assessment.

23. Petitioner's land-disturbing activities were therefore not exempt from the requirements of the SPCA because the activities were not conducted in accordance with the FPGs.

24. No rights of the Petitioner have been violated by the methods and procedures used by the Division of Land Resources or the Division of Forest Resources in conducting the investigation and enforcement activities involved in this contested case. The 1989 Memorandum of Agreement between the Division of Land Resources and the Division of Forest Resources (Ex. R-56), the 1992 Memorandum to DLR and DFR staff from the Directors of the Divisions of Land Resources and Forest Resources (Ex. R-57), and the DFR internal policies for the Forest Water Quality Program (Ex. P-3) are not "Rules" within the meaning of Chapter 150B, and the adoption or issuance of such memoranda and policies confer no enforceable obligations upon the Petitioner, nor any enforceable rights in favor of the Petitioner.

25. A "Rule" is "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly? or that describes the procedure or practice requirements of an agency." N.C.G.S. § 150B-2(8a). A Rule does not include, inter alia,:

- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department? including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies? .
- c. Non-binding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule? .
- g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing? investigations, or inspections;?or in the defense, prosecution, or settlement of cases.

Id. at (a), (c), (g). A Rule is not valid and enforceable unless adopted in substantial compliance with the notice, comment, public hearing, and other requirements for adopting a rule established in the APA. N.C.G.S. § 150B-18.

26. The 1989 and 1992 inter-agency memoranda and the DFR policies are statements about how those two agencies intend, on a routine basis, to evaluate and investigate issues relevant to a determination of whether the SPCA forestry exemption is available in a particular circumstance. Neither the SPCA nor its implementing regulations, nor the FPGs, dictate how the applicability of the forestry exemption or compliance with the FPGs is to be determined. The memoranda and policies do not attempt to define the operative statutory language used in the SPCA forestry exemption, impose additional obligations, or otherwise alter the substantive requirements of the statute and regulations. Instead, the memoranda and policies describe, in general terms, internal agency procedures for applying the forestry exemption.

27. Respondent substantially complied with the memoranda by proceeding to issue a Notice of Violation without a referral to DFR since during the initial site visit by DLR, the activity reasonably appeared to DLR to be for an ultimate development purpose; by requesting DFR review of the site once Petitioner claimed the forestry exemption when it commenced this Contested Case Proceeding;

by deferring any enforcement or other activity in connection with the site during the time period in which the site was being evaluated by DFR; and by resuming site evaluation and enforcement activity when DFR did not assume responsibility or "jurisdiction" for the site.

28. The DLR/DFR memoranda and DFR policies do not specifically contemplate nor specifically provide for how a site will be addressed by DFR if a claim of the forestry exemption is made for the first time more than a year after the conclusion of the land-disturbing activities, after more than a year of DLR agency enforcement action, and in the context of appeal of a penalty in litigation. DFR made a reasonable judgment under all the facts and circumstances of the case, taking into account the memoranda and its policies and practices in similar cases, that the Holly Ridge tract was appropriately addressed by DLR for its violations of the Act. DFR's determination, made three times over a period of six months from April to October, 2000, that the site was not in compliance with the FPGs was not contrary to law, based upon improper procedure, nor arbitrary and capricious.

29. The undersigned therefore concludes that Respondent did not fail to comply with its internal memoranda and policies in investigating, evaluating, and acting to have Petitioner comply with sedimentation requirements. DLR gave Petitioner many months to comply with the requirements of the Act before assessing the first penalty, and many more months including a deferral of prosecution following the September 1999 hurricanes, before assessing the second Civil Penalty. The required actions under the SPCA and FPGs that apply to Petitioner's site are very similar in their purpose and, to a large extent, in practice, and Petitioner made little effort to comply with those requirements during the entire 1999 year.

30. Even had Respondent failed to comply with its internal memoranda and policies, those provisions are neither statutes nor rules, have not been promulgated as rules, create no binding standards, and do not have the force of law. E.g., Dillingham v. NC Department of Human Resources, 132 N.C. App. 704, 710-11, 513 S.E. 2d 823, 827-28 (1999); Duke University Medical Center v. Bruton, 134 N.C. App. 39, 52, 516 S.E. 2d 633, 641 (1999). See also, Schweiker v. Hansen, 450 U.S. 785, 789, 101 S.Ct. 1468 (1981) (agency internal policies, manuals, guidance and memoranda that are intended to provide guidance to employees do not have the force of law and are not binding on the agency); Murphy v. United States, 121 F. Supp. 2d 21, 26 (D.D.C. 2000); National Treasury Employees Union v. Kemp, 1992 U.S. dist. LEXIS 15077 at *3 (N.D.Cal. 1992).

31. Respondent was aware of and considered its internal memoranda, procedures, and policies, and did not act arbitrarily and capriciously in addressing the Petitioner's excavation activities.

32. Even if Respondent failed in some manner to follow its internal memoranda, procedures, and policies in addressing Petitioner's land disturbance activities, and even if such failure constituted a legal error, such error was harmless to Petitioner because Petitioner's actions make clear that Petitioner would not have taken prompt and reasonable steps to bring the site into compliance with the FPGs, and therefore under the memoranda and policies the site would have been referred back to DLR for enforcement in any event.

Contested Issue No. 2 - Petitioner's Violations of the SPCA

33. The General Assembly adopted the SPCA in 1973 having concluded that the "sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare ? ." N.C.G.S. § 113A-51.

34. To this end, the SPCA sets out four mandatory standards for land-disturbing activity which address (1) buffer zones, (2) angles of graded slopes and fill, (3) erosion and sedimentation control practices or devices, and (4) erosion and sedimentation control plans. The SPCA requires a buffer zone near any lake or natural watercourse which will confine visible siltation within the 25 percent of the buffer zone nearest the land-disturbing activity. N.C.G.S. § 113A-57(1). The SPCA requires an angle on graded slopes and fills that can retain vegetative cover or other adequate erosion-control devices or structures. It also requires that exposed slopes be planted (or otherwise provided with ground cover, devices or structures sufficient to restrain erosion) within thirty days of any phase of grading. N.C.G.S. § 113A-57(2). The SPCA requires that any person conducting an activity comprising more than one acre of disturbance install such erosion and sedimentation control devices and practices, within thirty days of any phase of grading completion, sufficient to retain the sediment generated by the activity within the boundaries of the tract during construction and development. It requires the person to plant or otherwise provide permanent ground cover sufficient to restrain erosion after completion of the project. N.C.G.S. § 113A-57(3). Finally, the SPCA requires a person conducting a land-disturbing activity of more than one acre to submit an erosion and sedimentation control plan thirty days prior to initiating the activity. N.C.G.S. § 113A-57(4).

35. Rules promulgated by the Sedimentation Control Commission to implement the SPCA establish additional requirements. "Persons conducting land-disturbing activity shall take all reasonable measures to protect all public and private property from damage caused by such activities." 15A N.C.A.C. 4B.005. Erosion and sedimentation control measures, structures, and devices must be planned, designed, and constructed "to provide protection from the runoff" of the 10-year/24-hour storm. Id. at .0008.

Land-disturbing activity in connection with construction in, on, over, or under a lake or natural watercourse shall minimize the extent and duration of disruption of the stream channel. Id. at .0012.

36. The Petitioner violated the SPCA and its implementing regulations in each of the ways found in the 5 March , 2000 Civil Penalty Assessment. As set forth in greater detail in the Findings of Fact:

- a. During the 1998 excavation, after the excavation ended in November 1998 until the hurricanes of 1999, and then within a reasonable period of time after the hurricanes of 1999, Petitioner failed to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity, in violation of 15A N.C.A.C. 4B.0005, and specifically failed to take such measures during the period April 24, 1999 through December 15, 1999.
- b. During the 1998 excavation, after the 1998 excavation until the hurricanes of 1999, and then within a reasonable period of time after the hurricanes of 1999, Petitioner failed to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity, in violation of N.C.G.S. § 113A-57(2), and specifically failed to maintain on graded slopes and fills an angle which can be retained by vegetative cover or other adequate erosion control devices or structures during the period April 24, 1999 through December 15, 1999.
- c. During the 1998 excavation, after the 1998 excavation until the hurricanes of 1999, and then within a reasonable period of time after the hurricanes of 1999, Petitioner failed to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity, in violation of N.C.G.S. § 113A-57(2), and specifically failed on exposed slopes within 30 working days of completion of any phase of grading to plant or otherwise provide ground cover, devices, or structures sufficient to restrain erosion during the period April 24, 1999 through December 15, 1999.
- d. During the 1998 excavation, after the 1998 excavation until the hurricanes of 1999, and then within a reasonable period of time after the hurricanes of 1999, Petitioner failed to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity, in violation of N.C.G.S. § 113A-57(3), and specifically failed to install such sedimentation and erosion control devices and practices as are sufficient to retain sediment generated by land-disturbing activity within the boundaries of the tract during construction from November 12, 1999 through December 15, 1999.
- e. During the 1998 excavation, after the 1998 excavation until the hurricanes of 1999, and then within a reasonable period of time after the hurricanes of 1999, Petitioner failed to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity, in violation of N.C.G.S. § 113A-57(2), and specifically failed to provide in proximity to a lake or natural watercourse, a buffer zone as defined in 15A N.C.A.C. 4A.0005(4), in violation of N.C.G.S. § 113A-57(1) from November 12, 1999 through December 15, 1999.

37. In addition, although not cited as a basis for the 5 March, 2000 Civil Penalty Assessment, the undersigned concludes that during the period of time covered by the Civil Penalty Assessment, the Petitioner failed to have in place an approved Erosion Control Plan for the project, and failed to correct violations found in the earlier 9 July 1999 Civil Penalty Assessment.

38. The undersigned therefore concludes that Respondents have met their burden of proof to show that Petitioner violated the SPCA in the manner determined by the Civil Penalty Assessment.

Contested Issue No. 3 - Penalty Amount

39. The assessment of civil penalties under the SPCA is constitutional because the SPCA contains adequate guiding standards to check the exercise of DENR's discretion in determining civil penalties within an authorized range, commensurate with the seriousness of the violations of the SPCA. In Re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

40. For violations prior to October 1, 1999, the SPCA authorizes a maximum civil penalty of \$500 per day for any violations of the SPCA, rules promulgated thereunder, or activities falling outside of an approved plan. N.C.G.S. § 113A-64(a)(1) (1999).

41. In general, the Director of the Division of Land Resources did not act arbitrarily or capriciously in assessing the civil penalty against Petitioner since he assessed the fine within the adequate guiding standards. The amount of the fine was based on the Director's consideration of the required factors under N.C. Gen. Stat. § 113A-64(a)(3) and 15A N.C.A.C 4C.0006. Further, the amount of the fine was consistent with other civil penalties assessed for similar "worst site" violations. The \$500.00 daily penalty did not exceed the maximum civil penalty of \$500.00 per violation as each day of a continuing violation constituted a separate violation

CONTESTED CASE DECISIONS

under N.C.G.S. § 113A-64(a)(1) (1999). In addition, the time period was not calculated erroneously as it was calculated in accordance with the SPCA from the date the Notice of Violation was received, according to N.C.G.S. § 113A-64(a)(1), until the date of the last Sedimentation Inspection Report showing violations that the Director received prior to assessing the civil penalty.

42. In general, the procedures taken to assess the civil penalty and the civil penalty, itself, were free of error, and were proper, and lawful.

43. However, with regard only to the \$400 per day assessed for the degree and extent of harm, there was error. Because of the facts found above, this amount was not supported by the evidence. The amount of \$125 per day is supported by the evidence.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

RECOMMENDED DECISION

IT IS HEREBY RECOMMENDED that the Secretary of the Department of Environment and Natural Resources, pursuant to N.C. Gen. Stat. § 113A-55, or his designee find:

1. That in issuing the March 5, 2000 Civil Penalty Assessment to the Petitioner, the State agency did not act erroneously, fail to follow proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule except as to the penalty assessment for degree and extent of harm; and
2. That the March 5, 2000 Civil Penalty Assessment is valid, lawful, and enforceable with the same exception; and
3. That the amount of the penalty be reduced from \$118,000 to \$104,180 for the reasons set forth above.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699, in accordance with G.S. 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.

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' attorneys of record and to the Office of Administrative Hearings.

This the 20th day of December, 2001.

James L. Conner, II
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
00 OSP 1702
00 OSP 2117

MICHAEL H VANDERBURG, Petitioner,)	
)	
v.)	RECOMMENDED DECISION
)	
N.C. DEPARTMENT OF REVENUE, Respondent.)	

PROCEDURAL BACKGROUND

The appeal of Michael H. Vanderburg, Petitioner herein, was heard before the Honorable Beecher Gray, Administrative Law Judge, Office of Administrative Hearings, on July 12, 13 and 19, 2001, in the James K. Polk Building, in Mecklenburg County, Charlotte, North Carolina.

APPEARANCES

Petitioner: John W. Gresham
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Respondent: Ms. Alexandra M. Hightower
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(919) 716-6550

ISSUES

The issues presented by the evidence at the hearing are:

1. Whether the Respondent's termination of Petitioner as a probationary employee was based on retaliation for engaging in constitutionally protected activity.
2. Whether the Respondent retaliated against Petitioner for engaging in protected activity in the terms and conditions of his employment.

FINDINGS OF FACT

A. Background

1. Petitioner Michael H. Vanderburg (hereinafter "Petitioner" or "Vanderburg") joined the Department of Revenue in January 1999 as a Revenue Officer Trainee.
2. As a Revenue Officer Trainee, Petitioner was required to serve a two year probationary period.

3. Petitioner was initially assigned to the Charlotte Revenue Office and worked under the supervision of Martha Calhoun.

4. On May 27, 1999, Ms. Calhoun met with Petitioner and reviewed his performance review for the period from the date of his employment in January through April 30, 2000. (Pet. Exh. 1).

5. Petitioner received good and very good ratings in all rating categories. Specifically he was rated very good in the pursuit and collection of delinquent cases where it was noted that he was “thorough in his follow-up and investigation of taxpayers and very good in following departmental policies.” In her concluding remarks, Ms. Calhoun noted that Petitioner “handles himself in a professional manner and is respectful of his co-workers and the public.” (Pet. Exh. 1).

6. Shortly after his review conference with Ms. Calhoun, Petitioner accepted a position with the New Hope Church of God as an associate pastor and subsequently completed a Department form entitled Request for Secondary Employment. The request was approved by the Department’s Assistant Secretary, Dewey Sanders on June 29, 1999. (Tr. Vol., pp. 34-35; Dept. Exh. 2).

7. The tracking reports regarding Petitioner’s work for the last week in May and the month of June of 1999 show he maintained his work and caseload during this period. (Pet. Exh. 4, 9, 17-21; Tr. Vol. 1, p. 234)

8. On July 1, 1999, Petitioner was reassigned to work under the supervision of Dean Barnes. (Tr. Vol., p. 36).

9. On July 22, 1999, Petitioner met with Mr. Barnes and Chris Pappas who was the Office Manager for the Collections Division in Charlotte. (Tr. Vol. 1, p. 194).

10. In the meeting Petitioner was ordered to remove all items from his cubicle walls and remove the screensaver from his computer. (Tr. Vol. 1, p. 36). He was told that this directive was the result of two anonymous complaints that the religious nature of the materials was offensive. (Tr. Vol. 1, p. 36).

11. In this meeting Mr. Barnes also stated in the conference that he was concerned with Petitioner’s Associate Pastor position. (Tr. Vol. 1, p. 41).

12. Petitioner advised Mr. Barnes that Assistant Secretary Dewey Sanders had approved his work as a pastor and that he felt that issue was closed. (Tr. P. 41).

13. Petitioner also protested that he should not be required to remove his items unless other employees were required to move their personal items from their cubicles. (Tr. Vol. 1., p. 40).

14. At the time the Petitioner was requested to remove his personal items (Pet. Exh. A4-A11) from his cubicle, other employees displayed a wide range of material in their cubicles including items with a religious theme. (Pet. Exh. B1 & B2, C1– C3, D1-D2, E1-E2, F1 & F2; Tr. Vol. 1, p 184; Tr. Vol. 1, p. 279).

15. On the evening of July 22, 1999, Petitioner talked with his father who also is named Michael Vanderburg and also works for the Department of Revenue in the Charlotte office as an auditor, and prepared a letter to Mr. Pappas about his directive. (Tr. Vol. 1, pp. 41-42; Tr. Vol. II, p, 569; Pet. Exh. 2).

16. When he arrived at the Charlotte office on the morning of July 23, he took the pictures of the various cubicles that are shown in Exhibits A-F. (Tr. Vol. 1, p. 43).

17. Early in the workday on July 23, 1999, Chris Pappas approached Petitioner’s father and asked to talk with him. Mr. Pappas confirmed that he had directed Petitioner to remove all of the materials from his cubicle. (Tr. Vol. III, p. 570).

18. Petitioner’s father advised Pappas that he knew about the matter and that Petitioner had a letter for him to forward on to Assistant Secretary Sanders. (Tr. Vol. III, p. 571)

19. At this point Mr. Pappas became agitated and referred to Petitioner’s office as a “shrine.” (Tr. Vol. III, p. 572).

20. After Petitioner’s father indicated that he did not think Petitioner would remove all of the items from his cubicle, Mr. Pappas indicated that since Petitioner was still in training, he could “just fire him right now.” (Tr. Vol. III, p. 573).

21. When Petitioner’s father then asked about Petitioner’s work, Mr. Pappas conceded that Petitioner did “real good work” and worked “very hard.” (Tr. Vol. III, p. 573).

22. When Petitioner's father then suggested that Petitioner might remove certain items from his cubicle, Mr. Pappas, without explanation reversed his earlier pronouncement and told Petitioner's father that all he wanted Petitioner to remove was one newspaper article and a small lighthouse figurine that contained inspirational cards. (Tr. Vol. III, p. 574).

23. Subsequent to his conversation with Petitioner's father, Mr. Pappas met with Petitioner in his office. When Petitioner gave Mr. Pappas his letter (Pet. Exh. 2), Mr. Pappas set the letter to the side and told Petitioner that he may have misunderstood him on July 22nd in regards to removing all the items from his cubicle; that he wanted to apologize if he had said or implied such a removal, and that he only wanted the newspaper article and lighthouse removed. (Tr. Vol. I, p. 49).

24. Petitioner told Mr. Pappas that he "would be more than happy" to remove the items, and immediately did so. (Tr. Vol. I, pp. 49-50).

25. Mr. Pappas then advised Petitioner that there was no need to send his letter to Mr. Pappas' superiors for there would be no repercussions or retaliation. Petitioner agreed that the letter need not be sent to the supervisors but asked that it be put in his personnel file. (Tr. Vol. I, pp. 50-51).

26. Petitioner further asked if Mr. Pappas would transfer him from under Dean Barnes' supervision, but Mr. Pappas declined to do so.

27. The next day Petitioner provided Mr. Pappas with a letter memorializing their July 23, 1999, conversation and also requested that it be placed in his personnel file. (Pet. Exh. 3; Tr. Vol. 1, p. 53).

28. Although the practice of the Department is to assign caseloads to revenue officers by a neutral principal, portions of the alphabet, Petitioner's caseload increased substantially in August of 1999. Neither party introduced an adequate explanation for the increase in cases. The Department acknowledgment that it would periodically equalize the caseloads does not explain the increase since the Department did not claim that there was such an equalization in August. (Pet. Exh. 4; Tr. Vol. I, pp. 235 & 280).

29. The Petitioner was able to reduce his expanded caseload significantly by the end of September 1999. In October of 1999, Petitioner requested a transfer to the Department's Gastonia office. (Pet. Exh. 4; Tr. Vol. 1, pp. 59 & 62).

30. While working under Ms. Calhoun's supervision, Petitioner as a trainee met with his supervisor on a weekly basis. At most, and the evidence is disputed about that meeting, Petitioner met with Barnes on one occasion from July through his interview evaluation in mid November of 1999. Meetings were scheduled but cancelled by Mr. Barnes. (Tr. Vol. I, pp. 56-57; Tr. Vol. II, pp. 324-327).

31. On November 18, 1999, Petitioner received an interim performance review from Mr. Barnes. The review asserted that Petitioner had priority cases in his caseload "which need work or follow-up." The interim review did not reference the unusual increase in Petitioner's caseload in August 1999 or the reduction in his caseload that had occurred after August of 1999. (Pet. Exh. 5).

32. The day following his interim review, Petitioner was summoned to a meeting with Mr. Pappas and Ralph Foster, who was Pappas's superior and served as the Director of the Western Collection Division. All three of the participants agree that in the meeting Mr. Foster referred to Petitioner as a "smart ass" and a "smart butt." Petitioner asserts that he conducted himself professionally and did nothing to provoke these comments that followed Foster's comments that he had "specific concerns" about Petitioner's future with the Department. The testimony by the Department's witnesses conflicts on the cause for the unprofessional comments. Mr. Foster asserts that he made these comments after Petitioner was unprofessional and rude to Mr. Pappas. Mr. Pappas asserts that the comments followed a "shouting match between Mr. Foster and Petitioner." (Tr. Vol. I, pp. 62, 212-13; Vol. II, pp. 313-314).

33. Petitioner's last day of work in the Charlotte office was November 24, 1999. On that date Mr. Pappas informed Petitioner that he would not receive an annual raise. The Department acknowledges that Petitioner was professional in this meeting. (Tr. Vol. I, pp. 63 & 214).

34. Petitioner then prepared a letter with supporting documentation that he sent to Dewey Sanders on or about November 29, 1999. In the submission to Mr. Barnes, Petitioner set out the events that had occurred from July 22, 1999, forward. He specifically detailed the actions of Mr. Foster on November 19, 1999. (Pet. Exh. 6; Tr. Vol. 1, p. 63).

35. After Petitioner had been in his new position in Gastonia for about two weeks, Mr. Foster came to Gastonia in mid-December and indicated he wanted to talk with Petitioner. When Petitioner indicated that he did not want a recurrence of the November 19, 1999, meeting, Mr. Foster advised Petitioner that he could include the Gastonia office manager, Libby McAteer, in the meeting. When Petitioner asked to include Ms. McAteer, Mr. Foster then advised Petitioner that, "No, you're going to meet with me" and would not include Ms. McAteer. (Tr. Vol. 1; pp. 65 & 66).

36. In the ensuing meeting, Mr. Foster advised Petitioner that he could be fired at anytime and that Petitioner needed to listen to him. He also pulled out of his briefcase the November 29, 1999, submission which had been made to Dewey Sanders and asked Petitioner, "and what do you think you were doing; you really messed up now; do you think Dewey Sanders would listen to you." Mr. Foster ended the conference by telling Petitioner that he was waiting for the opportunity to dismiss him. According to Petitioner's testimony this conference was worse than his other interviews with Mr. Foster. Mr. Foster did not contradict Petitioner's account of this meeting. (Pet. Exh. 7; Tr. Vol. I, pp. 66-67; Tr. Vol. II, pp. 308-328).

37. Mr. Foster acknowledged that he talked to Robie McLamb, the Department official who subsequently terminated Petitioner in November of 2000, during the three month period that McLamb supervised Petitioner. (Tr. Vol. II, p. 321).

38. When Petitioner began work in Gastonia, he was assigned a caseload solely of personal income tax cases. He worked under the supervision of Ms. McAteer with some assistance from the assistant office manager, J. B. Williams. (Tr. Vol. 1, pp. 68-69).

39. On June 1, 2000, Petitioner received an evaluation from Ms. McAteer that served as Petitioner's annual review. In the conference that included Petitioner, Ms. McAteer and Mr. Williams, Petitioner was advised orally that he was doing a great job, it was a pleasure to have him in Gastonia and that his supervisors were well pleased. The written review ended with Ms. McAteer's comment "keep up the good work." (Pet. Exh. 8' Tr. Vol. I, pp. 69-70).

40. In the evaluation conference, Ms. McAteer advised Petitioner that he was to be reassigned to a business tax territory and that Mr. Williams would be his immediate supervisor for the new territory. (Tr. Vol. I; p. 71).

41. Within several weeks of the evaluation, Ms. McAteer also had indicated to a member of the New Hope Church of God that she had a very high opinion of Petitioner's work since he was assigned to Gastonia. (Tr. Vol. III, pp. 581-583).

42. The business tax territory to which Petitioner was assigned had previously been assigned to Grady Robbins who had left the Department in February. Since that time the caseload had been essentially unmanaged until it was assigned to Petitioner although Mr. Williams had spent some limited time on the territory. The documents produced by the Department showed that from the time Mr. Robbins left until April 24, 2000, the territory had increased from 226 cases to 438 cases. Petitioner was not assigned the territory for another two months. (Dept. Exh. 11 & 11a; Tr. Vol. 1, p. 72; Tr. Vol. III, pp. 588-589, 603, & 615-616).

43. On June 20th when Petitioner received the business territory it consisted of four file drawers of rubber-banded information that he began to put into alphabetical order so that he could begin to manage the territory. (Tr. Vol. 1, p. 72; Tr. Vol. III, p.592).

44. Petitioner worked not only with J. B. Williams on managing his territory, but also worked with tax auditor Wayne Stallings. Both Mr. Stallings and Mr. Williams described Petitioner as very helpful, frequently checking with his supervisor and working very hard on the territory. (Tr. Vol. 1, p. 184; Tr. Vol. III, p. 603).

45. In September of 2000, the Department reorganized the Collections division and Robie McLamb became the director of Collections for the State. (Tr. Vol. II, p. 424).

46. Both before and after assuming his position, Mr. McLamb had talked with Ralph Foster about Petitioner and his employment with the Department. (Tr. Vol. II, p. 321; Vol. II, pp. 474-75).

47. On October 24, Mr. McLamb met with Petitioner in the Gastonia office. In the meeting Mr. McLamb, who had not met Petitioner had a number of criticism of Petitioner. He began the meeting by telling Petitioner that he had heard much about him and that he had "concerns" about the Petitioner. The first concern Mr. McLamb expressed was that Petitioner had trouble getting along with people in authority, but his main concern was "numbers." He was just there for the "numbers." (Tr. Vol. I, p. 85; Tr. Vol. II, p. 451).

48. Mr. McLamb also stated to Petitioner that if Chris Pappas had a problem with somebody, then that person had a problem and that Chris Pappas had a problem with Petitioner. Mr. Pappas testified that he had no discussion with Mr. McLamb about Petitioner. (Tr. Vol. 1, p. 88; Tr. Vol. II, p. 258).

49. On October 23, 2000, the day prior to his meeting with Petitioner, Mr. McLamb had met with Ms. McAteer and Mr. Williams in Charlotte to discuss Petitioner. At the meeting and at the time he decided to dismiss petitioner, the only information Mr. McLamb had about Petitioner's caseload was a report from sometime in July showing that Petitioner had a total of 750 cases as of the running of the report. Mr. McLamb offered no explanation for not reviewing similar reports from February and April that showed how the unattended caseload subsequently assigned to Petitioner was expanding. Up through the date of Petitioner's subsequent

termination on November 9, 2000, Mr. McLamb continued to claim that he was not aware of what Petitioner's caseload had been when he was assigned the territory on June 20, 2000. (Tr. Vol. II, pp. 477-478).

50. Mr. Williams testified that at the October 23, 2000, conference he advised Mr. McLamb that Petitioner's numbers were decreasing and that Petitioner has inherited the largest territory in Gastonia. (Tr. Vol. III, p. 604.)

51. Shortly after the October meeting Mr. Williams further advised Petitioner that "it didn't look good, that it looked like some of the higher ups in the Department didn't want him in the Department, that it didn't have to do with the numbers. Mr. Williams also asked if Petitioner knew anyone who has clout that could help him. (Tr. Vol. I, p. 95; Tr. Vol. III, p. 605).

52. Following his meeting with Mr. McLamb and his conversation with Mr. Williams, Petitioner sought advice from the Department's personnel director, Chuck Hunt, about filing appropriate charges regarding the Department's actions. Mr. Hunt advised that he would not recommend that Petitioner file a petition, especially with the EEOC, but that anything Petitioner needed, he could obtain information from OAH. (Tr. Vol. 1, p. 97).

53. Petitioner then contacted OAH and filed his initial petition (00-OSP-1702) on November 6, 2000. (Tr. Vol. 1, p. 97).

54. On November 7, 2000, Mr. McLamb met with Petitioner and advised him that his employment was not continued. Mr. McLamb indicated he had looked at some additional statistics and his decision was based on Petitioner's numbers and outstanding cases. When Petitioner asked if Mr. McLamb had taken into account the number of cases Petitioner had inherited, Mr. McLamb replied, "no." (Pet. Exh. 14 & 15; Tr. Vol. I, p. 103).

55. Mr. McLamb acknowledged to Petitioner that "people in Charlotte and Ralph Foster had input into the decision to not continue his employment and that he was aware of Petitioner's letter to Dewey Sanders in November of 1999 and his pending OAH petition. (Pet. Exh. 14 & 15; Tr. Vol. 1, p. 103).

56. Mr. Williams was present during parts of the termination conference to fill out Petitioner's checkout sheet. When Petitioner told Mr. Williams that he was being told it was about numbers and job performance, Mr. Williams replied that he "don't see it the way they see it" but that it did not seem to matter what he thought since he was the "lower peg" on the whole thing. (Pet. Exh. 14 & 15).

57. Following Petitioner's termination, Mr. McLamb met with the Gastonia staff and stated that "Petitioner had been terminated because Petitioner was not up to par on his job; that the numbers weren't there." (Tr. Vol. III, p. 615).

58. At this point another collector, Kim Wright, who had worked as a collector for over ten years, spoke up and told Mr. McLamb that the caseload Petitioner had inherited in June had really accumulated; that the paperwork was tremendous and that when the caseload had been given to J. B. Williams in the interim he had his own workload so it still didn't get attended to. Ms. Wright went on to describe the "overwhelming number of delinquents" Petitioner inherited. There was not "a whole lot of response" from Mr. McLamb. (Tr. Vol. III, pp. 615-616).

59. Following his termination on November 9, 2000, Petitioner filed his second petition. (00-OSP-2117).

CONCLUSIONS OF LAW

1. Because Petitioner was a probationary employee, he has the burden of proof to show that his discharge, as well as the adverse actions alleged in his first petition, were based on unlawful considerations.

2. Petitioner's evidence demonstrates that he had a genuine belief that the directives given to him by Mr. Pappas and Mr. Barnes, shortly after Dewey Sanders had approved his associate pastor position, were violations of his free expression rights under both the federal and state constitutions. See e.g. *Tucker v. State of California Department of Education*, 97 F.3d 1204, 1215 (9th Cir. 1996); *Brown v. Polk County, Iowa*, 61 F.3d 650, 657-659 (8th Cir. 1996); *N.C. Const. Art. 1 §§ 13 & 14*.

3. While Petitioner complied with the modified request of Pappas, he chose to document his concerns about his constitutionally protected right to religious expression and he did so in his Exhibit 3. The way in which Petitioner documented his concerns was appropriate and was not challenged by the Department in this proceeding.

4. Thus, the legal issue to be determined in this matter is whether the Department's actions of denying Petitioner his raise for six months and subsequently terminating his employment was related to his initial letter of concern about his religious expression in July of 1999 and his continued submission, which detailed the chain of supervisory confrontations primarily instigated by Ralph Foster.

5. The record shows no documented concerns about Petitioner or his performance prior to his July 22nd and 23rd memos. Indeed the evaluations given to him on May 27, 1999, reflects very positively on both Petitioner's performance and his working relationship with others. However, after July 23rd the record reflects that Petitioner's caseload increased and his contacts with the supervisor who had been involved in the July 22nd directive regarding the materials in his cubicle significantly decreased. His conference with Ralph Foster in which Foster was advising Petitioner that his supervisors now had a negative opinion of him and that he was a "smart ass" or "smart butt" reflects a Department still smarting over Petitioner's assertion of his rights in July. Contemporaneous with the conference with Foster, Petitioner was given a mediocre review based on assertions about his work that are not justified in light of Petitioner's Exhibit 4 which showed he is reducing his caseload after the large August increase and in light of the fact that Barnes was not providing the assistance expected for a probationary tax collector. Subsequent to this review and the conference with Foster, Petitioner was denied his annual increase.

6. A key element in deciding whether Petitioner's discharge was impermissibly based on his legitimate protected activity in documenting his concerns about his religious expression is the meeting between Petitioner and Ralph Foster in December of 1999. After Petitioner had availed himself of the Department's "open door" policy and in late November sent his Exhibit 6 to the Assistant Secretary (a submission which outlines his concerns and includes his July 22nd and 23rd letters, he received no response from the Assistant Secretary. Rather, Foster came to Petitioner, told him he really "messed up" by sending his submissions to the Assistant Secretary and threatened to fire Petitioner. In this meeting, Petitioner reasserted that he believed that all of the chain of negative action started with the July 22nd directive about his religious material and his responses to the directive. Notably, Mr. Foster did not deny or contradict the testimony and Exhibit 7 introduced by Petitioner including his last comment in the conference was that "he was waiting for the opportunity to dismiss Petitioner."

7. Such an opportunity did not arise during Petitioner's first six months in Gastonia for his work in his initial assignment governed an evaluation ending in "keep up the good work." However, his reassignment to a caseload which had been neglected and in which the paperwork was tremendous provided the opportunity.

8. The Department asserts as the legitimate basis for his termination the "numbers" reflected in his caseload. While a failure by a probationary employee to reasonably work his caseload is an acceptable reason for termination, the evidence set out in the findings of fact do not support that the "numbers" were the actual basis for Petitioner's termination for the following reasons:

- a. The decision maker, McLamb, acknowledged that the only report he looked at when making the decision to terminate Petitioner was July 2000 figures which simply described the caseload about a month after assignment to Petitioner. He also did not consider that Petitioner had taken 10 days of sick leave during the month of July, 2000.
- b. Decision maker Mr. McLamb ignored the input of Petitioner's immediate supervisor, J. B. Williams, about Petitioner's good work and the size of his caseload to the point that Mr. Williams went to Petitioner and told him that "these people don't want you" and asked if Petitioner knew anyone higher up to whom he could appeal.
- c. The decision maker had no response when another collector confronted him when he claimed that Petitioner's firing was the result of his numbers and specifically described to Mr. McLamb the mess Petitioner had inherited.
- d. The figures that were available to Mr. McLamb for February and April of 2000 in the same format as the July report clearly showed that Petitioner as a new employee had inherited a caseload that by June 20 was likely three times larger than the caseload assigned to veteran collectors. Mr. McLamb offered no explanation for failing to review these documents that would have belied his purported reason for terminating Petitioner.
- e. Mr. McLamb and Mr. Foster admitted that they had conversation about Petitioner and Mr. McLamb admitted when terminating him that Mr. Foster had input in the decision.

9. Having determined that the reason that the employer has put forward for the termination decision is not worthy of belief, the factfinder can infer the ultimate issue of unlawful termination from the falsity of the Department's explanation. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110 (2000). Based upon the evidence introduced by Petitioner including the very specific threats of Foster and the factfinder's determination that the reason for Petitioner's termination supplied by the Department was not the actual reason but was a pretext, the factfinder determines that as a matter of law the initial denial of Petitioner's pay increase in November of 1999 and his subsequent termination in November of 2000 were retaliatory because of Petitioner's protest against what he believed to be encroachment by Respondent on his protected rights of religious expression under the state and federal constitutions.

CONTESTED CASE DECISIONS

RECOMMENDED DECISION

The Administrative Law Judge recommends that the State Personnel Commission reinstate Petitioner to a permanent position as a revenue officer at the appropriate grade, and step within the Department, with all of the other benefits of continuous employment, and orders payment of the Petitioner's attorney's fees. Further, the State Personnel Commission should order that the Petitioner be paid front pay from the date that this decision of reinstatement becomes final until the Petitioner is reinstated to his position. 25 N.C.A.C. 2 B .0414, .0421, .0422, .0431, .0432.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The Recommended Decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B-36(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the Recommended Decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 31st day of December, 2001.

Beecher R. Gray
Administrative Law Judge

4. Respondent's Exhibit #4, Revocation Notice dated June 8, 2001;
5. Respondent's Exhibit #5, copy of 10 NCAC 3D.1501;
6. Respondent's Exhibit #6, New Hanover County Code, Sections 20-31 through 20-64; and
7. Respondent's Exhibit #7, City of Wilmington Resolution regarding ambulance service.

STIPULATIONS

The parties entered into the following stipulations:

1. Petitioner does not have a franchise agreement in New Hanover County. (T. p. 6)
2. Petitioner has a franchise agreement in Brunswick County. (T. p. 7)

Based upon the documents filed in this matter, exhibits admitted into evidence, stipulations entered into by the parties and the sworn testimony of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. The North Carolina Department of Health and Human Services, Division of Facility Services, Office of Emergency Management Services ("EMS") is charged with ensuring that the public's health and safety is met by establishing minimum standards and promulgating rules according to the General Statutes. (T. p. 54)
2. Petitioner provides non-emergency ambulance transport to patients. (T. p. 98) It operates in both New Hanover County and Brunswick County. (T. p. 111) Petitioner's office is located in Wilmington. (T. p. 111)
3. Keith Harris is a regional manager of the Eastern Office of EMS. (T. p. 14) As regional manager, one of his duties is to investigate complaints which have been brought to the attention of the Office of EMS. (T. p. 15) Mr. Harris has conducted approximately 20 to 25 investigations and has completed both basic and advanced level investigation courses. (T. pp. 15-16)
4. On November 14, 2000, Mr. Harris received a telephone call from Todd Baker, an Office of EMS employee in the Central Office, who stated that Ms. Rachel Odom had called him to report a complaint regarding the Petitioner. (T. pp. 16-17)
5. Mr. Harris contacted Ms. Odom on November 14, 2000. (T. p. 18) Ms. Odom is a certified EMT. (T. p. 38) EMT stands for emergency medical technician. (T. p. 104) One duty of an EMT is to transport patients from their homes to medical facilities, doctor's appointments and then back home. (T. p. 39) Ms. Odom was employed with the Petitioner as an EMT from approximately July 2000 until approximately early December 2000. (T. pp. 39, 41) Ms. Odom has completed the course work for the next level of pre-hospital care, but has not yet taken the State exam. (T. p. 40) Ms. Odom intends to take the State exam. (T. p. 41)
6. Ms. Odom told Mr. Harris that on Tuesday, November 14, 2000, while she was working for the Petitioner, she transported by herself three dialysis patients by ambulance to Southeastern Dialysis Center in Wilmington. (T. pp. 22-23; Ex. 1, p. 4) No other personnel was on board at the time of the transport. (T. pp. 43, 50) Ms. Odom stated she conducted the transport without any other personnel on board because she was instructed to do so by Mr. Doug Kirk. (T. p. 42) Mr. Kirk is employed by Petitioner as a manager. (T. pp. 26, 33, 90) Ms. Odom testified that Petitioner transported the dialysis patients every Tuesday, Thursday and Saturday. (T. p. 30)
7. After talking with Ms. Odom, Mr. Harris requested that she complete a written statement regarding her complaint. (T. p. 28) Ms. Odom completed a written statement and sent it to Mr. Harris at the Eastern Office of EMS in Greenville. (T. pp. 28, 45; Ex. 1, pp. 31-33)
8. Ms. Odom testified that she contacted the Office of EMS to file a complaint against Petitioner because she was concerned about patient safety. (T. pp. 50-51)
9. The Office of EMS interprets N.C. Gen. Stat. § 131E-158 to require at least two certified personnel to be aboard an ambulance when patients are being transported; anything less is a violation of statute. (T. pp. 23-24) If there is only a driver aboard the ambulance, there is no one else available to attend to a patient if there is a medical incident. (T. pp. 50-51)
10. Previously, on September 18, 2000, as the result of having learned that Petitioner possibly transported a patient by ambulance without sufficient personnel aboard, Mr. Harris went to Petitioner's office and met with Mr. Kirk. (T. p. 26; Ex. 1, p. 13)

During that meeting, Mr. Harris informed Mr. Kirk that N.C. Gen. Stat. § 131E-158 states the minimum staffing requirements for ambulance transportation. (T. pp. 26-27, 99-100)

11. Prior to September 18, 2000, Ms. Pat Well, a regional manager for the Office of EMS, and Jeremy Banks, former employee of the Office of EMS, met with Mr. Kirk and informed him of the minimum staffing requirements for ambulance transportation. (T. pp. 27-28)

12. On Thursday, November 16, 2000, Mr. Harris and another employee went to Southeastern Dialysis Center to observe Petitioner transporting the dialysis patients. Petitioner had already transported the dialysis patients that day, and therefore, Mr. Harris did not observe any transportation by Petitioner. (T. pp. 29-30)

13. On Saturday, November 18, 2000, Mr. Harris returned to Southeastern Dialysis Center. (T. pp. 30-31; Ex. 1, p. 5) Mr. Harris observed Mr. Kirk arrive driving one of Petitioner's ambulances. Mr. Harris observed Mr. Kirk get out of the driver's door and go around to the passenger side and assist a lady out of the ambulance. Mr. Harris observed Mr. Kirk help two other people out of the same side door. Mr. Kirk then got in the driver's side of the ambulance and drove off. (T. p. 31) Mr. Harris saw no one else present in the ambulance. Mr. Harris could see in both the driver and passenger door and he saw both doors open. (T. pp. 31- 32) Nothing was obstructing Mr. Harris' view. (T. p. 32) Mr. Harris could not see into the back of the ambulance. (T. p. 37)

14. On November 22, 2000, Mr. Harris and Mr. Allen Johnson went to Petitioner's office. (T. p. 32; Ex. 1, p. 6) Mr. Johnson is a regional specialist with the Office of EMS. Mr. Harris is Mr. Johnson's supervisor. (T. p. 33) Mr. Harris requested to see Petitioner's ACRs from October 1, 2000, through November 20, 2000. (T. pp. 33-34; Ex. 1, p. 6) ACR stands for ambulance call report. ACRs contain all patient information and medical care. (T. p. 33) With regard to ACRs for November 18, 2000, Mr. Kirk did not produce any ACRs for November 18, 2000, and stated he did not complete ACRs when he did a free transport. Mr. Kirk admitted during the meeting and later in his testimony at hearing, that he, without anyone else on board the ambulance, gave a courtesy transport to a lady on November 18, 2000. (T. pp. 34, 90-92, 95, 101; Ex. 1, p. 6) In response to Respondent's First Set of Interrogatories and Request for Production of Documents, Mr. Kirk stated the ACRs for November 18 had been misplaced. (T. p. 103)

15. During the November 22, 2000 meeting at Petitioner's office, Mr. Harris informed Mr. Kirk of the minimum staffing requirements for transporting patients by ambulance. (T. p. 100; Ex. 1, p. 6)

16. Also, during the November 22 meeting, Mr. Harris asked Mr. Kirk if Petitioner had a franchise agreement in New Hanover County. Mr. Kirk said no. (T. pp. 34-35) Petitioner was on notice from the County that it was required to have a franchise agreement in order to do business in New Hanover County. (Ex. 1, p. 37)

17. The Office of EMS's long-standing interpretation of 10 NCAC 3D.1501(a)(4) is that a provider must have a franchise agreement in each county where the provider makes pick-ups and deliveries. (T. pp. 65-66, 71) There is no allowance in the Rule .1501(a)(4) for a privilege license to pass as a substitute for a franchise agreement. (T. pp. 70-71) Mr. Pratt testified that in 28 years he has never seen a privilege license pass as a substitute for a franchise agreement. (T. pp. 70-71)

18. New Hanover County has a franchise ordinance in effect which has been adopted by the City of Wilmington. (Ex. 6, Ex. 7) Petitioner has never presented written evidence that New Hanover County was intending to issue it a franchise. (T. p. 72)

19. Mr. Harris completed a written report of his entire complaint investigation. (T. pp. 18-20; Ex. 1)

20. Based on the aforementioned facts and documentation, Mr. Harris concluded that on November 14, 2000, and November 18, 2000, Petitioner transported patients with only one certified person on board. (T. p. 35; Ex. 1, p. 7) Mr. Harris further concluded that Petitioner did not have a franchise agreement in New Hanover County, as required by 10 NCAC 3D.1501. (T. p. 35; Ex. 1, p. 7) Based on the foregoing, he recommended that the complaint investigation be forwarded to Mr. Drexal Pratt, Section Chief of the Office of EMS, for further review. (T. pp. 35-36, 53; Ex. 1, p. 7) Mr. Harris forwarded the report to Mr. Pratt. (T. pp. 36, 57)

21. Mr. Pratt has 28 years of experience in EMS. He has served as Section Chief for the last two years. One of his duties as Section Chief is to review complaint investigations and issue a final decision regarding the investigations. (T. pp. 55-56) Mr. Pratt received and reviewed the report completed by Mr. Harris. (T. p. 58)

22. Based on his review of the report and the fact that Petitioner had been informed on numerous occasions of the statutory staffing requirements for ambulance transport, Mr. Pratt decided to notify Petitioner of Respondent's intent to revoke Petitioner's provider's license. (T. pp. 58-59, 80-81) Accordingly, on March 5, 2001, Mr. Pratt sent by certified mail a Notice of Intent to Revoke Ambulance Provider License to Mr. Kirk. (T. pp. 59-60, Ex. 2)

23. As outlined in the Notice, Respondent determined that Petitioner transported patients without minimum staffing as required by the General Statutes and routinely transported patients in New Hanover County without a franchise from the county. (T. pp. 60-61; Ex. 2, pp. 1-2)

24. In the Notice, Petitioner was informed of the specific facts supporting the basis for the intent to revoke. (T. pp. 63-64; Ex. 2, p. 3) Petitioner was also informed in the Notice of its opportunity to respond. (T. p. 67)

25. Mr. Pratt received a response from Petitioner. (T. p. 67; Ex. 3) Mr. Pratt reviewed Petitioner's response. Petitioner's response only reaffirmed Respondent's information that Petitioner had transported patients without proper staffing. (T. p. 68; Ex. 3) Specifically, in the first paragraph of Petitioner's response, Mr. Kirk admitted that on at least one occasion Petitioner transported a patient by ambulance without sufficient staffing. (T. p. 68; Ex. 3)

26. After reviewing Mr. Harris' report, consulting with Office of EMS staff, and reviewing Petitioner's response, and due to his concern for patient health and safety, Mr. Pratt decided to revoke Petitioner's license on the following grounds: (1) Petitioner had violated N.C. Gen. § 131E-158 by transporting patients by ambulance without sufficient personnel, and (2) Petitioner had violated 10 NCAC 3D.1501 by operating in New Hanover County without a franchise. Mr. Pratt testified that either of the grounds would have been sufficient standing alone to justify revocation of Petitioner's license. (T. p. 79)

27. On June 8, 2001, Mr. Pratt notified Petitioner by certified mail that its provider's license was revoked. (T. pp. 62, 69-70, 86; Ex. 4) In the Notice, Respondent informed Petitioner of its appeal rights. (T. p. 70; Ex. 4)

28. Normally, the Office of EMS communicates with the provider about any alleged statutory and regulatory violations and the provider corrects any violations and revocation is not necessary. Petitioner continued to violate the minimum staffing requirements after several communications with the Office of EMS and continued to operate in New Hanover County after being informed by the County that it needed a franchise. (T. pp. 58-59, 80, 85; Ex. 1, p. 37)

29. Mr. Pratt testified that the Office of EMS has received reports since March 5, 2001, that Petitioner has transported patients without sufficient staffing. (T. p. 81)

Based upon the foregoing Stipulations and Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 131E and 150B of the North Carolina General Statutes; however, the Office of Administrative Hearings does not have jurisdiction over the constitutional challenge of 10 NCAC 3D.1501, as the Office of Administrative Hearings is a court of limited jurisdiction. *See Great American Insurance Co. v. Gold*, 254 N.C. 168, 250 S.E.2d 792 (1961).

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

3. The North Carolina Department of Health and Human Services, Division of Facility Services, Office of EMS Section, is charged with ensuring that the public's health and safety is met by establishing minimum standards and promulgating rules according to the General Statutes.

4. As an ambulance provider, Petitioner is subject to the provisions of Article 7 of N.C. Gen. Stat. § 131E and the rules promulgated thereunder.

5. Pursuant to N.C. Gen. Stat. 131E-155.1(d) and 10 NCAC 3D. 1401, the Office of EMS may deny, suspend, amend, or revoke an ambulance provider license in any case in which the Department finds that there has been substantial failure to comply with the provisions of Article 7 of N.C. Gen. Stat. § 131E or the rules adopted thereunder.

6. N.C. Gen. Stat. § 131E-158 requires at least two certified personnel to be aboard an ambulance when patients are being transported, and Petitioner violated Section 131E-158 on November 14, 2000, and November 18, 2000, when it transported by ambulance three patients with only one certified personnel on board the ambulance, and violated Section 131E-158 on November 18, 2000, when it transported by ambulance a patient with only one certified personnel on board.

7. Pursuant to 10 NCAC 3D.1501(a)(4), where there is a franchise ordinance in effect, an ambulance provider must have a current franchise to operate, or present written evidence of intent to issue a franchise from the franchiser.

8. Petitioner has violated 10 NCAC 3D. 1501(a)(4) because Petitioner does not have a franchise to operate in New Hanover County and it has presented no written evidence of New Hanover County's intent to issue it a franchise.

9. Petitioner has substantially failed to comply with the provisions of Article 7 of N.C. Gen. Stat. § 131E and the rules adopted thereunder.

10. Petitioner's provider's license should be suspended until it obtains a franchise in New Hanover County, and the revocation of Petitioner's provider's license as it relates to Petitioner's failure to comply with staffing requirements, should be suspended for five years on the condition that there is no subsequent violation of the staffing requirements. If Petitioner transports without sufficient staffing within the next five years, the revocation of its provider's license shall become effective.

DECISION

As to its operations in New Hanover County, Petitioner's provider's license shall be suspended until it obtains a franchise in said County. As to its operations in Brunswick County, the revocation of Petitioner's provider's license shall be suspended for five years on the condition that there is no subsequent violation of the staffing requirements. If Petitioner transports without proper staffing in either county within the next five years, the revocation of its provider's license shall become effective in both counties.

ORDER

It is hereby ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 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 decisions. N.C. Gen. Stat. § 150-36(a).

The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Facility Services.

This the 31st day of December 2001.

Fred G. Morrison Jr.
Senior Administrative Law Judge