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For the CUMULATIVE INDEX to the NC Register go to:
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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

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NORTH CAROLINA REGISTER
Publication Schedule for July 2003 – December 2003

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Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule (first legislative day of the next regular session)	270th day from publication in the Register
17:13	01/02/03	12/06/02	01/17/03	03/03/03	03/20/03	05/01/03	05/10/04	09/29/03
17:14	01/15/03	12/19/02	01/30/03	03/17/03	03/20/03	05/01/03	05/10/04	10/12/03
17:15	02/03/03	01/10/03	02/18/03	04/04/03	04/21/03	06/01/03	05/10/04	10/31/03
17:16	02/17/03	01/27/03	03/04/03	04/21/03	04/21/03	06/01/03	05/10/04	11/14/03
17:17	03/03/03	02/10/03	03/18/03	05/02/03	05/20/03	07/01/03	05/10/04	11/28/03
17:18	03/17/03	02/24/03	04/01/03	05/16/03	05/20/03	07/01/03	05/10/04	12/12/03
17:19	04/01/03	03/11/03	04/16/03	06/02/03	06/20/03	08/01/03	05/10/04	12/27/03
17:20	04/15/03	03/25/03	04/30/03	06/16/03	06/20/03	08/01/03	05/10/04	01/10/04
17:21	05/01/03	04/09/03	05/16/03	06/30/03	07/21/03	09/01/03	05/10/04	01/26/04
17:22	05/15/03	04/24/03	05/30/03	07/14/03	07/21/03	09/01/03	05/10/04	02/09/04
17:23	06/02/03	05/09/03	06/17/03	08/01/03	08/20/03	10/01/03	05/10/04	02/27/04
17:24	06/16/03	05/23/03	07/01/03	08/15/03	08/20/03	10/01/03	05/10/04	03/12/04
18:01	07/01/03	06/10/03	07/16/03	09/02/03	09/22/03	11/01/03	05/10/04	03/27/04
18:02	07/15/03	06/23/03	07/30/03	09/15/03	09/22/03	11/01/03	05/10/04	04/10/04
18:03	08/01/03	07/11/03	08/16/03	09/30/03	10/20/03	12/01/03	05/10/04	04/27/04
18:04	08/15/03	07/25/03	08/30/03	10/14/03	10/20/03	12/01/03	05/10/04	05/11/04
18:05	09/02/03	08/11/03	09/17/03	11/03/03	11/20/03	01/01/04	05/10/04	05/29/04
18:06	09/15/03	08/22/03	09/30/03	11/14/03	11/20/03	01/01/04	05/10/04	06/11/04
18:07	10/01/03	09/10/03	10/16/03	12/01/03	12/22/03	02/01/04	05/10/04	06/27/04
18:08	10/15/03	09/24/03	10/30/03	12/15/03	12/22/03	02/01/04	05/10/04	07/11/04
18:09	11/03/03	10/13/03	11/18/03	01/02/04	01/20/04	03/01/04	05/10/04	07/30/04
18:10	11/17/03	10/24/03	12/02/03	01/16/04	01/20/04	03/01/04	05/10/04	08/13/04
18:11	12/01/03	11/05/03	12/16/03	01/30/04	02/20/04	04/01/04	05/10/04	08/27/04
18:12	12/15/03	11/20/03	12/30/03	02/13/04	02/20/04	04/01/04	05/10/04	09/10/04

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 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 60 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.

Note from the Codifier: *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..*

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice of Application for Innovative Approval of a Wastewater System for On-site Subsurface Use

Pursuant to G.S. 130A-343(g), the North Carolina Department of Environment and Natural Resources (DENR) shall publish a Notice in the NC Register that a manufacturer has submitted a request for approval of a wastewater system, component, or device for on-site subsurface use. The following application has been submitted to DENR:

Application by: Carl Thompson
Infiltrator Systems, Inc.
P.O. Box 768
Old Saybrook, CT 06475
1-800-221-4436
Fax 860-577-7001

For: Modification to "Infiltrator" chambered sewage effluent disposal system Innovative Approval

DENR Contact: Dr. Robert Uebler
1-252-946-6481
FAX 252-975-3716
bob.uebler@ncmail.net

The application may be reviewed by contacting the applicant or at 2728 Capital Blvd., Raleigh, NC, On-Site Wastewater Section, Division of Environmental Health. Draft proposed innovative approvals and proposed final action on the application by DENR can be viewed on the On-Site Wastewater Section web site: www.deh.enr.state.nc/oww/.

Written public comments may be submitted to DENR within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Mr. Bill Jeter, Chief, On-site Wastewater Section, 1642 Mail Service Center, Raleigh, NC 27699-1642, or bill.jeter@ncmail.net, or Fax 919.715.3227. Written comments received by DENR in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

North Carolina Department of Labor
Division of Occupational Safety and Health
4 West Edenton Street
Raleigh, NC 27601

(919) 662-4597

NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS

In consideration of G.S. 150-B-21.5(c) the Occupational Safety and Health Division of the Department of Labor hereby gives notice that:

- rule changes have been submitted to update the North Carolina Administrative Code at 13 NCAC 07F .0101 to incorporate by reference the occupational safety and health related provisions of Title 29 of the Code of Federal Regulations Part 1910 promulgated as of June 2, 2003, except as specifically described, and

- the North Carolina Administrative Code at 13 NCAC 07A .0301 automatically includes amendments to certain parts of the Code of Federal Regulations, including Title 29, Part 1904—Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses recent verbatim adoptions concerning:

- Powered Industrial Trucks Standard
  (68 FR 32637, June 2, 2003)

- Exit Routes, Emergency Action Plans and Fire Prevention Plans
  (67 FR 67950 - 67965, November 7, 2002)

The Federal Register (FR), as cited above, contains both technical and economic discussions that explain the basis for each change.

For additional information, please contact:

Bureau of Education, Training and Technical Assistance
Occupational Safety and Health Division
North Carolina Department of Labor
4 West Edenton Street
Raleigh, North Carolina 27601

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:

Barbara A. Jackson, General Counsel
North Carolina Department of Labor
Legal Affairs Division
4 West Edenton Street
Raleigh, NC 27601

NOTICE OF REQUEST FOR PERMANENT VARIANCE FROM OCCUPATIONAL SAFETY AND HEALTH STANDARD

BY

NORTH CAROLINA DEPARTMENT OF LABOR

Statement of the Subject Matter: The Commissioner of Labor hereby gives notice that she is considering, in accordance with G.S. 95-132(b), an application for a permanent variance from Continental General Tire, Inc. ("Continental").

Reason for Proposed Action: On January 30, 2002, Continental filed an application for a permanent variance with the Occupational Safety and Health Division of the North Carolina Department of Labor ("OSHNC"). If granted, the variance will allow Continental to store more than 300 pounds of LP gas cylinders in three (3) separate storage locations or clusters contained within a single building, provided that no more than nine (9) 33-pound cylinders are stored in any one (1) location or cluster. Unless the application for permanent variance is granted, Continental would be prohibited from storing more than 300 pounds of LP gas cylinders in a single building pursuant to 29 CFR 1910.110(f)(4)(i), Storage and Handling of Liquified Petroleum Gases, which has been adopted by reference by OSHNC.

Authority for Proposed Action: G.S. 95-132(b); 13 NCAC 07A.0710.

Comment and Hearing Procedures: Interested and potentially affected persons or parties are invited to make known their views, comments, information or arguments regarding the permanent variance application and consideration of the granting of the permanent variance. To review the application or to obtain a copy of it, contact Lynette D. Johnson, Assistant Agency Rulemaking Coordinator, at the address below. Affected employees and employers may request a public hearing by filing a written request for a hearing by the close of business on October 8, 2003. Written comments, data or other information relevant to this proceeding should be submitted by the close of business on October 15, 2003. Requests for a hearing and written comments should be submitted to Lynette D. Johnson, Assistant Agency Rulemaking Coordinator, N.C. Department of Labor, Legal Affairs Division, 1101 Mail Service Center, Raleigh, North Carolina, 27699-1101. Fax transmittals may be directed to (919) 733-4235.

Barbara A. Jackson
General Counsel/Agency Rulemaking Coordinator

SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY

NODA Properties, LLC

Pursuant to G.S. ?130A-310.34, NODA Properties, LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in the City of Charlotte, Mecklenburg County, North Carolina. The Property is comprised of approximately 3.5 acres located at 2320 North Davidson Street in Charlotte. Environmental contamination exists on the Property in groundwater. NODA Properties, LLC has committed itself to redevelop the Property exclusively for industrial, commercial, retail and residential uses in a mixed-use format. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and NODA Properties, LLC, which in turn includes (a) a legal description of the Property, (b) a map showing the location of the Property, (c) a description of the contaminants involved and their concentrations in the media of the Property, (d) the above-stated description of the intended future use of the Property, and (e) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the offices of the City of Charlotte, Neighborhood Development Key Business, Employment & Business Service, located at 600 East Trade Street, by contacting Carolyn Minnich at that address, at cminnich@ci.charlotte.nc.us, or at (704) 336-3499; or at 401 Oberlin Road, Raleigh, NC 27605 by contacting Scott Ross at that address, at scott.ross@ncmail.net, or at (919) 733-2801, ext. 328. Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the Property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Head, Special Remediation Branch
Superfund Section
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

Note from the Codifier: *The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.*
Statutory reference: G.S. 150B-21.2.

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Structural Pest Control Committee intends to amend the rule(s) cited as 02 NCAC 34 .0102, .0505, .0604-.0605.*

Proposed Effective Date: *February 1, 2004*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *Any person may request a public hearing on the proposed rules by submitting a request in writing no later than October 16, 2003, to Carl Falco, Secretary, NC Structural Pest Control Committee, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Reason for Proposed Action: *Provide a clear definition of "wood-decay fungi"; strengthen the requirements governing the performance of and contracts for pre-construction termite treatments, to ensure the proper completion of this work and protect the consumer's interest.*

Comment Procedures: *Comments from the public shall be directed to Carl Falco, Secretary, NC Structural Pest control Committee, 1001 Mail Service Center, Raleigh, NC 27699-1001, phone (919) 733-6100, fax (919) 733-0633, and email carl.falco@ncmail.net . Comment period ends December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 34 - STRUCTURAL PEST CONTROL DIVISION

SECTION .0100 - INTRODUCTION AND DEFINITIONS

02 NCAC 34 .0102 DEFINITIONS

In addition to the definitions contained in the Act, the following definitions apply:

(1) "Act or law" means the Structural Pest Control Act of North Carolina of 1955.

(2) "Active infestation of a specific organism" means evidence of present activity by that organism, visible in, on, or under a structure, or in or on debris under the structure.

(3) "Active ingredient" means an ingredient which will or is intended to prevent, destroy, repel, or mitigate any pest.

(4) "Acutely toxic rodenticidal baits" means all baits that, as formulated, are classified as Toxicity Category I or II (Signal Word "Danger" or "Warning") under 40 CFR Part 156.10.

(5) "Board of Agriculture" means the Board of Agriculture of the State of North Carolina.

(6) "Commercial certified applicator" shall mean any certified applicator employed by a licensed individual.

(7) "Commercial structure" means any structure which is not a residential structure, including but not limited to shopping centers, offices, nursing homes, and similar structures.

(8) "Complete surface residual spray" means the over-all application of any pesticide by spray or otherwise, to any surface areas within, on, under, or adjacent to, any structure in such a manner that the pesticide will adhere to surfaces and remain toxic to household pests and rodents or other pests for an extended period of time.

(9) "Continuing education units" or "CEU" means units of noncredit education awarded by the Division of Continuing Studies, North Carolina State University or comparable educational institution, for satisfactorily completing course work.

(10) "Continuing certification unit" or "CCU" means a unit of credit awarded by the Division upon satisfactory completion of one clock hour of approved classroom training.

(11) "Crack and crevice application" means an application of pesticide made directly into a

crack or void area with equipment capable of delivering the pesticide to the target area.

(12) "Deficient soil sample" shall mean any soil sample which, when analyzed, is found to contain less than 25 percent, expressed in parts per million (ppm), of the termiticide applied by a licensee which would be found if the termiticide had been applied at the lowest concentration and dosage recommended by the labeling.

(13) "Department" means the Department of Agriculture and Consumer Services of the State of North Carolina.

(14) "Disciplinary action" means any action taken by the Committee as provided under the provisions of G.S. 106-65.28.

(15) "Division" means the Structural Pest Control Division of the Department of Agriculture and Consumer Services of the State of North Carolina.

(16) "Enclosed space" means any structure by whatever name known, including household structures; commercial buildings; warehouses; docks; vacant structures; places where people congregate such as hospitals, schools, churches, and others; railroad cars; trucks; ships; aircraft; and common carriers. It shall also mean vaults, tanks, chambers, and special rooms designed for use, being used, or intended to be used for fumigation operations.

(17) "EPA" means the Environmental Protection Agency of the United States Government.

(18) "EPA registration number" means the number assigned to a pesticide label by EPA.

(19) "Flammable pesticidal fog" means the fog dispelled into space and produced:

(a) from oil solutions of pesticides finely atomized by a blast of heated air or exhaust gases from a gasoline engine, or from mixtures of water and pesticidal oil solutions passed through a combustion chamber, the water being converted to steam, which exerts a shearing action, breaking up the pesticidal oil into small droplets (thermal fog); or

(b) from oil solutions of pesticides which are forced through very narrow space by centrifugal force and atomized as they are thrown off into the air (mechanical or cold fogs).

(20) "Fog or fogging" means micron sized particles of pesticide(s) dispersed by means of a thermal or centrifugal fogger or a pressurized aerosol pesticide.

(21) "Fumigation" means the use of fumigants within an enclosed space, or in, or under a structure, in concentrations which may be hazardous to man.

(22) "Fumigation crew" or "crew" means personnel performing the fumigation operation.

(23) "Fumigation operation" means all details prior to application of fumigant(s), the application of fumigant(s), fumigation period, and post fumigation details as outlined in these Rules.

(24) "Fumigation period" means the period of time from application of fumigant(s) until ventilation of the fumigated structure(s) is completed and the structure or structures are declared safe for occupancy for human beings or domestic animals.

(25) "Fumigator" means a person licensed under the provisions of G.S. 106-65.25(a)(3) or certified under the provisions of G.S. 106-65.26 to engage in or supervise fumigation operations.

(26) "Gas-retaining cover" means a cover which will confine fumigant(s) to the space(s) intended to be fumigated.

(27) "General fumigation" means the application of fumigant(s) to one or more rooms and their contents in a structure, at the desired concentration and for the necessary length of time to control rodents, insects, or other pests.

(28) "Household" means any structure and its contents which are used for man.

(29) "Household pest" means any vertebrate or invertebrate organism occurring in a structure or the surrounding areas thereof, including but not limited to insects and other arthropods, commensal rodents, and birds which have been declared pests under G.S. 143-444. "Household pest" does not include wood-destroying organisms.

(30) "Household pest control" means that phase of structural pest control other than the control of wood-destroying organisms and fumigation and shall include the application of remedial measures for the purpose of curbing, reducing, preventing, controlling, eradicating, and repelling household pests.

(31) "Inactive license" shall mean any structural pest control license held by an individual who has no employees and is not engaged in any structural pest control work except as a certified applicator or registered technician.

(32) "Infestation of a specific organism" means evidence of past or present activity by that organism, visible in, on, or under a structure, or in or on debris under the structure.

(33) "Inspection for a specific wood-destroying organism" means the careful visual examination of all accessible areas of a building and the probing of accessible structural members adjacent to slab areas, chimneys, and other areas particularly susceptible to attack by wood-destroying organisms to determine the presence of and the damage by that specific wood-destroying organism.

(34) "Inspector" means any employee of the Structural Pest Control Division of the

Department of Agriculture and Consumer Services of the State of North Carolina.

(35) "Licensed structural pest control operation," or "pest control operation," or "operator," or "licensed operator" means any person licensed under the provisions of G.S. 106-65.25(a) or unlicensed who, for direct or indirect hire or compensation is engaged in the business of structural pest control work, as defined in G.S. 106-65.24(23).

(36) "Liquefied gas aerosol" means the spray produced by the extreme rapid volatilization of a compressed and liquefied gas, to which has been added a nonvolatile oil solution containing a pesticide.

(37) "Noncommercial certified applicator" shall mean any certified applicator not employed by a licensed individual.

(38) "Open porch" means any porch without fill in which the distance from the bottom of the slab to the top of the soil beneath the slab is greater than 12 inches.

(39) "Physical barrier" as used in 02 NCAC 34 .0500, means a barrier, which, by its physical properties and proper installation, is capable of preventing the passage of subterranean termites into a structure to be protected from subterranean termites.

(40) "Residential structure" means any structure used, or suitable for use, as a dwelling such as a single- or multi-family home, house trailer, motor home, mobile home, a condominium or townhouse, or an apartment or any other structure, or portion thereof.

(41) "Secretary" means the Secretary to the North Carolina Structural Pest Control Committee.

(42) "Service vehicle" means any vehicle used regularly to transport the licensee or certified applicator or registered technician or other employee or any equipment or pesticides used in providing structural pest control services.

(43) "Slab-on-ground" means a concrete slab in which all or part of that concrete slab is resting on or is in direct contact with the ground immediately beneath the slab.

(44) "Solid masonry cap" means a continuous concrete or masonry barrier covering the entire top, width and length, of any wall, or any part of a wall, that provides support for the exterior or structural parts of a building.

(45) "Space spray" means any pesticide, regardless of its particle size, which is applied to the atmosphere within an enclosed space in such a manner that dispersal of the pesticide particles is uncontrolled. Pesticidal fogs or aerosols, including those produced by centrifugal or thermal fogging equipment or pressurized aerosol pesticides, shall be considered space sprays.

(46) "Spot fumigation" means the application of a fumigant to a localized space or harborage within, on, under, outside of, or adjacent to, a structure for local household pest or rodent control.

(47) "Spot surface residual spray" means the application of pesticidal spray directly to a surface and only in specific areas where necessary and in such a manner that the pesticidal material will largely adhere to the surface where applied and will remain toxic to household pests or rodents or other pests for which applied for an extended period of time.

(48) "Structure" means all parts of a building, whether vacant or occupied, in all stages of construction.

(49) "Structural pests" means all pests that occur in any type of structure of man and all pests associated with the immediate environs of such structures.

(50) "Sub-slab fumigation" means the application of a fumigant below or underneath a concrete slab and is considered spot fumigation.

(51) "Supervision," as used in 02 NCAC 34 .0325, shall mean the oversight by the licensee of the structural pest control activities performed under that license. Such oversight may be in person by the licensee or through instructions, verbal, written or otherwise, to persons performing such activities. Instructions may be disseminated to such persons either in person or through persons employed by the licensee for that purpose.

(52) "Termiticide(s)" (as used in these Rules) means those pesticides specified in 02 NCAC 34 .0502, Pesticides for Subterranean Termite Prevention and/or Control.

(53) "Termiticide barrier" shall mean an area of soil treated with an approved termiticide, which, when analyzed, is not deficient in termiticide.

(54) "To use any pesticide in a manner inconsistent with its labeling" means to use any pesticide in a manner not permitted by the labeling. Provided that, the term shall not include:

(a) applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling unless the labeling specifically prohibits deviation from the specified dosage, concentration, or frequency;

(b) applying a pesticide against any target pest not specified on the labeling if the application is to the site specified on the labeling, unless the EPA has required that the labeling specifically state that the pesticide may be used only for the pests specified on the labeling; or

(c) employing any method of application not prohibited by the labeling unless the labeling specifically states that the product may be applied only by the methods specified by the labeling.

(55) "Type of treatment" means the method used to apply a pesticide formulation to a specific location, including but not limited to: space spray, crack and crevice, complete surface residual, spot surface residual, bait placement, or fog.

(56) "Unauthorized personnel" means any individual or individuals not given specific authorization by the licensee or certified applicator to enter areas to which access is restricted by these Rules.

(57) "Waiver" means a standard form prescribed by the Committee pursuant to 02 NCAC 34 .0603 which will, when completed correctly, permit the licensee to deviate from or omit one or more of the minimum treatment methods and procedures for structural pests which are set forth in the Committee rules, definitions, and requirements.

(58) "Wood-decaying fungi" means any of the brown or white rot fungi in the Class Hymenomycetes that are capable of digesting or consuming the structural elements of wood after installation and causing a significant decline in strength or failure of wooden structural members.

~~(58)~~(59) "Wood-destroying insect report" means any written statement or certificate issued by an operator or his authorized agent, regarding the presence or absence of wood-destroying insects or their damage in a structure.

~~(59)~~(60) "Wood-destroying organism" is an organism such as a termite, beetle, other insect, or fungus which may devour or destroy wood or wood products and other cellulose material in, on, under, in contact with, and around structures.

~~(60)~~(61) "Wood-destroying organism report" means any written statement or certificate issued by an operator or his authorized agent, regarding the presence or absence of wood-destroying organisms or their damage in a structure.

Authority G.S. 106-65.29.

SECTION .0500 - WOOD-DESTROYING ORGANISMS

02 NCAC 34 .0505 SUBTERRANEAN TERMITE PREVENTION/RES BLDGS UNDER CONST

(a) All treatments performed pursuant to this Rule shall be performed at the label recommended rate and concentration only.

(b) The following standards and requirements shall apply to the treatment of a building for subterranean termite control during construction if the building has a basement or crawl space:

(1) Establish a vertical barrier in the soil by trenching or trenching and rodding along inside of the main foundation wall; the entire perimeter of all multiple masonry chimney bases, pillars, pilasters, and piers; and both sides of partition or inner walls with a termiticide from the top of the grade to the top of the footing or to a minimum depth of 30 inches, whichever is less. Where footings are exposed, treatment shall be performed adjacent to the footing but not below the bottom of the footing. Trench shall be no less than six inches in depth or to the bottom of the footing, whichever is less. Where drain tile, french drains, or other foundation drainage systems present a hazard of contamination outside the treatment zone, treatment shall be performed in a manner that will not introduce termiticide into the drainage system.

(2) After a building or structure has been completed and the excavation filled and leveled, so that the final grade has been reached along the outside of the main foundation wall, establish a vertical barrier in the soil by trenching or trenching and rodding adjacent to the outside of the main foundation wall with a termiticide from the top of the grade to the top of the footing or to a minimum depth of 30 inches, whichever is less. Where footings are exposed, treatment shall be performed adjacent to the footing and not below the bottom of the footing. Trench shall be no less than six inches in depth or to the bottom of the footing, whichever is less. Where drain tile, french drains, or other foundation drainage systems present a hazard of contamination outside the treatment zone, treatment shall be performed in a manner that will not introduce termiticide into the drainage system.

(3) Establish a horizontal termiticide barrier in the soil within three feet of the main foundation, under slabs, such as patios, walkways, driveways, terraces, gutters, etc., attached to the building. Treatment shall be performed before slab is poured, but after fill material or fill dirt has been spread.

(4) Establish a horizontal termiticide barrier in the soil under the entire surface of floor slabs, such as basements, porches, entrance platforms, garages, carports, breezeways, sun rooms, etc. The treatment shall be performed before slab is poured but after fill material or fill dirt has been spread.

(5) Establish a vertical termiticide barrier in the soil around all critical areas, such as expansion and construction joints and plumbing and utility conduits, at their point of penetration of the slab or floor or, for crawl space construction, at the point of contact with the soil.

(6) If concrete slabs are poured prior to treatment, treatment of slabs shall be performed as required by 02 NCAC 34 .0503(a) or (b): Except that; the buyer of the property or his authorized agent may release the licensee from further treatment of slab areas under this Rule

provided such release is obtained in writing on the Subterranean Termite Sub-Slab Release Form provided by the Division, which shall contain the name of the builder, address of property, identification of the slab areas not treated, name and address of the structural pest control company and shall be signed by the company representative and the home buyer. This form may be obtained by writing the North Carolina Department of Agriculture and Consumer Services, Structural Pest Control Division, PO Box 27647, Raleigh, NC 27611 or by calling (919) 733-6100.

(c) Slab-on-Ground Construction. All parts of Paragraph (a) of this Rule shall be followed, as applicable, in treating slab-on-ground construction.

(d) All treating requirements specified in this Rule shall be completed within 60 days following the completion of the structure, as described in Subparagraph (b)(2) of this Rule.

(e) Paragraphs (b) and (c) of this Rule shall not apply to subterranean termite treatment performed using termite bait(s) labeled for protection of the entire structure when the licensee provides a warranty for the control of subterranean termites on the entire structure.

(f) Paragraphs (b) and (c) of this Rule shall not apply to subterranean termite treatment performed using EPA registered topically applied wood treatment termiticides labeled for the protection of the entire structure when the licensee applies the material according to labeled directions and provides a warranty for the control of subterranean termites on the entire structure.

(g) No later than the date of the completion of any treatment performed under this Rule, the licensee or his employee shall place a durable sticker/label, no less than three inches square, on the meter base, circuit breaker box or inside surface of kitchen cabinet door or other readily noticeable location providing, at a minimum, the following information:

(1) The statement: "This structure was treated for the prevention of subterranean termites. A warranty has been issued to the builder. If you did not receive your copy of this warranty at closing, contact your builder or the company below for additional warranty information." in boldface type;

(2) Name, address and telephone number of the company performing the treatment; and

(3) Date of final treatment.

Authority G.S. 106-65.29.

SECTION .0600 - WOOD-DESTROYING ORGANISMS AGREEMENTS

02 NCAC 34 .0604 WOOD-DESTROYING ORGANISMS RECORDS

(a) A duplicate of each written agreement and waiver (if applicable) for the control or prevention of any wood-destroying organism shall be kept by the licensee for a minimum of two years beyond the expiration date of the written agreement. The duplicate of each written agreement shall contain, in addition to the information specified under 02 NCAC 34 .0605, the following:

(1) EPA approved brand name of pesticide used;

(2) Names of all employees who applied pesticide;

(3) Information required by EPA;

(4) For restricted use pesticides, the concentration and approximate total volume of each pesticide applied. For restricted use pesticides, this information, along with the information required by Subparagraphs (a)(1) and ~~(a)(2)~~ (2)of this Rule shall also be included on the customer's copy of the written agreement; and

(5) In addition, for all treatments performed pursuant to 02 NCAC 34 .0505 or .0506, the following records shall be made and maintained:

(A) the date of each termiticide application;

(B) the portion or portions of the structure treated;

(C) the approximate volume of termiticide applied during each treatment; and

(D) the concentration at which the termiticide is applied.

(b) A duplicate of each wood-destroying insect or wood-destroying organism report shall be kept by the licensee for a minimum of two years beyond the date of issuance.

(c) Noncommercial certified applicators shall maintain the following records for two years beyond the last date of treatment:

(1) EPA approved brand name of all pesticides used;

(2) Concentration and approximate total volume of pesticide applied;

(3) Names of all employees that applied pesticide;

(4) Target pest;

(5) Site of application;

(6) Date of application; and

(7) Information required by EPA.

(d) If the pesticide used to control any wood-destroying organism requires or recommends monitoring or inspecting for the pest to be controlled, the licensee, certified applicator, or their employees shall make and maintain records of all such inspection or monitoring activities. Such records shall be made available for inspection as provided for in 02 NCAC 34 .0328.

(e) For all treatments performed pursuant to 02 NCAC 34 .0505 or .0506, the licensee shall place, or cause to be placed, a record of treatment in the permit box or, if no box exists, with the building permit on the job site. The treatment record shall be on a form prescribed by the Division and shall include at least the following information:

(1) Date of application(s);

(2) Specific area(s) treated during each application;

(3) Name of termiticide applied;

(4) Approximate volume of termiticide applied; and

(5) Date of final treatment.

Authority G.S. 106-65.29.

02 NCAC 34 .0605 CONTRACTUAL AGREEMENTS

FOR WOOD-DESTROYING ORGANISMS

(a) All agreements for the control or prevention of wood-destroying organisms in existing structures shall be in writing and shall include the following:

(1) Date property was inspected and full name of the inspector;

(2) Exact location of property inspected or treated;

(3) Name and address of the property owner or his authorized agent;

(4) Name and address of the company proposing or performing the treatment;

(5) License number and phase(s) of the licensee and under whose license the work is to be performed;

(6) Signature of licensee or his authorized agent;

(7) A foundation diagram or, if required or recommended by the label of the pesticide used, a site plan of the structure(s) or portions of such structure(s) inspected. The diagram or site plan shall indicate:

(A) The location of individual water sources;

(B) Any visible evidence of wood-destroying organism infestation;

(C) Whether the infestation is active or inactive;

(D) The location of any visibly damaged timbers;

(E) Portions of the structure treated and not treated;

(F) The approximate number and proposed location(s) of bait or monitoring device placements, if applicable. Upon completion of the installation the property owner or agent shall be provided with a diagram or site plan showing the actual number and locations of all stations; and

(G) For treatment of wood-decay fungus infestations, the location and result of all moisture meter readings obtained pursuant to 02 NCAC 34 .0508;

(8) The date upon which the written agreement is entered into and the period of time covered by the written agreement;

(9) The wood-destroying organism(s) to be controlled or prevented and the terms of the service agreement or warranty to be issued, if any;

(10) Whether or not reinspections are to be made and, if so, approximate time interval between, and renewal fees for same;

(11) Conditions under which retreatments will be made;

(12) Total price to be charged for treatment service and for repairs or excavations, where such are to be performed;

(13) The written agreement, waiver (if applicable), and Wood-Destroying Insect Report or Wood-Destroying Organism Report, shall not show or include the address and telephone number of any licensee's representative or employee other than the address and telephone number of those specified in Subparagraphs (a)(4) and ~~(a)(5)~~ (5) of this Rule;

(14) Any licensee or business entity advertising to be bonded shall advise each customer, in writing, in the proposal, whether or not the warranty or written agreement will be covered by a bond of any type;

(15) If the performance of the work is guaranteed by a bond, the agreement shall set forth those performance guarantees in wording identical to that in the bond itself;

(16) 02 NCAC 34 .0501(a) shall also be followed;

(17) Whether the written agreement or warranty may be transferred to subsequent owners of the property and the terms of any such transfer.

(b) A structure or structures covered by a written agreement or warranty for wood-destroying organism(s) treatment shall not knowingly be placed under an additional written agreement or warranty for the same treatment while the first written agreement or warranty is still in effect without first obtaining a separate written acknowledgment of such signed by the property owner or authorized agent.

(c) When periodic reinspections or retreatments are specified in written agreements for the control or prevention of wood-destroying organisms, the licensee shall issue to the property owner or his authorized agent, after each reinspection or retreatment, a signed report of each reinspection or retreatment showing the condition of the property with respect to the presence or absence of wood-destroying organisms. A record of such reinspections and retreatments shall be kept in the file of the licensee. Such reports shall be subject to inspection by the enforcement agency or committee.

(d) All agreements for the control or prevention of wood-destroying organisms in buildings under construction shall be in writing and shall include the following:

(1) Date of final treatment and period of time covered by the written agreement;

(2) Exact location of the treated property;

(3) Name and address of the property owner or his authorized agent;

(4) Name and address of the licensee;

(5) License number and phase(s) of the licensee and full name of company licensee represents;

(6) Signature of licensee or his authorized agent;

(7) The wood-destroying organism(s) to be controlled or prevented and the terms of the warranty to be issued, if any;

(8) Whether or not reinspections are to be made and, if so, approximate time interval between, and renewal fees, if any, for same;

(9) Conditions under which retreatments will be made;

(10) Total price to be charged for treatment service;

(11) Any licensee or business entity advertising to be bonded shall advise each customer, in writing, in the proposal, whether or not the warranty or written agreement will be covered

by a bond of any type;

(12) If the performance of the work is guaranteed by a bond, the agreement shall set forth those performance guarantees in wording identical to that in the bond itself;

(13) 02 NCAC 34 .0604(a) shall also be followed;

(14) Whether the written agreement or warranty may be transferred to subsequent owners of the property and the terms of any such ~~transfer.~~ transfer;

(15) For treatment of new construction for control or prevention of subterranean termites, the licensee shall provide to the builder (or owner, if known at time of treatment) a one-year transferable warranty, which contains the following terms and conditions:

(A) The warranty shall cover repair of damage and retreatment of the structure;

(B) The warranty period shall begin on or after the day the pretreatment is completed;

(C) The PCO must offer the homeowner the opportunity to renew the warranty on the same terms and conditions the licensee offers renewals of the regular termite treatment contracts for four consecutive years;

(D) The warranty must be transferable to any owner within either the original one-year warranty period, or within any of the four years specified in Part (d)(15)(C) of this Rule, by notification from the new or the old owner to the licensee or his agent. Failure of the homeowner to renew any one year relieves the PCO of any future responsibility for renewal based upon Parts (d)(15)(C) and (D) of this Rule. The renewal warranty must, as a minimum, extend retreatment, but may by mutual agreement, be extended and/or enlarged; and

(E) Neither the licensee's original warranty nor any extension thereof shall extend to:

(i) Violations of the Standard Builder's Code by the owner/builder which occur after the completion of the pretreatment;

(ii) Additions not treated by the licensee or his representative;

(iii) Infestations originating or thriving as a result of remodeling, landscaping or other alteration which occurs after pretreatment is complete and which entails considerable disturbance of the treated soil area or would otherwise enable termites to avoid or circumvent the treatment; and

(iv) Infestations originating or thriving as a result of building defects, including but not limited to water leaks, excessive moisture or structural defects, of which the property has been notified and given the opportunity to correct.

(e) If the licensee provides preventive treatment(s) for subterranean termites to a structure(s) for someone such as a builder or construction company who is constructing the building(s) for someone else or with the purpose of offering the building(s) for sale, the licensee may enter into a single master agreement with the builder to provide the preventive treatment(s) for subterranean termites. This single master agreement shall include the following:

(1) Name and address of the builder or his authorized agent;

(2) That information required in Subparagraphs ~~(d)(4), (d)(5), (d)(6), (d)(7), (d)(8), (d)(9), (d)(10), (d)(11), (d)(12), (d)(13), and (d)(14)~~ (d)(4) through (15) of this Rule.

(f) When a structure is treated under an agreement with a builder, the licensee shall:

(1) Following completion of the treatment and upon notification by the builder or buyer, issue a written agreement to the initial buyer. The written agreement issued to the buyer shall include the following:

(A) Name and address of the builder or his authorized agent as it appears on the builder's agreement;

(B) That information required in Subparagraphs ~~(d)(1), (d)(2), (d)(3), (d)(4), (d)(5), (d)(6), (d)(7), (d)(8), (d)(9), (d)(11),~~ (d)(1) through (9), (11), (14),and ~~(d)(14)~~ (15) of this Rule. The builder shall be issued a copy of any written agreement issued the buyer.

(2) Maintain a record of each treatment performed on each structure to include the following information:

(A) Location of the structure treated;

(B) Date each treatment was performed;

(C) The portion(s) of the structure treated.

Authority G.S. 106-65.29.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rules cited as 10A NCAC 41A .0101, .0209, .0212.*

Proposed Effective Date: *May 1, 2004*

Public Hearing:
Date: *October 22, 2003*
Time: *2:30 p.m.*
Location: *1330 St. Mary's Street, Room G1-A, Raleigh, NC*

Reason for Proposed Action:
10A NCAC 41A .0101 – *The Monkeypox virus recently has been identified as a public health threat in the U.S. Consequently, it is important that this disease be promptly and accurately identified to state public health authorities if it is to be effectively controlled. It therefore is imperative that this disease be added to those other diseases and conditions that are required to be reported to the Division of Public Health.*
10A NCAC 41A .0209 – *The recurrence of tuberculosis as a public health threat in the U.S. makes it important that this disease be promptly and accurately identified. It therefore is imperative that laboratories throughout the state that isolate the Mycobacterium complex send a subculture of the isolate to the State Laboratory of Public Health to be genotyped for the DNA "fingerprinting" that is necessary in order to accurately reveal a common source of any outbreak.*
10A NCAC 41A .0212 – *Serve acute respiratory syndrome (SARS) has been identified as a serious public health threat. It remains infectious in the bodies of its victims, and it therefore is imperative that bodies of SARS victims be handled with special precautions if SARS is to be effectively controlled.*

Comment Procedures: *Written comments should be submitted to Chris G. Hoke, JD, 1915 MSC, Raleigh, NC 27699-1915. Phone (919) 715-4168, email: chris.hoke@ncmail.net. Comments should be submitted through December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 41 - HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41A - COMMUNICABLE DISEASE CONTROL

SECTION .0100 - REPORTING OF COMMUNICABLE DISEASES

10A NCAC 41A .0101 REPORTABLE DISEASES AND CONDITIONS

(a) The following named diseases and conditions are declared to be dangerous to the public health and are hereby made reportable within the time period specified after the disease or condition is reasonably suspected to exist:

(1) acquired immune deficiency syndrome (AIDS) - 7 days;
(2) anthrax - 24 hours;
(3) botulism - 24 hours;
(4) brucellosis - 7 days;
(5) campylobacter infection - 24 hours;
(6) chancroid - 24 hours;
(7) chlamydial infection (laboratory confirmed) - 7 days;
(8) cholera - 24 hours;
(9) Creutzfeldt-Jakob disease – 7 days;
(10) cryptosporidiosis - 24 hours;
(11) cyclosporiasis - 24 hours;
(12) dengue - 7 days;
(13) diphtheria - 24 hours;
(14) *Escherichia coli*, shiga toxin-producing - 24 hours;
(15) ehrlichiosis - 7 days;
(16) encephalitis, arboviral - 7 days;
(17) enterococci, vancomycin-resistant, from normally sterile site - 7 days;
(18) foodborne disease, including but not limited to Clostridium perfringens, staphylococcal, and Bacillus cereus - 24 hours;
(19) gonorrhea - 24 hours;
(20) granuloma inguinale - 24 hours;
(21) Haemophilus influenzae, invasive disease - 24 hours;
(22) Hantavirus infection – 7 days;
(23) Hemolytic-uremic syndrome/thrombotic thrombocytopenic purpura - 24 hours;
(24) Hemorrhagic fever virus infection – 24 hours;
(25) hepatitis A - 24 hours;
(26) hepatitis B - 24 hours;
(27) hepatitis B carriage - 7 days;
(28) hepatitis C, acute - 7 days;
(29) human immunodeficiency virus (HIV) infection confirmed - 7 days;
(30) legionellosis - 7 days;
(31) leptospirosis - 7 days;
(32) listeriosis – 24 hours;
(33) Lyme disease - 7 days;
(34) lymphogranuloma venereum - 7 days;
(35) malaria - 7 days;
(36) measles (rubeola) - 24 hours;
(37) meningitis, pneumococcal - 7 days;
(38) meningococcal disease - 24 hours;

(39) monkeypox – 24 hours;
~~(39)~~(40) mumps - 7 days;
~~(40)~~(41) nongonococcal urethritis - 7 days;
~~(41)~~(42) plague - 24 hours;
~~(42)~~(43) paralytic poliomyelitis - 24 hours;
~~(43)~~(44) psittacosis - 7 days;
~~(44)~~(45) Q fever - 7 days;
~~(45)~~(46) rabies, human - 24 hours;
~~(46)~~(47) Rocky Mountain spotted fever - 7 days;
~~(47)~~(48) rubella - 24 hours;
~~(48)~~(49) rubella congenital syndrome - 7 days;
~~(49)~~(50) salmonellosis - 24 hours;
~~(50)~~(51) severe acute respiratory syndrome (SARS) – 24 hours;
~~(51)~~(52) shigellosis - 24 hours;
~~(52)~~(53) smallpox – 24 hours;
~~(53)~~(54) streptococcal infection, Group A, invasive disease - 7 days;
~~(54)~~(55) syphilis - 24 hours;
~~(55)~~(56) tetanus - 7 days;
~~(56)~~(57) toxic shock syndrome - 7 days;
~~(57)~~(58) toxoplasmosis, congenital - 7 days;
~~(58)~~(59) trichinosis - 7 days;
~~(59)~~(60) tuberculosis - 24 hours;
~~(60)~~(61) tularemia - 24 hours;
~~(61)~~(62) typhoid - 24 hours;
~~(62)~~(63) typhoid carriage (Salmonella typhi) - 7 days;
~~(63)~~(64) typhus, epidemic (louse-borne) - 7 days;
~~(64)~~(65) vibrio infection (other than cholera) - 24 hours;
~~(65)~~(66) whooping cough - 24 hours;
~~(66)~~(67) vaccinia – 24 hours;
~~(67)~~(68) yellow fever - 7 days.

(b) For purposes of reporting; confirmed human immunodeficiency virus (HIV) infection is defined as a positive virus culture; repeatedly reactive EIA antibody test confirmed by western blot or indirect immunofluorescent antibody test; positive polymerase chain reaction (PCR) test; or other confirmed testing method approved by the Director of the State Public Health Laboratory conducted on or after February 1, 1990. In selecting additional tests for approval, the Director of the State Public Health Laboratory shall consider whether such tests have been approved by the federal Food and Drug Administration, recommended by the federal Centers for Disease Control and Prevention, and endorsed by the Association of Public Health Laboratories.

(c) In addition to the laboratory reports for Mycobacterium tuberculosis, Neisseria gonorrhoeae, and syphilis specified in G.S. 130A-139, laboratories shall report:

(1) Isolation or other specific identification of the following organisms or their products from human clinical specimens:

(A) Any hantavirus or hemorrhagic fever virus.
(B) Arthropod-borne virus (any type).
(C) Bacillus anthracis, the cause of anthrax.
(D) Bordetella pertussis, the cause of whooping cough (pertussis).
(E) Borrelia burgdorferi, the cause of Lyme disease (confirmed tests).
(F) Brucella spp., the causes of brucellosis.
(G) Campylobacter spp., the causes of campylobacteriosis.
(H) Chlamydia trachomatis, the cause of genital chlamydial infection, conjunctivitis (adult and newborn) and pneumonia of newborns.
(I) Clostridium botulinum, a cause of botulism.
(J) Clostridium tetani, the cause of tetanus.
(K) Corynebacterium diphtheriae, the cause of diphtheria.
(L) Coxiella burnetii, the cause of Q fever.
(M) Cryptosporidium parvum, the cause of human cryptosporidiosis.
(N) Cyclospora cayetanesis, the cause of cyclosporiasis.
(O) Ehrlichia spp., the causes of ehrlichiosis.
(P) Shiga toxin-producing Escherichia coli, a cause of hemorrhagic colitis, hemolytic uremic syndrome, and thrombotic thrombocytopenic purpura.
(Q) Francisella tularensis, the cause of tularemia.
(R) Hepatitis B virus or any component thereof, such as hepatitis B surface antigen.
(S) Human Immunodeficiency Virus, the cause of AIDS.
(T) Legionella spp., the causes of legionellosis.
(U) Leptospira spp., the causes of leptospirosis.
(V) Listeria monocytogenes, the cause of listeriosis.
(W) Monkeypox.
~~(W)~~(X) Plasmodium falciparum, P. malariae, P. ovale, and P. vivax, the causes of malaria in humans.
~~(X)~~(Y) Poliovirus (any), the cause of poliomyelitis.
~~(Y)~~(Z) Rabies virus.
~~(Z)~~(AA) Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.
~~(AA)~~(BB) Rubella virus.
~~(BB)~~(CC) Salmonella spp., the causes of salmonellosis.
~~(CC)~~(DD) Shigella spp., the causes of shigellosis.
~~(DD)~~(EE) Smallpox virus, the cause of smallpox.
~~(EE)~~(FF) Trichinella spiralis, the cause of trichinosis.
~~(FF)~~(GG) Vibrio spp., the causes of cholera and other vibrioses.
~~(GG)~~(HH) Yellow fever virus.

~~(III)~~(II) Vaccinia virus.

~~(II)~~(JJ) Yersinia pestis, the cause of plague.

(2) Isolation or other specific identification of the following organisms from normally sterile human body sites:

(A) Group A Streptococcus pyogenes (group A streptococci).

(B) Haemophilus influenzae, serotype b.

(C) Neisseria meningitidis, the cause of meningococcal disease.

(D) Vancomycin-resistant Enterococcus spp.

(3) Positive serologic test results, as specified, for the following infections:

(A) Fourfold or greater changes or equivalent changes in serum antibody titers to:

(i) Any arthropod-borne viruses associated with meningitis or encephalitis in a human.

(ii) Any hantavirus or hemorrhagic fever virus.

(iii) Chlamydia psittaci, the cause of psittacosis.

(iv) Coxiella burnetii, the cause of Q fever.

(v) Dengue virus.

(vi) Ehrlichia spp., the causes of ehrlichiosis.

(vii) Measles (rubeola) virus.

(viii) Mumps virus.

(ix) Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.

(x) Rubella virus.

(xi) Yellow fever virus.

(B) The presence of IgM serum antibodies to:

(i) Chlamydia psittaci

(ii) Hepatitis A virus.

(iii) Hepatitis B virus core antigen.

(iv) Rubella virus.

(v) Rubeola (measles) virus.

(vi) Yellow fever virus.

Authority G.S. 130A-134; 130A-135; 130A-139; 130A-141.

SECTION .0200 - CONTROL MEASURES FOR COMMUNICABLE DISEASES

10A NCAC 41A .0209 LABORATORY TESTING

All laboratories shall do the following:

(1) When Neisseria meningitidis is isolated from a normally sterile site, test the organism for specific serogroup or send the isolate to the State ~~Public Health~~ Laboratory of Public Health for serogrouping;

(2) When a stool culture is requested on a specimen from a person with bloody diarrhea, culture the stool for shiga-toxin producing Escherichia coli or send the specimen to the State ~~Public Health~~ Laboratory of Public Health; and

(3) When Haemophilus influenzae is isolated, test the organism for specific serogroup or send the isolate to the State ~~Public Health~~ Laboratory of Public Health for serogrouping.

(4) When Mycobacterium tuberculosis complex is isolated, test the organism for specific restriction fragment length polymorphism (RFLP) or send the isolate, or a subculture of the isolate, to the State Laboratory of Public Health for genotyping.

Authority G.S. 130A-139.

10A NCAC 41A .0212 HANDLING AND TRANSPORTATION OF BODIES

(a) It shall be the duty of the physician attending any person who dies and is known to ~~have smallpox, plague,~~ be infected with HIV ~~infection~~, plague, or hepatitis B ~~infection,~~ or any person who dies and is known or reasonably suspected to be infected with smallpox, rabies, severe acute respiratory syndrome (SARS), or Jakob-Creutzfeldt to provide written notification to all individuals handling the body of the proper precautions to prevent infection. This written notification shall be provided to funeral service personnel at the time the body is removed from any hospital, nursing home, or other health care facility. When the patient dies in a location other than a health care facility, the attending physician shall notify the funeral service personnel verbally of the precautions required as soon as the physician becomes aware of the death. These precautions are noted in Paragraphs (b) and (c).

(b) The body of ~~a~~ any person who died and is known or reasonably suspected to be infected with ~~from smallpox~~ smallpox or severe acute respiratory syndrome (SARS) or any person who died and is known to be infected with ~~or~~ plague shall not be embalmed. The body shall be enclosed in a strong, tightly sealed outer case which will prevent leakage or escape of odors as soon as possible after death and before the body is removed from the hospital room, home, building, or other premises where the death occurred. This case shall not be reopened except with the consent of the local health director. Nothing in this paragraph shall prohibit cremation.

(c) Persons handling ~~bodies of persons~~ the body of any person who died and ~~were~~ is known to ~~have~~ be infected with HIV ~~infection,~~ or hepatitis B ~~infection, Jakob-Creutzfeldt,~~ or any person who died and is known or reasonably suspected to be infected with Jakob-Creutzfeldt or rabies shall be provided written notification to observe blood and body fluid precautions.

Authority G.S. 130A-144.

TITLE 13 – DEPARTMENT OF LABOR

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor intends to amend the rule cited as 13 NCAC 07A .0303.*

Proposed Effective Date: *February 1, 2004*

Public Hearing:
Date: *November 25, 2003*
Time: *2:00 p.m.*
Location: *4 West Edenton St., Room 249, Raleigh, NC*

Reason for Proposed Action: *The NC Department of Labor proposes to clarify department policy concerning disclosure of documents by stating the governing statutes that apply to its documents and delineating the stage at which OSH citations, notices and investigative files may be disclosed.*

Comment Procedures: *Written comments should be submitted to Barbara A. Jackson, 1101 Mail Service Center, Raleigh, NC 27699-1101. Phone: (919) 733-0368, fax: (919) 733-4235, email: bjackson@mail.dol.state.nc.us. Comments will be accepted through December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 07 - OSHA

SUBCHAPTER 07A - GENERAL RULES AND OPERATIONAL PROCEDURES

SECTION .0300 - PROCEDURES

13 NCAC 07A .0303 DISCLOSURE

(a) Policy. The department's ~~policy~~policies regarding the disclosure of documents in investigative and other files ~~is~~ are governed by G.S. 132 and the exceptions set forth in G.S. 95-136. Specific guidelines for the application of this policy to OSHA division files are set forth in this Rule. It should be emphasized that ~~our~~ the department's policy is to disclose all documents to which the public is entitled under North ~~Carolina~~Carolina's statutory provisions; while safeguarding the rights of complainants and witnesses required to be protected by law. ~~At the same time, great care should be taken to assure that documents which are not disclosable are kept confidential since disclosure of such documents may seriously prejudice the prosecution of cases of the occupational safety and health program.~~

(b) Specific Guidelines

(1) Prior to the issuance of a citation, the contents and copies of the case file, including any complaints, samples, photographs, testing results, trade secrets, and the narrative of the investigator's report, ~~are~~ shall not ~~to~~ be disclosed.

(2) After a citation and notice of proposed penalty have been ~~issued and received by an employer,~~issued, the citation and notice are disclosable, upon request. Disclosure will be issued by the director or his authorized representative. Prior to the contestment deadline, no other file contents shall be disclosable.

(3) If an employer or employee files a notice of contest respecting a citation, the case file (except for the citation and proposed penalty), shall not be disclosable until a final order is issued and the dates for all further appeals have expired. The disclosure of documents in proceedings before the Safety and Health Review Board will take place in accordance with the rules of evidence of the Safety and Health Review Board.

(4) Case files are to be disclosed, upon written request, in the following situations:

(A) if a determination is made that no citation will be issued and that no court action will be initiated, unless further inspection is contemplated, in which case the file shall not be disclosed until a final decision is made not to issue a citation; and

(B) if no notice of contest is filed within the statutory period, or if a notice of contest is filed but a settlement is reached, the notice is withdrawn, or the case is otherwise closed.

(5) The following information contained in a releasable case file shall not be released at any time:

(A) Trade secrets;

(B) Personnel or medical files unless permission is granted for release by the employee;

(C) Complainant and witness names or statements unless permission is granted for release by the complainant or witness; and

(D) Interagency or intra-agency documents otherwise protected by law. Legal counsel may be consulted in unique situations before any case file is released and may examine the file and designate the specific documents or portions of documents not to be disclosed.

(6) Documents which are matters of public record may be disclosed at any time; for example, pleadings and briefs filed with the ~~OSHA~~ Safety and Health Review Board or the courts.

Authority G.S; 95-129; 95-136(g).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor intends to amend the rule cited as 13 NCAC 12 .0402.*

Proposed Effective Date: *February 1, 2004*

Public Hearing:
Date: *November 25, 2003*
Time: *3:00 p.m.*
Location: *4 West Edenton St., Room 249, Raleigh, NC*

Reason for Proposed Action: *The NC Department of Labor proposes to amend the criteria for signing Youth Employment Certificate Applications. In addition, the Department proposes to eliminate the parent, guardian, custodian or person standing in place of a parent signature requirement for youths adjudicated emancipated pursuant to G.S. 7B, Article 35.*

Comment Procedures: *Written comments should be submitted to Barbara A. Jackson, 1101 Mail Service Center, Raleigh, NC 27699-1101. Phone: (919) 733-0368, fax: (919) 733-4235, email: bjackson@mail.dol.state.nc.us. Comments will be accepted through December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 12 - WAGE AND HOUR

SECTION .0400 - YOUTH EMPLOYMENT

13 NCAC 12 .0402 APPLICATION FOR A YOUTH EMPLOYMENT CERTIFICATE

(a) A youth may obtain a youth employment certificate from the county director of social services' office or approved designee in the county in which the youth resides or the county in which the youth intends to work.

(b) The youth must provide proof of age by means of one of the following:

(1) A birth certificate;
(2) Evidence from the bureau of vital statistics in the state in which the youth was born;
(3) Any state driver's license, learner's permit, or state-issued identification card;
(4) Passport;
(5) School records or insurance records; or
(6) Other documentary evidence determined as equivalent by the Wage and Hour Office.

(c) The youth shall obtain a youth employment certificate form on which the youth and the employer must supply the following information:

(1) Youth's name, address, phone number, sex, age and birth date;
(2) Employer's company name, type of business, address and phone number; and
(3) Job description.

(d) The youth employment certificate must be signed by the ~~youth in the presence of the issuing officer,~~ youth, by a parent, guardian, custodian, or person standing in place of a parent as defined in 29 CFR 570.126,and by the employer. In the event that a final decree of emancipation has been issued for the youth by a court of competent jurisdiction pursuant to G.S. 7B, Article 35, the youth may sign the certificate without the approval of a parent, guardian or custodian, or person standing in place of a parent as defined in 29 CFR 570.126.

(e) A youth may obtain a youth employment certificate electronically from the Department of Labor, if available. The Department shall use electronic means to verify the age and permissibility of employment based on type of employment and prohibitions in G.S. 95-25.5 and the child labor provisions of the F.L.S.A. Electronically issued youth employment certificates shall not be valid until signed ~~by the youth, the employer and the youth's parent, guardian, or person standing in place of a parent as defined in 29 CFR 570.126~~as set forth in Paragraph (d) of this Rule.

Authority G.S. 95-25.5; 95-25.19.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the DENR – Environmental Management Commission intends to amend the rule cited as 15A NCAC 02B .0311.*

Proposed Effective Date: *February 1, 2004*

Public Hearing: *Joint hearing for proposed reclassification of surface waters and 401 certification*
Date: *November 6, 2003*
Time: *6:00 p.m.*

Location: *Jordan Matthews High School Auditorium, 910 East Cardinal St., Siler City, NC*

Reason for Proposed Action: *Dr. J.H. Carter III and Associates and the Town of Siler City have requested that two Rocky River segments in Chatham County (Cape Fear River Basin) be reclassified to WS-III Critical Area (CA). The reason for the reclassification is to allow a new dam structure to be placed below the existing dam. The existing dam does not impound enough water to result in a true reservoir according to DWQ and DEH staff. However, the new dam will cause the nature of this water supply source to change from run-of-river to an approximately 160-acre reservoir. The Town wishes to have the new dam constructed and the resulting reservoir created in order to meet water demands through 2030. The proposed CA would extend along the current river from the proposed dam, which is to be placed approximately 65 feet downstream of the existing dam, to a point approximately 3.6 miles upstream of the proposed dam. This proposal also includes several tributaries to the above–mentioned main stem portion of Rocky River; some of these tributaries, which are presently classified WS-III, are proposed to be reclassified to WS-III CA. The new WS-III CA will be the area measured 0.5 miles from the proposed reservoir normal pool elevation of approximately 540 feet. The new dam will raise the normal water level above the spillway of the existing dam, and as a result, approximately 140 acres of land will be impounded in the new CA. The waters to be reclassified above the current CA meet water supply water standards because these waters are currently classified as WS-III. The waters to be reclassified below the current CA meet water supply water standards according to DWQ staff. If reclassified, development and discharge restrictions will apply. However, there are no current or planned dischargers and no planned development in the entire proposed reclassification area. Chatham County and the Town of Siler City, the only local governments with jurisdiction in the reclassification area, would need to modify their water supply watershed protection ordinances within 270 days after the reclassification effective date. Chatham County has provided written support for this reclassification.*

Comment Procedures: *Comments from the public shall be directed to Bob Zarzecki, DENR Division of Water Quality, 401/Wetlands Unit, 1650 Mail Service Center, Raleigh, NC 27699-1650, phone (919)733-9726, fax (919)733-6893, and email bob.zarzecki@ncmail.net . Comment period ends December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

☐ **State**
☐ **Local**
☐ **Substantive (≥$3,000,000)**
☒ **None**

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02B - SURFACE WATER AND WETLAND STANDARDS

SECTION .0300 - ASSIGNMENT OF STREAM CLASSIFICATIONS

15A NCAC 02B .0311 CAPE FEAR RIVER BASIN

(a) Places where the schedules may be inspected:

(1) Clerk of Court:
Alamance County
Bladen County
Brunswick County
Caswell County
Chatham County
Columbus County
Cumberland County
Duplin County
Durham County
Forsyth County
Guilford County
Harnett County
Hoke County
Lee County
Montgomery County
Moore County
New Hanover County
Onslow County
Orange County
Pender County
Randolph County
Rockingham County
Sampson County
Wake County
Wayne County

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

(A) Winston-Salem Regional Office
585 Waughtown Street
Winston-Salem, North Carolina

(B) Fayetteville Regional Office
Systel Building
225 Green Street
Suite 714
Fayetteville, North Carolina

(C) Raleigh Regional Office
3800 Barrett Drive
Raleigh, North Carolina

(D) Washington Regional Office
943 Washington Square Mall

Washington, North Carolina

(E) Wilmington Regional Office
127 Cardinal Drive Extension
Wilmington, North Carolina

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

(1) March 1, 1977;
(2) December 13, 1979;
(3) December 14, 1980;
(4) August 9, 1981;
(5) April 1, 1982;
(6) December 1, 1983;
(7) January 1, 1985;
(8) August 1, 1985;
(9) December 1, 1985;
(10) February 1, 1986;
(11) July 1, 1987;
(12) October 1, 1987;
(13) March 1, 1988;
(14) June 1, 1988;
(15) July 1, 1988;
(16) January 1, 1990;
(17) August 1, 1990;
(18) August 3, 1992;
(19) September 1, 1994;
(20) August 1, 1998;
(21) April 1, 1999;
(22) August 1, ~~2002.~~ 2002;
(23) August 1, 2004.

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

(1) Cane Creek [Index No. 16-21-(1)] from source to a point 0.5 mile north of N.C. Hwy. 54 (Cane Reservoir Dam) including the Cane Creek Reservoir and all tributaries has been reclassified from Class WS-III to WS-I.
(2) Morgan Creek [Index No. 16-41-1-(1)] to the University Lake dam including University Lake and all tributaries has been reclassified from Class WS-III to WS-I.

(d) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin has been amended effective July 1, 1988 by the reclassification of Crane Creek (Crains Creek) [Index No. 18-23-16-(1)] from source to mouth of Beaver Creek including all tributaries from C to WS-III.

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

(1) Intracoastal Waterway (Index No. 18-87) from southern edge of White Oak River Basin to western end of Permuda Island (a line from Morris Landing to Atlantic Ocean), from the eastern mouth of Old Topsail Creek to the southwestern shore of Howe Creek and from the southwest mouth of Shinn Creek to channel marker No. 153 including all tributaries except the King Creek Restricted Area, Hardison Creek, Old Topsail Creek, Mill Creek, Futch Creek and Pages Creek were reclassified from Class SA to Class SA ORW.
(2) Topsail Sound and Middle Sound ORW Area which includes all waters between the Barrier Islands and the Intracoastal Waterway located between a line running from the western most shore of Mason Inlet to the southwestern shore of Howe Creek and a line running from the western shore of New Topsail Inlet to the eastern mouth of Old Topsail Creek was reclassified from Class SA to Class SA ORW.
(3) Masonboro Sound ORW Area which includes all waters between the Barrier Islands and the mainland from a line running from the southwest mouth of Shinn Creek at the Intracoastal Waterway to the southern shore of Masonboro Inlet and a line running from the Intracoastal Waterway Channel marker No. 153 to the southside of the Carolina Beach Inlet was reclassified from Class SA to Class SA ORW.

(f) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin has been amended effective January 1, 1990 as follows: Big Alamance Creek [Index No. 16-19-(1)] from source to Lake Mackintosh Dam including all tributaries has been reclassified from Class WS-III NSW to Class WS-II NSW.

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

(h) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective June 1, 1994 as follows:

(1) The Black River from its source to the Cape Fear River [Index Nos. 18-68-(0.5), 18-68-(3.5) and 18-65-(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.
(2) The South River from Big Swamp to the Black River [Index Nos. 18-68-12-(0.5) and 18-68-12(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.
(3) Six Runs Creek from Quewhiffle Swamp to the Black River [Index No. 18-68-2] was reclassified from Class C Sw to Class C Sw ORW.

(i) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective September 1, 1994 with the reclassification of the Deep River [Index No. 17-(36.5)] from the Town of Gulf-Goldston water supply intake

to US highway 421 including associated tributaries from Class C to Classes C, WS-IV and WS-IV CA.

(j) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 1998 with the revision to the primary classification for portions of the Deep River [Index No. 17-(28.5)] from Class WS-IV to Class WS-V, Deep River [Index No. 17-(41.5)] from Class WS-IV to Class C, and the Cape Fear River [Index 18-(10.5)] from Class WS-IV to Class WS-V.

(k) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective April 1, 1999 with the reclassification of Buckhorn Creek (Harris Lake)[Index No. 18-7-(3)] from the backwaters of Harris Lake to the Dam at Harris Lake from Class C to Class WS-V.

(l) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective April 1, 1999 with the reclassification of the Deep River [Index No. 17-(4)] from the dam at Oakdale-Cotton Mills, Inc. to the dam at Randleman Reservoir (located 1.6 mile upstream of U.S. Hwy 220 Business), and including tributaries from Class C and Class B to Class WS-IV and Class WS-IV & B. Streams within the Randleman Reservoir Critical Area have been reclassified to WS-IV CA. The Critical Area for a WS-IV reservoir is defined as 0.5 mile and draining to the normal pool elevation of the reservoir. All waters within the Randleman Reservoir Water Supply Watershed are within a designated Critical Water Supply Watershed and are subject to a special management strategy specified in 15A NCAC 02B .0248.

(m) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 2002 as follows:

(1) Mill Creek [Index Nos. 18-23-11-(1), 18-23-11-(2), 18-23-11-3, 18-23-11-(5)] from its source to the Little River, including all tributaries was reclassified from Class WS-III NSW and Class WS III&B NSW to Class WS-III NSW HQW@ and Class WS-III&B NSW HQW@.

(2) McDeed's Creek [Index Nos. 18-23-11-4, 18-23-11-4-1] from its source to Mill Creek, including all tributaries was reclassified from Class WS III NSW and Class WS III&B NSW to Class WS-III NSW HQW@ and Class WS-III&B NSW HQW@.

(3) The "@" symbol as used in Paragraph (m) of this Rule means that if the governing municipality has deemed that a development is covered under a "5/70 provision" as described in Rule 15A NCAC 02B .0215(3)(b)(i)(E) (Fresh Surface Water Quality Standards for Class WS-III Waters), then that development is not subject to the stormwater requirements as described in rule 15A NCAC 02H .1006 (Stormwater Requirements: High Quality Waters).

(n) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 2004 as follows:

(1) A portion of Rocky River [Index Number 17-43-(1)] from a point approximately 0.3 mile upstream of Town of Siler City upper reservoir dam to a point approximately 0.3 mile downstream of Lacy Creek from WS-III to WS-III CA.

(2) A portion of Rocky River [Index Number 17-43-(8)] from dam at lower water supply reservoir for Town of Siler City to a point approximately 65 feet below dam (site of proposed dam) from C to WS-III CA.

(3) A portion of Mud Lick Creek (Index No. 17-43-6) from a point approximately 0.4 mile upstream of Chatham County SR 1355 to Town of Siler City lower water supply reservoir from WS-III to WS-III CA.

(4) A portion of Lacy Creek (17-43-7) from a point approximately 0.6 mile downstream of Chatham County SR 1362 to Town of Siler City lower water supply reservoir from WS-III to WS-III CA.

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

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 16 - BOARD OF DENTAL EXAMINERS

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Dental Examiners intends to amend the rules cited as 21 NCAC 16M .0101-.0102.*

Proposed Effective Date: *February 1, 2004*

Public Hearing:
Date: *October 17, 2003*
Time: *8:30 a.m.*
Location: *North Carolina Board of Dental Examiners, 15100 Weston Parkway, Suite 101, Cary, NC*

Reason for Proposed Action: *To increase fees for the general dentistry and dental hygiene examination and to increase fees for renewal of the general dentistry license and dental hygiene license to meet the increased financial demands of operations of the Board.*

Comment Procedures: *Comments from the public shall be directed to Lisa Thompson, 15100 Weston Parkway, Suite 101, Cary, NC 27513. Comment period ends December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile

transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

SUBCHAPTER 16M - FEES PAYABLE

21 NCAC 16M .0101 DENTISTS

(a) The following fees shall be payable to the Board:

(1)	Application for general dentistry examination	~~$500.00~~ $675.00
(2)	Renewal of general dentistry license	189.00
~~(2)~~(3)	Application for instructor's license or renewal thereof	140.00
~~(3)~~(4)	Application for provisional license	$100.00
~~(4)~~(5)	Application for intern permit or renewal thereof	$150.00
~~(5)~~(6)	Certificate of license to a resident dentist desiring to change to another state or territory	$ 25.00
~~(6)~~(7)	Duplicate license	$ 25.00
~~(7)~~(8)	Reinstatement of license after retirement from practice in this State	$225.00
~~(8)~~(9)	Fee for late renewal of any license or permit	$ 50.00
~~(9)~~(10)	Application for license by credentials	$2000.00
~~(10)~~(11)	Application for limited volunteer dental license	$100.00
~~(11)~~(12)	Renewal of limited volunteer dental license	$ 25.00

(b) Each dentist renewing his license to practice dentistry in North Carolina shall be assessed a fee of forty dollars ($40.00) in addition to the annual renewal fee, to be contributed to the operation of the North Carolina Caring Dental Professionals.

Authority G.S. 90-28; 90-39; 90-48.

21 NCAC 16M .0102 DENTAL HYGIENISTS

(a) The following fees shall be payable to the Board:

(1)	Application for examination	~~$125.00~~$170.00
(2)	Renewal of dental hygiene license	$ 81.00
~~(2)~~(3)	Reinstatement of license after retirement from practice in this State	$ 60.00
~~(3)~~(4)	Application for provisional licensure	$ 60.00
~~(4)~~(5)	Certificate to a resident dental hygienist desiring to change to another state or territory	$ 25.00
~~(5)~~(6)	Application for license by credentials	$750.00

(b) Each dental hygienist renewing his or her license to practice dental hygiene in North Carolina shall be assessed a fee of twenty-five dollars ($25.00), in addition to the annual renewal fee, to be contributed to the operation of the North Carolina Caring Dental Professionals.

Authority G.S. 90-232.

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CHAPTER 32 - NORTH CAROLINA MEDICAL BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Medical Board intends to amend the rules cited as 21 NCAC 32S .0106, .0109-.0110.*

Proposed Effective Date: *March 1, 2004*

Public Hearing:
Date: *October 20, 2003*
Time: *10:00 a.m.*
Location: *North Carolina Medical Board, 1203 Front St., Raleigh, NC*

Reason for Proposed Action: *Pursuant to G.S. 90-18.1, the Board is responsible for ensuring that the supervising physician has provided to the physician assistant written instructions about ordering medications, tests, and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test, or treatment is ordered. The adoption of a rule requiring regularly scheduled meetings between the supervising physician and the physician assistant to discuss clinical problems and quality improvement will further the above interest more effectively. Continuing Medical Education requirement changed to allow greater flexibility in choice of CME courses.*

Comment Procedures: *Comments from the public shall be directed to Alexa Kapetanakis, Physician Extender Coordinator, 1203 Front St., Raleigh, NC 27609 and email alexa.kapetanakis@ncmedboard.org . Comment period ends December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**

☒ **None**

SUBCHAPTER 32S - PHYSICIAN ASSISTANT REGULATIONS

SECTION .0100 – DEFINITIONS

21 NCAC 32S .0106 CONTINUING MEDICAL EDUCATION

~~(a)~~ In order to maintain physician assistant licensure, documentation must be maintained by the physician assistant of 100 hours of continuing medical education (CME) completed for every two year period, at least 40 hours of which must be American Academy of Physician Assistants Category I CME or the equivalent. CME documentation must be available for inspection by the Board or an agent of the Board upon request.

~~(b) Any physician assistant who prescribes controlled substances shall complete at least three hours of CME every two years on the medical and social effects of the misuse and abuse of alcohol, nicotine, prescription drugs (including controlled substances), and illicit drugs.~~

Authority G.S. 90-18(13); 90-18.1.

21 NCAC 32S .0109 PRESCRIPTIVE AUTHORITY

A physician assistant is authorized to prescribe, order, procure, dispense and administer drugs and medical devices subject to the following conditions:

(1) The physician assistant and the supervising physician(s) shall acknowledge that each is familiar with the laws and rules regarding prescribing and shall agree to comply with these laws and rules by incorporating the laws and rules into the written prescribing instructions required for each approved practice site; and

(2) The physician assistant has received from the supervising physician written instructions for prescribing, ordering, and administering drugs and medical devices and a written policy for periodic review by the physician of these instructions and policy; and

(3) In order to compound and dispense drugs, the physician assistant must obtain approval from the Board of Pharmacy and must carry out the functions of compounding and dispensing by current Board of Pharmacy rules and any applicable federal guidelines; and

(4) In order to prescribe controlled substances, both the physician assistant and the supervising physician must have a valid DEA registration and the physician assistant shall prescribe in accordance with information provided by the Medical Board and the DEA. All prescriptions for substances falling within schedules II, IIN, III, and IIIN, as defined in the federal Controlled Substances Act, shall not exceed a legitimate 30 day supply; and

(5) Each prescription issued by the physician assistant shall contain, in addition to other information required by law, the following:

(a) the physician assistant's name, practice address, telephone number; and

(b) the physician's assistant's license number and, if applicable, the physician assistant's DEA number for controlled substances prescription; and

(c) the responsible supervising physician's (primary or back-up) name and telephone number; and

(6) Documentation of ~~each prescription~~ prescriptions must be noted on the patient's record and must include the ~~following information~~:

~~(a)~~ medication name and dosage, amount prescribed, directions for use, and number of refills,~~refills; and~~

~~(b) signature of physician assistant with supervising physician's co-signature according to the site specific rule in 21 NCAC 32S .0110.~~

(7) Physician Assistants who request, receive, and dispense professional medication samples to patients must comply with all applicable state and federal regulations.

Authority G.S. 90-18(13); 90-18.1; 90-171.23(14); 58 Fed. Reg. 31,171(1993) (to be codified at 21 C.F.R. 301).

21 NCAC 32S .0110 SUPERVISION OF PHYSICIAN ASSISTANTS

(a) A physician assistant may perform medical acts, tasks, or functions only under the supervision of a physician. Supervision shall be continuous but, except as otherwise provided in these Rules, shall not be construed as requiring the physical presence of the supervising physician at the time and place that the services are rendered.

(b) It is the obligation of each team of physician(s) and physician assistant(s) to ensure that the physician assistant's scope of practice is identified; that delegation of medical tasks is appropriate to the skills of the supervising physician(s) as well as the physician assistant's level of competence; that the relationship of, and access to, each supervising physician is defined; and that a process for evaluation of the physician assistant's performance is established. A primary supervising physician and a physician assistant in a new practice arrangement will meet monthly for the first six months to discuss practice relevant clinical problems and quality improvement measures. Thereafter, regular meetings between the primary supervising physician and the physician assistant shall occur no less than every six months. A record of these meetings shall be signed and dated by both the supervising physician and the physician assistant, and shall be available for inspection upon request by the Board's representative. A statement describing these supervisory arrangements in all settings must be signed by each supervising physician and the physician assistant and shall be kept on file at all practice sites. This statement describing supervisory arrangements and instructions for prescriptive authority shall be available upon request by the Board or its representatives.

(c) ~~The time interval between the physician assistant's contact with the patient and the chart review and countersigning by the supervising physician may be a maximum of seven days for outpatient (clinic/office) charts.~~ Entries by a physician assistant into patient charts of inpatients (hospital, long term care institutions) must comply with the rules and regulations of the institution.~~institution; but, at a minimum, the initial work-up and treatment plan and the discharge summary must be countersigned by the supervising physician within seven days of the time of generation of these notes. In the acute inpatient setting, the initial work-up, orders, and treatment plan must be signed and dated within two working days.~~

Authority G.S. 90-18(13); 90-18.1.

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CHAPTER 46 - BOARD OF PHARMACY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Pharmacy intends to adopt the rules cited as 21 NCAC 46 .1818, .2508-.2510, .2612, amend the rules cited as 21 NCAC 46 .1317, .1503, .1505, .1602-.1604, .1801, .1804, .1806, .1808, .1812-.1813, .2502, .2504, .2507, .2601, .2605, .3101, .3202-.3205, .3207, .3209 and repeal the rule cited as 21 NCAC 46 .1807.*

Proposed Effective Date: *February 1, 2004*

Public Hearing:
Date: *October 29, 2003*
Time: *12:00 p.m.*
Location: *Sheraton Imperial, 4700 Emperor Blvd., Durham, NC (I-40 Exit 282, Page Rd.)*

Reason for Proposed Action:
21 NCAC 46 .1317 – *To define certain terms used in the practice of pharmacy, the Pharmacy Practice Act and Board rules.*
21 NCAC 46 .1503 – *To bring the experience in pharmacy requirement up-to-date with current practice. The Doctor of Pharmacy curriculum now includes clinical experience.*
21 NCAC 46 .1505 – *To revise Board examination requirements to delete outdated examination process and to make the examination requirements more current.*
21 NCAC 46 .1602 – *To allow for foreign graduates to obtain a license by reciprocity.*
21 NCAC 46 .1603 – *To clarify when a new permit is required to ensure that the controlling entity is the permit holder.*
21 NCAC 46 .1604 – *To reconcile this Rule with the amendment to Rule .1603.*
21 NCAC 46 .1801 – *To incorporate the current Medical Board policy regarding when a prescription may be issued without a physical examination and a prior prescriber-patient relationship.*
21 NCAC 46 .1804 – *To clarify that a holder of a device and medical equipment permit may not acquire, receive, store or deliver prescription drugs unless the entity also holds a pharmacy permit in order to protect the public.*
21 NCAC 46 .1806 – *To expand existing duties to allow certified technicians to transfer prescriptions to increase the efficiency of pharmacy operations.*
21 NCAC 46 .1807 – *To merge requirements for the facsimile transmission of prescription orders with requirements for the electronic transmission of prescription orders to keep current with existing technology and to avoid confusion.*
21 NCAC 46 .1808 - *To ensure the public is protected with respect to repackaged pharmaceuticals.*
21 NCAC 46 .1812 – *To protect the public with respect to change in prescription orders to ensure that the patient is adequately informed of compensation to enable the patient to make a more informed decision regarding prescription drugs.*
21 NCAC 46 .1813 – *To merge requirements for the facsimile transmission of prescription orders with the requirements for the electronics transmission of prescription orders to keep current with existing technology and to avoid confusion.*
21 NCAC 46 .1818 – *To inform patient and health care provider of name of generic drug for increase in the public health, safety and welfare.*
21 NCAC 46 .2502 – *To allow for more flexibility in the pharmacist-manager position, to improve security in the pharmacy, and to provide for increased accountability for pharmacists and technicians in order to protect the public.*
21 NCAC 46 .2504 – *To require written counseling information to be provided in a foreign language if requested to ensure that the patient is adequately informed and to ensure that patients are equally counseled and protected regardless of whether the patient receives prescriptions from local or non local pharmacies. This amendment also eliminates duplication in drug utilization review.*
21 NCAC 46 .2507 – *To allow for more widespread access to immunization for greater public protection.*
21 NCAC 46 .2508 – *To prohibit agreements that take away a patient's ability to choose a provider to allow for greater access to services.*
21 NCAC 46 .2509 – *To aid other licensing boards in investigating complaints against their licenses and gaining access to records resulting in a greater protection to the public.*
21 NCAC 46 .2510 – *To allow for advances in practice through new procedures to provide better care for the public.*
21 NCAC 46 .2601 – *To clarify that when a pharmacy is dispensing or delivering devices and medical equipment, the pharmacist-manager or clinical pharmacist practitioner is responsible in order to provide for greater accountability.*
21 NCAC 46 .2605 – *To set out requirements for a person in charge for a device and medical equipment permit to ensure that the person-in-charge is qualified to carry out his or her responsibilities.*
21 NCAC 46 .2612 – *To set out requirements for storage of devices and medical equipment and to limit dispensing devices and medical equipment to the site holding the permit in order to protect the public.*
21 NCAC 46 .3101 – *To allow for more complete patient care.*
21 NCAC 46 .3202-.3205, .3207, .3209 – *To incorporate pharmacy technicians into peer review activities for impaired pharmacy personnel.*

Comment Procedures: *Comments from the public shall be directed to David R. Work, P.O. Box 4560, Chapel Hill, NC 27515-4560. Comment period ends December 1, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

☐ **State**
☐ **Local**
☒ **Substantive (**≥$3,000,000**)** *21 NCAC 46 .2504*
☒ **None** *21 NCAC 46 .1317, .1503, .1505, .1602-.1604, .1801, .1804, .1806-.1808, .1812-.1813, .1818, .2502, .2507-.2510, .2601, .2605, .2612, .3101, .3202-.3205, .3207, .3209*

SECTION .1300 - GENERAL DEFINITIONS

21 NCAC 46 .1317 DEFINITIONS

The definitions of various terms used in this Chapter are found in G.S. 90, Article 4A, and as follows:

(1) Ambulation Assistance Equipment. Devices that aid in walking, excluding canes, crutches, and walkers.

(2) Approved School or College of Pharmacy. A school or college of pharmacy accredited by the American Council on Pharmaceutical Education, or a foreign school with a professional pharmacy degree program of at least five years approved by the Board.

(3) Auxiliary Drug Inventory. A secure, segregated, supplementary source for drugs to be used solely for the purpose of providing adequate drug availability when the pharmacy is closed or the pharmacist is unavailable.

(4) Board. As defined in G.S. 90-85.3(b).

(5) Certified technician. A technician who has passed a nationally recognized pharmacy technician certification board exam, or its equivalent, that has been approved by the Board.

~~(5)~~(6) Consultant Pharmacist. A licensed pharmacist who, in collaboration with the supervising physician and nurse practitioner or assistant to the physician, develops a retrospective drug utilization review program which:

(a) reviews the appropriateness of the choice of medication(s) for the patient and the patient's therapeutic regimen, including choice of medication, dose, frequency, and route of administration;

(b) identifies and resolves therapeutic duplication in the patient's medication regimen; and

(c) considers patient-specific medication contraindications.

The consultant pharmacist holds himself available for consultation in person, by telephone, or by other means of direct communication at all times when drugs are dispensed.

~~(6)~~(7) Diagnostic equipment. Equipment used to record physiological information while a person goes about normal daily living or while asleep in order to document a disease process. EPTs, thermometers, and cholesterol equipment are not included as diagnostic equipment.

~~(7)~~(8) Drug review or Pharmaceutical care assessment. An onsite review of a patient's or resident's record by a licensed pharmacist that involves interpretation and evaluation of the drug therapy and other pharmaceutical care services to achieve intended medication outcomes and minimize negative effects of drug therapy.

~~(8)~~(9) Duplicate as used in G.S. 90-85.24. Any license, permit, or registration issued or reissued by the Board which is identical to a previously issued license, permit, or registration, including a permit reissued due to a change in pharmacist-manager.

~~(9)~~(10) Emergency Drugs. Those drugs whose prompt use and immediate availability are generally regarded by physicians as essential in the proper treatment of unforeseen adverse changes in a patient's health or well-being.

(11) Employee. A person who is or would be considered an employee under the North Carolina Workers' Compensation Act. This definition applies to locations both within and outside of this State holding pharmacy or device and medical equipment permits and without regard to the number of persons employed by the permit holder.

~~(10)~~(12) Executive Director. The Secretary-Treasurer and Executive Director of the Board.

~~(11)~~(13) Graduate of an Approved School or College of Pharmacy. A person who has received an undergraduate professional degree in pharmacy from an approved school or college of pharmacy, or a person who has graduated from a foreign professional school of pharmacy and has successfully completed the Foreign Pharmacy Graduate Equivalency Examination offered by the National Association of Boards of Pharmacy and the Test of English as a Foreign Language.

~~(12)~~(14) HMES. Home medical equipment supplier.

~~(13)~~(15) Health Care Facility Pharmacy. A pharmacy maintained in a hospital, clinic, nursing home, rest home, sanitarium, non-federal governmental institution, industrial health facility, or other like health service under the supervision of a pharmacist; or the central area in a hospital, clinic, or other health care facility where drugs are procured, stored, processed, or issued, or where pharmaceutical services are performed.

~~(14)~~(16) Indulgence in the Use of Drugs. The use of narcotic drugs or other drugs affecting the central nervous system or the use of intoxicating beverages to an extent as to deprive the user of reasonable self-control or the ability to exercise such judgment as might reasonably be expected of an average prudent person.

~~(15)~~(17) Limited Service Pharmacy Permit. A pharmacy permit issued by the Board to an applicant that wishes to render in an institutional setting pharmaceutical services not limited to scope and kind but to time and conditions under which such services are rendered.

(18) Medication Management Therapy Services and Related Functions. Included in the practice of pharmacy as part of monitoring, recording and reporting drug therapy and device usage are medication management therapy services and related functions.

~~(16)~~(19) Medication Administration Record. A record of drugs administered to a patient.

~~(17)~~(20) Medication Order. An order for a prescription drug or other medication or a device for a patient from a person authorized by law to prescribe medications.

~~(18)~~(21) Mobility equipment. Devices that aid a person in self-movement, other than walking, including manual or power wheelchairs and scooters.

~~(19)~~(22) Oxygen and respiratory care equipment. Equipment or devices used to administer oxygen or other legend drugs, maintain viable airways or monitor cardio-respiratory conditions or events, including, but not limited to, compressed medical gases; oxygen concentrators; liquid oxygen; nebulizers; compressors; aerosol therapy devices; portable suction machines; nasal continuous positive airway pressure (CPAP) machines; Bi-phasic positive pressure devices (BiPAP); infant monitors, such as apnea monitors and cardio- respiratory monitors; positive and negative pressure mechanical ventilators; and pulse oximeters.

~~(20)~~(23) Patient Medication Profile. A list of all prescribed medications for a patient.

~~(21)~~(24) Pharmacist. Any person within the definition set forth in G.S. 90- 85.3(p), including any druggist.

~~(22)~~(25) Pharmacist-Manager. The person who accepts responsibility for the operation of a pharmacy in conformance with all statutes and regulations pertinent to the practice of pharmacy and distribution of drugs by signing the permit application, its renewal or addenda thereto.

~~(23)~~(26) Pharmacy. Any place within the definition set forth in G.S. 90- 85.3(q), including any apothecary or drugstore.

~~(24)~~(27) Pharmacy Intern. Any person who is duly registered with the Board under the internship program of the Board to acquire pharmacy experience or enrolled in approved academic internship programs. A pharmacy intern working under a pharmacist preceptor or supervising pharmacist may, while under supervision, perform all acts constituting the practice of pharmacy.

~~(25)~~(28) Place of residence. Any place used as an individual's temporary or permanent home.

~~(26)~~(29) President. The President of the Board.

~~(27)~~(30) Rehabilitation environmental control equipment. Equipment or devices which permit a person with disabilities to control his or her immediate surroundings.

~~(28)~~(31) Rehabilitation Services. Services and equipment required to maintain or improve functional status and general health as prescribed by the physician which are uniquely specified for each individual's lifestyle. The people involved in this process include the patient, caregiver, physician, therapist, rehabilitation equipment supplier and others who impact on the individual's life style and endeavors.

~~(29)~~(32) Signature. A written or electronic signature or computerized identification code.

~~(30)~~(33) Two Years College Work. Attendance at an accredited college for two academic years of not less than eight and one-half months each and the completion of work for credit leading to a baccalaureate degree or its equivalent and that would permit the student to advance to the next class.

~~(31)~~(34) Undergraduate Professional Degree in Pharmacy. A B.S. or Pharm. D. degree.

~~(32)~~(35) Vice-President. The Vice-President of the Board.

Authority G.S. 90-85.3; 90-85.6; 90-85.8; 90-85.13; 90-85.14; 90-85.15; 90-85.21; 90-85.38; 90-85.40.

SECTION .1500 - ADMISSION REQUIREMENTS: EXAMINATIONS

21 NCAC 46 .1503 EXPERIENCE IN PHARMACY

(a) An applicant for license must show that he has received 1500 hours of practical experience under the supervision of a licensed pharmacist which has been acquired after the satisfactory completion of two years of college work. ~~At least~~

~~1000 hours of this experience must be acquired in a community or hospital pharmacy or other place approved by the Board in the manner prescribed in (b) of this Rule. No period of experience of less than two consecutive weeks of not less than 30 hours per week, or more than 50 hours per week of actual hours worked with a maximum of ten hours per day, will be credited toward this requirement. Hours acquired concurrent with pharmacy college attendance with no period of experience of less than two consecutive weeks of not less than 10 hours per week or more than 20 hours per week of actual hours worked will be credited toward this requirement. Experience obtained in clinical programs through schools, or in Board approved demonstration projects concurrent with pharmacy school attendance, is acceptable only for actual hours certified by the school up to a maximum of 50 hours per week. Any experience obtained in government, the pharmaceutical industry, or other non-traditional pharmacy-related locations while under the preceptorship of a licensed pharmacist is acceptable up to a maximum of 500 hours. Non-traditional internship experience would be any pharmacy related practical experience that is not primarily associated with pharmaceutical care activities in community and hospital pharmacy practice.~~ The Board shall accept hours of experience certified by the school from which the applicant has graduated.

(b) All practical pharmacy experience to be acceptable must be acquired under the general conditions approved by the Board as follows:

(1) All practical pharmacy experience must be validated through registration in the internship program administered by the Board.

(2) Persons working under the supervision of registered pharmacists and expecting to qualify for the registered pharmacist examination must notify the Board within five days of the beginning and the ending of such employment.

(3) The Board shall not allow credit for claims of practical experience required under the pharmacy laws, unless such claims can be corroborated by records on file in the Board's office showing the beginning and the ending of the practical experience claimed as supplied by the applicant during this training period.

(4) Practical experience shall be credited only when it has been obtained in a location holding a pharmacy permit, or a location approved by the Board for that purpose.

(c) The pharmacist intern, or student, and the pharmacist preceptor, or supervising pharmacist, shall at all times comply with the Board's rules and the laws governing the practice of pharmacy and the distribution of drugs. Failure of the pharmacist intern to do so is grounds to disqualify the period of experience from counting toward the minimum requirements. A pharmacist preceptor who causes or permits a pharmacist intern to violate the Board's rules or the laws governing the practice of pharmacy and the distribution of drugs forfeits his right to supervise such experience for a period of time determined by the Board. A pharmacist who has been found in violation of laws, rules, or regulations governing the practice of pharmacy and the distribution of drugs cannot serve a s a preceptor without the approval by the Board.

(d) The Board may accept training in pharmacy gained in another state pursuant to internship registration in this to another state if the Board is satisfied that such training is equivalent.

Authority G.S. 90-85.6; 90-85.14; 90-85.15; 90-85.38.

21 NCAC 46 .1505 EXAMINATION

(a) The ~~examination shall consist of testing in the following areas:~~ applicant shall pass the following examinations:

(1) ~~theoretical examination including pharmacology, pharmacy, chemistry, mathematics, and the practice of pharmacy which may be reported separately or combined as one score.~~ a national examination approved by the Board;

(2) ~~practical pharmacy examination which may be reported separately or combined as one score including: prescription reading and interpretation, drug identifications, determination of errors and omissions, omissions and pharmaceutical jurisprudence, patient counseling, drug utilization review, and such other reasonable tests of the applicant's ability to translate professional knowledge into terms of actual practice.~~ a jurisprudence examination approved by the Board; and

(3) a practical examination which includes an error and omission section.

(b) For the purpose of grading or rating, the answers, which shall be legible, shall be valued b marks or points based on their importance, as determined by the judgment of the examiners.

(c) In order to pass, a score of 75 or more is required on ~~both the practical and the theoretical sections.~~ each examination. Candidates who obtain a score of 75 or more on ~~the practical pharmacy section or a score of 75 or more on the theoretical section~~ each examination are deemed to have passed the respective ~~section~~ examination provided that the candidate obtains a passing score on the remaining ~~section in North Carolina~~ examinations within the next following two calendar years. If the examination is taken outside of North Carolina, the examination score shall be properly transferred to North Carolina. A candidate who fails to pass ~~both sections of the examination~~ all three examinations in the two calendar year period must retake and pass ~~both sections of the examination.~~ all three examinations.

(d) At the time of the examination, the Board may designate certain questions which, if missed, shall require the candidate to obtain continuing education. The continuing education required will be specified by the Board and must be obtained by the candidate prior to issuance of a pharmacist license.

Authority G.S. 90-85.15; 90-85.16.

SECTION .1600 - LICENSES AND PERMITS

21 NCAC 46 .1602 LICENSE BY RECIPROCITY

An applicant for licensure without examination, must have:

(1) Originally been licensed as a pharmacist by an examination equivalent to the North Carolina examination specified in Rule .1505(a)(1) and (a)(2) of this Chapter;

(2) Achieved scores on an equivalent examination, such as the NAPLEX ~~examination,~~ examination or the Foreign Pharmacist Graduate Equivalency Examination, where applicable, which would qualify for licensure in this state at the time of examination; and

(3) Been licensed by as state which deems licensees from this state to be equivalent to the extent that they are suitable for licensure in that state without further substantial examination.

Authority G.S. 90-85.6; 90-85.20.

21 NCAC 46 .1603 WHEN NEW PERMIT REQUIRED

A new pharmacy, device, or medical equipment permit is required for a new location, a change to a different or successor business entity, or a change resulting in a different person or entity owning~~of~~ more than 50 percent ~~ownership~~ interest in the permit holder or any entity in the chain of ownership above the permit holder, except as provided in 21 NCAC 46 .1604 of this Section. A new permit is required if there is a change in the authority to control or designate a majority of the members or board of directors of a nonprofit corporation holding a pharmacy permit or any nonprofit corporation in the chain of ownership above the permit holder.

Authority G.S. 90-85.6; 90-85.21; 90-85.22.

21 NCAC 46 .1604 WHEN NEW PERMIT NOT REQUIRED

(a) A new pharmacy, device or medical equipment permit is not required in the following situations:

~~(1) where the change of ownership does not involve the acquisition of more than 50 percent interest in the permit holder or an entity in the chain of ownership above the permit holder, or~~

~~(2)~~(1) the permit holder is a publicly-traded corporation and continues to hold the permit; or

~~(3)~~(2) the permit holder is a corporation which is a wholly-owned subsidiary, and any change in the ownership of any corporation in the chain of ownership above the permit holder is due to the stock of such corporation being publicly-traded.

(b) A permit which is involved in a pending disciplinary proceeding may not be surrendered, terminated, or transferred.

Authority G.S. 90-85.6; 90-85.21; 90-85.22.

SECTION .1800 - PRESCRIPTIONS

21 NCAC 46 .1801 RIGHT TO REFUSE A PRESCRIPTION

(a) A pharmacist or device and medical equipment dispenser may refuse to fill or refill a prescription order, if, in his professional judgment, it would be harmful to the recipient, is not in the recipient's best interest or if there is a question as to its validity.

(b) A pharmacist shall not fill or refill a prescription order if the pharmacist actually knows or reasonably should know that the order was issued without a physical examination of the patient and in the absence of a prior prescriber-patient ~~relationship.~~ relationship, unless:

(1) the prescription order was issued for the patient by a psychiatrist;

(2) the prescription order was issued for the patient after discussion of the patient status with a treating psychologist, therapist, or physician;

(3) the prescription order was ordered by a physician for flu vaccinations for groups of patients or members of the public;

(4) the prescription order was for prophylactic purposes, such as the ordering of antibiotics by a pediatrician for members of a child's family when the child has a positive strep test;

(5) the prescription order was an emergency order for medication related to pregnancy prevention; and

(6) the prescription order was an order for medications to be taken by groups traveling to foreign countries.

Authority G.S. 90-85.6; 90-85.32.

21 NCAC 46 .1804 PRESCRIPTION: RECEIVING AND DISPENSING

(a) In order to assure that the practitioner-pharmacist-patient relationship exists and to promote the safe and secure distribution of drugs and devices, prescription orders may be received for filling and refilling only by a pharmacist or a bona fide employee of the pharmacy. The pharmacist-manager of the pharmacy shall be ultimately responsible for the safe, lawful and secure receipt of prescription orders and delivery of prescription drugs. Notwithstanding the provisions of this Rule, prescription drugs also may be delivered by mail in accordance with the provisions of 21 NCAC 46 .1601(b).

(b) In filling or refilling prescription orders, the pharmacist shall not be required to deal with parties, including managed care companies and insurance providers, outside the practitioner-pharmacist-patient relationship.

(c) In order to promote the safe and secure distribution of ~~drugs, devices,~~ devices and medical equipment, prescription orders for devices and medical equipment may be received for filling and refilling only by the person in charge of the facility holding the device and medical equipment permit or a bona fide employee of the facility. The person in charge shall be ultimately responsible for the safe, lawful and secure receipt of prescription orders and delivery of ~~prescription drugs, devices,~~ devices and medical equipment. Unless the location also holds a pharmacy permit, a facility holding a device and medical equipment permit shall not acquire, receive, store, or deliver prescription drugs.

Authority G.S. 90-85.6; 90-85.32.

21 NCAC 46 .1806 TRANSFER OF PRESCRIPTION INFORMATION

(a) The transfer of original prescription information for the purpose of refill dispensing is permissible between pharmacies subject to the following requirements:

(1) the transfer is communicated directly ~~between two pharmacists and not by only one pharmacist gaining access to an information file containing data for several locations, unless all locations accessed are under common ownership or accessed pursuant to contractual agreement of the pharmacies;~~ from either a pharmacist or certified technician to either a pharmacist or certified technician;

(2) the transferring pharmacist or certified technician invalidates the prescription and any remaining refills by marking the word "void" ~~or its equivalent~~ on the face of the ~~prescription;~~prescription or its equivalent;

(3) the transferring pharmacist or certified technician records the name and address of the pharmacy to which it was transferred and the name of the pharmacist or certified technician receiving the prescription information on the reverse of the invalidated prescription;

(4) the transferring pharmacist or certified technician records the date of the transfer and the name of the pharmacist or certified technician transferring the information.

(b) The pharmacist or certified technician receiving the transferred prescription information shall reduce to writing the following:

(1) The word "transfer" on the face of the transferred ~~prescription.~~ prescription;

(2) All information required to be on a prescription, including:

(A) Date of issuance of original prescription;

(B) Number of refills authorized on original prescription;

(C) Date and time of transfer;

(D) Number of valid refills remaining and date of last refill;

(E) Pharmacy's name, address and original prescription number from which the prescription information was transferred;

(F) Name of transferring ~~pharmacist;~~pharmacist or certified technician; and

(G) Manufacturer or brand of drug dispensed.

(c) The transferred prescription, as well as the original, must be maintained for a period of three years from the date of last refill.

(d) Dispensing is permitted only within the original authorization for refills and no dispensing on such transfer shall occur beyond that authorized on the original prescription. Any dispensing beyond that originally authorized or one year, whichever is less, may occur only on a new prescription.

(e) The requirements of (a) and (b) of this Rule may be facilitated by use of a computer or data system without reference to an original prescription document. The system must be able to identify transferred prescriptions and prevent subsequent prescription refills at that pharmacy.

(f) This Rule applies to the transfer of prescriptions issued by prescribers in other states, provided that the pharmacist or certified technician receiving the prescription is reasonably satisfied that a viable physician-patient relationship exists and dispensing the drug is in the patient's best interests.

(g) All records pertinent to this Rule shall be readily retrievable.

(h) A system must be in place that will allow only authorized access by a pharmacist or certified technician to all records pertinent to this Rule and will indicate on the prescription record when and by whom such access was made.

(i) The transfer of original prescription information for the purpose of refill dispensing is permissible between device and medical equipment permit holders so long as the transferring permit holder provides all records and documentation necessary for dispensing and does not interfere with the service and claims processing procedures of the receiving permit holder.

Authority G.S. 90-85.6(a); 90-85.32.

21 NCAC 46 .1807 FACSIMILE TRANSMISSION OF PRESCRIPTION ORDERS

~~Prescription orders may be transmitted using a facsimile ("FAX") machine, provided that:~~

~~(1) The order contains the date, time, telephone number and location of the transmitting machine, the name of the operator of the transmitting machine, and the signature of the prescriber;~~

~~(2) Refill orders transmitted by FAX shall contain all information required for original prescription orders except for the prescriber's signature;~~

~~(3) No agreement between a prescriber and a pharmacy or device and medical equipment permit holder shall require that prescription orders be transmitted by FAX from the prescriber to only that pharmacy or device and medical equipment permit holder;~~

~~(4) There shall be no additional charge to the patient because the prescription order was transmitted by FAX;~~

~~(5) The use of FAX machines in hospitals to facilitate dispensing to inpatients shall be considered internal communication and not governed by this Rule;~~

~~(6) An original prescription transmitted by FAX shall contain all information required of an original prescription by statute and rule, and corresponding information shall be retained by the prescriber;~~

~~(7) Transfer of prescriptions by FAX is permitted provided that all the requirements of Rule .1806 of this Section are met; and~~

~~(8) The pharmacist-manager or person in charge of the device and medical equipment permit holder maintains security of the process, including retention of readable records for the period of time required by law and verification of orders if indicated by the circumstances.~~

Authority G.S. 90-85.6(a); 90-85.32.

21 NCAC 46 .1808 REPACKAGED PHARMACEUTICALS

~~A drug product which is manufactured and sold by a manufacturer as a generic drug product shall be considered a generic drug product, though subsequently repackaged and given a brand name.~~ Drugs or devices which have been dispensed previously may be relabeled or repackaged only by the original dispensing pharmacy.

Authority G.S. 90-85.6(a); 90-85.32.

21 NCAC 46 .1812 CHANGES IN PRESCRIPTION ORDERS

A permit holder or registrant requesting a ~~change~~ change, solely for formulary reasons, from the prescription drug originally prescribed to a different prescription drug shall disclose to the prescriber and patient~~at the time of the request~~ the fact that the payor, patient or pharmacy may receive specific incentives, discounts or rebates from the utilization of any business relationship between the permit holder or registrant and the manufacturer of the requested prescription drug. Disclosure sufficient to comply with this Rule is made when made in writing at the time the prescription is dispensed.

Authority G.S. 90-85.6; 90-85.32.

21 NCAC 46 .1813 TRANMISSION OF PRESCRIPTION ORDERS

(a) Prescription orders may be transmitted by using a facsimile machine ("FAX") or by electronic transmission. "Electronic transmission" means transmission of the digital representation of information by way of electronic ~~equipment other than facsimile machine described in Rule .1807 of this Section.~~ equipment.

(b) All prescription drug orders ~~communicated by way of~~ transmitted by FAX or by electronic transmission shall:

(1) be transmitted directly to a pharmacist or pharmacy technician in a pharmacy of the patient's choice with no intervening person having access to the prescription drug order;

(2) identify the transmitter's phone number for verbal confirmation, the time and date of transmission, and the identity of the pharmacy intended to receive the transmission;

(3) be transmitted by an authorized practitioner or his designated agent and contain either a written signature or a digital signature unique to the practitioner; ~~and~~

(4) be deemed the original prescription drug order, provided it meets all requirements of federal and state laws and ~~regulations.~~ regulations; and

(5) if a refill order, contain all information required for original prescription orders except for the prescriber's signature.

(c) The prescribing practitioner may authorize his agent to ~~electronically transmit~~transmit by FAX or by electronic transmission a prescription drug order to a pharmacist or pharmacy technician in a pharmacy provided that the identity of the transmitting agent is included in the order.

(d) The pharmacist shall exercise professional judgment regarding the accuracy, validity, and authenticity of ~~an electronically transmitted~~ a prescription drug order transmitted by FAX or by electronic transmission consistent with federal and state laws and regulations.

(e) All equipment for receipt of prescription drug orders by FAX or by electronic transmission shall be maintained so as to ensure against unauthorized access.

(f) Prescriptions may be transferred ~~electronically~~by FAX or by electronic transmission if all the requirements of Rule .1806 of this Section are met.

(g) No agreement between a prescriber and a pharmacy or device and medical equipment permit holder shall require that prescription orders be transmitted by FAX or by electronic transmission from the prescriber to only that pharmacy or device and medical equipment permit holder.

Authority G.S. 90-85.6; 90-85.32.

21 NCAC 46 .1818 PRESCRIPTION LABELS

Prescription labels shall list at a minimum the generic name of the drug, even if the generic drug is unavailable to dispense.

Authority G.S. 90-85.6; 90-85.32.

SECTION .2500 - MISCELLANEOUS PROVIS IONS

21 NCAC 46 .2502 RESPONSIBILITIES OF PHARMACIST-MANAGER

(a) The pharmacist-manager shall assure that prescription legend drugs and controlled substances are safe and secure within the pharmacy.

(b) The pharmacist-manager employed or otherwise engaged to supply pharmaceutical services may have a flexible schedule of attendance but shall be present for at least ~~one-half the hours the pharmacy is open or 32 hours a week, whichever is less.~~ 20 hours on average per week or one-half of the hours the pharmacy is open, whichever is less. A pharmacist employee not meeting this requirement may serve as pharmacist-manager of the permit holder temporarily for a period not to exceed 90 days.

(c) Whenever a change of ownership or change of pharmacist-manager occurs, the successor pharmacist-manager shall complete an inventory of all controlled substances in the pharmacy within 10 days. A written record of such inventory, signed and dated by the successor pharmacist-manager, shall be maintained in the pharmacy with other controlled substances records for a period of three years.

(d) The pharmacist-manager shall develop and implement a system of inventory record-keeping and control which will enable that pharmacist-manager to detect any shortage or discrepancy in the inventories of controlled substances at that pharmacy at the earliest practicable time.

(e) The pharmacist-manager shall maintain complete authority and control over ~~any and all keys to~~ access to the dispensing area of the pharmacy and shall be responsible for the ultimate security of the pharmacy. Only personnel authorized by the pharmacist-manager shall have access to the dispensing area of the pharmacy. ~~A~~ The dispensing area of a pharmacy shall be secured by a physical or electronic barrier to prohibit

unauthorized entry ~~if no pharmacist will be present in the pharmacy for a period of 90 minutes or more.~~ w hen unattended by authorized personnel.

(f) These duties are in addition to the specific duties of pharmacist-managers at institutional pharmacies and pharmacies in health departments as set forth in the Rules on this Chapter.

(g) A person shall not serve as pharmacist-manager at more than one pharmacy at any one time except for limited service pharmacies.

(h) When a pharmacy is to be closed permanently. The pharmacist-manager shall inform the Board and the United States Drug Enforcement Administration of the closing, arrange for the proper disposition of the pharmaceuticals and return the pharmacy permit to the Board's offices within 10 days of the closing date. Notice of the closing shall be given to the public by posted notice at the pharmacy at least 30 days prior to the closing date, and, if possible, 15 days after the closing date. Such notice shall notify the public that prescription files may be transferred to a pharmacy of the patient's or customer's choice during the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy chosen by the patient or customer, upon request. Absent specific instructions from the patient or customer, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy for maintenance of patient therapy and shall inform the public of such transfer by posted notice at the pharmacy for 15 days after the closing date, if possible. Controlled substance records shall be retained for the period of time required by law.

(i) The pharmacist-manager shall ensure that notice of the temporary closing of any pharmacy for more than 14 consecutive days is given to the public by posted notice at the ~~pharmacy~~ pharmacy, if possible, at least 30 days prior to the closing date, and, if possible, 15 days after the closing date. Such notice shall notify the public that prescription files may be transferred to a pharmacy of the patient's or customer's choice during the 30 day period prior to the closing date. During the 30 day period prior to the closing date, the pharmacist-manager, and the pharmacy's owner (if the owner is other than the pharmacist-manager), shall transfer prescription files to another pharmacy chosen by the patient or customer, upon request.

(j) The pharmacist-manager shall prepare a plan to safeguard prescription records and pharmaceuticals and minimize the interruption of pharmaceutical services in the event of a natural disaster such as hurricane or flood.

(k) The pharmacist-manager shall separate from the dispensing stock all drug products more than six months out of date.

(l) The pharmacist-manager shall report to the Board of Pharmacy information that reasonably suggests that there is a probability that a prescription drug or device dispensed from a location holding a permit has caused or contributed to the death of a patient or customer. This report shall be filed in writing on a form provided by the Board within 14 days of the owner representative or pharmacist-manger's becoming aware of the event. The pharmacist-manager shall retain all documents, labels, vials, supplies, substances and internal investigative reports relating to the event. All such items shall be made available to the Board upon request.

(m) The Board shall not disclose the identity of a pharmacist-manager who makes a report under Paragraph (1) of this Rule, except as required by law. All reports made under Paragraph (1) of this Rule shall not be released except as required by law.

(n) Dispensing errors which are not detected and corrected prior to the patient receiving the medication shall be documented and reported to the pharmacist-manager. Documentation shall include pertinent chronological information and appropriate forms including the identity of individual(s) responsible. These documents, including action taken as part of a quality assurance plan, shall be archived in a readily retrievable manner and open for review, copying or seizure by the Board or its designated employees within 48 hours of a request for inspection for a period of three years. These documents shall be released only to the Board or its designated employees pursuant to an investigation and shall not otherwise be released except as required by law. Upon request by the Board or its designated employees, these documents shall be transmitted by the pharmacist-manager to an office of the Board.

(o) In any Board proceeding, the Board shall consider compliance with Paragraph (1) and (n) of this Rule as a mitigating factor and noncompliance with Paragraphs (l) and (n) of this Rule as an aggravating factor.

(p) The pharmacist-manager shall develop and maintain a system of accountability for compounding or dispensing each medication. Records generated pursuant to this Paragraph shall be maintained and readily retrievable for a period of three years.

Authority G.S. 90-85.6; 90-85.21; 90-85.25; 90-85.26; 90- 85.32.

21 NCAC 46 .2504 PATIENT COUNSELING

(a) "Patient Counseling" shall mean the effective communication of information, as defined in this Rule, to the patient or representative in order to improve therapeutic outcomes by maximizing proper use of prescription medications, devices, and medical equipment. This Rule shall apply to pharmacists and to registrants under G.S. 90-85-21. All provisions of this Rule shall apply to device and medical equipment permit holders, except Subparagraph (a)(8) of this Rule and except where otherwise noted. Specific areas of patient counseling include, but are not limited to, those matters listed in this Rule that in the exercise of the pharmacist's or registrant's professional judgment are considered significant:

(1) name, description, and purpose of the medication;
(2) route, dosage, administration, and continuity of therapy;
(3) special directions for use by the patient;
(4) common severed side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;
(5) techniques for self-monitoring drug therapy;
(6) proper storage;
(7) prescription refill information; and
(8) action to be taken in the event of a missed dose.

(b) An offer to counsel shall be made on new or transfer prescriptions a the time the prescription is dispensed or delivered to the patient or representative. Ancillary personnel may make the offer to counsel, but the pharmacist or registrant must

personally conduct counseling if the offer is accepted. Counseling by device and medical equipment permit holders must be conducted by personnel proficient in explaining and demonstrating the safe and proper use of devices and equipment. The person in charge shall be responsible for ensuring that all personnel conducting counseling are proficient in explaining and demonstrating the safe and proper use of devices and equipment and for documenting the demonstration of such proficiency. The offer shall be made orally and in ~~person, whenever practicable, or through~~ person when delivery occurs at the pharmacy. When delivery occurs outside of the pharmacy, whether by mail, vehicular delivery or other means, the offer shall be made either orally and in person, or by telephone from the pharmacy to the patient. If delivery occurs outside of the pharmacy, the pharmacy shall provide the patient with access to a telephone service that is toll-free for long-distance calls. A ~~pharmacist or registrant~~ pharmacy whose primary patient population is accessible through a local measured or toll-free exchange need not be required to offer toll-free service. Counseling may be conducted by the provision of printed information in a foreign language if requested by the patient or representative. Professional judgment shall be exercised in determining whether or not to offer counseling for prescription refills. An offer to counsel shall be communicated in a positive manner to encourage acceptance.

(c) In order to counsel patients effectively, a reasonable effort shall be made to obtain, record, and ~~maintain, if significant,~~ maintain significant patient information, ~~including, but not limited to:~~ including:

(1) name, address, telephone number;
(2) date of birth (age), gender;
(3) medical history:
  (A) disease state(s);
  (B) allergies/drug reactions;
  (C) current list on non-prescription and prescription medications, devices, and medical equipment.
(4) pharmacist, registrant, or permit holder comments relevant to the individual's drug therapy.

A "reasonable effort" shall mean a good faith effort to obtain from the patient or representative the foregoing patient information. Ancillary personnel may collect, record, and obtain patient profile information, but the pharmacist, registrant, or person in charge of the facility holding the device and medical equipment permit must review and interpret patient profile information and clarify confusing or conflicting information. Professional judgment shall be exercised as to whether and when individual patient history information should be sought from other health care providers.

(d) Once patient information is obtained, this information shall be reviewed and updated by the pharmacist, registrant, or person in charge of the facility holding the device and medical equipment permit before each prescription is filled or delivered, typically at the point-of-sale or point of distribution to screen for potential drug therapy problems due to:

(1) therapeutic duplication;
(2) drug-disease contraindication;
(3) drug-drug interactions, including serious interactions with prescription or over-the-counter drugs;
(4) incorrect drug dosage or duration of drug treatment;
(5) drug-allergy interactions; and
(6) clinical abuse/misuse.

If a third party payor will perform a drug utilization review, then the pharmacist need not perform such review or screening.

(e) Unless refused by the patient or representative, patient counseling shall be provided as follows:

(1) counseling shall be "face to face" by the pharmacist, registrant, or personnel of a device and medical equipment permit holder when ~~possible or appropriate;~~ possible;
(2) alternative forms of patient information may be used to supplement patient counseling;
(3) patient counseling, as described in this Rule, shall be required for outpatient and discharge patients of hospitals, health maintenance organizations, health departments, and other institutions; however, compliance with this Rule in locations in which non-pharmacists are authorized by law or regulations to dispense may be accomplished by such authorized non-pharmacists; and
(4) patient counseling, as described in this Rule, shall not be required for inpatients of hospitals or other institutions where a nurse or other licensed health care professional administers the medication(s).

(f) Pharmacies that distribute prescription medication by mail, and where the practitioner-pharmacist-patient relationship does not exist, shall provide counseling services for recipients of such medication in accordance with this Rule.

(g) Records resulting from compliance with this Rule, including documentation of refusals to receive counseling, shall be maintained for three years in accordance with Section .2300 of this Chapter.

(h) Personnel of device and medical equipment permit holders shall give written notice of warranty, if any, regarding service after the sale. The permit holder shall maintain documentation demonstrating that the written notice of warranty was given to the patient.

(i) Offers to counsel and patient counseling for inmates need not be "face to face", but rather, may be conducted through a correctional or law enforcement officer or through printed material. A pharmacist, registrant or a device and medical equipment permit holder dispensing drugs or devices or delivering medical equipment to inmates need not comply with Paragraph (c) of this Rule. However, once such patient information is obtained, the requirements of Paragraph (d) of this Rule shall be followed.

Authority G.S. 90-85.6; 90-85.21; 90-85.21A; 90-85.22; 90-85.32; 42 U.S.C. 1396r-8(g).

21 NCAC 46 .2507 ADMINISTRATION OF IMMUNIZATIONS BY PHARMACISTS

A pharmacist who has successfully completed a course ~~of training approved by the Board, and the North Carolina Medical Board, or the North Carolina Board of Nursing,~~ in immunizations approved by the Board and the Center for Disease Control and Prevention may administer immunizations.

Authority G.S. 90-85.3; 90-85.6.

21 NCAC 46 .2508 PATIENT CHOICE

No entity holding a pharmacy permit or a device and medical equipment permit shall prohibit or restrict a patient from selecting a provider of prescription drugs, devices, or medical equipment of the patient's choice, either directly or indirectly through agreement or other arrangement with practitioners, pharmacies or providers of devices and medical equipment.

Authority G.S. 90-85.6; 90-85.32.

21 NCAC 46 .2509 AVAILABILITY OF PHARMACY RECORDS

A pharmacist may disclose pharmacy records to investigators of occupational licensing boards during the course of an investigation of a licensee.

Authority G.S. 90-85.6; 90-85.36.

21 NCAC 46 .2510 UNIQUE PROJECTS

The Board may approve unique projects designed to have a positive impact on the delivery of pharmaceutical care or designed to reduce healthcare expenditures.

Authority G.S. 90-85.6; 90-85.34.

SECTION .2600 - DEVICES

21 NCAC 46 .2601 DISPENSING AND DELIVERY

(a) Devices, as defined in G.S. 90-85.3(e), shall be dispensed only in a pharmacy as defined in G.S. 90-85.3(q) or other place registered with the Board pursuant to G.S. 90-85.22. Medical equipment, as defined in G.S. 90-85.3(11), shall be delivered only by a pharmacy as defined in G.S. 90-85.3(q) or other place registered with the Board pursuant to G.S. 90-85.22. Devices dispensed in hospitals and medical equipment delivered by hospitals are presumed to be the responsibility of the hospital pharmacy unless otherwise registered. This Rule shall apply only to entities engaged in the regular activity of delivering medical equipment.

(b) A pharmacy dispensing and delivering devices and medical equipment and not holding a device and medical equipment permit shall operate its device and medical equipment business at the same physical location as the pharmacy and through the same legal entity that holds the pharmacy permit. The pharmacist-manager or a clinical pharmacist practitioner shall be responsible for the dispensing and delivery of devices and medical equipment.

Authority G.S. 90-85.3(e),(11),(r); 90-85.6; 90-85.22.

21 NCAC 46 .2605 REGISTRATION OF NON-PHARMACISTS

(a) Registration of persons other than pharmacists dispensing devices or delivering medical equipment, pursuant to G.S. 90-85.22, shall be issued by the Board to the person in charge of the location dispensing the devices or delivering medical equipment. This person shall have responsibilities comparable to those of a pharmacist-manager pursuant to Board Rule .2502 of this Chapter, as applicable. Persons in charge shall keep on file for three years on the premises of each place where devices are dispensed or medical equipment is delivered all information related to warranties provided by manufacturers and the availability of repairs, that this requirement shall not apply to disposable devices and medical equipment. A person shall be in charge of only one location at a time.

(b) A person in charge shall:

(1) be a high school graduate or equivalent;

(2) pass an examination administered by the Board on the laws and regulations governing devices and medical equipment;

(3) not have been convicted of a felony;

(4) not have been a principal in a business entity that has been excluded from participation in a federal or state program; and

(5) submit letters of reference from at least two health care providers regarding the person's knowledge and ability to provide device and medical equip ment services.

Authority G.S. 90-85.3(e),(11),(r); 90-85.6; 90-85.22.

21 NCAC 46 .2612 STORAGE OF DEVICES AND MEDICAL EQUIPMENT

(a) Devices and medical equipment shall be stored at the location holding the pharmacy or device and medical equipment permit or a location that is within 50 miles of the permitted location. Devices and medical equipment shall not be stored on residential property.

(b) A device and medical equipment storage site not holding a pharmacy or device and medical equipment permit shall not provide any devices, medical equipment, or services directly to patients and shall not store any business or patient records.

(c) Device and medical equipment storage sites shall be subject to inspection by the Board.

Authority G.S. 90-85.6; 90-85.22; 90-85.32.

SECTION .3100 - CLINICAL PHARMACIST PRACTITIONER

21 NCAC 46 .3101 CLINICAL PHARMACIST PRACTITIONER

(a) Definitions:

(1) "Medical Board" means the North Carolina Medical Board.

(2) "Pharmacy Board" means the North Carolina Board of Pharmacy.

(3) "Joint Subcommittee" means the subcommittee composed of four members of the Pharmacy Board and four members of the Medical Board to whom responsibility is given by G.S. 90-6(c) to develop rules to govern the provision of drug therapy management by the Clinical Pharmacist Practitioner in North Carolina.

(4) "Clinical Pharmacist Practitioner or CPP" means a licensed pharmacist in good standing who is approved to provide drug therapy management, including controlled substances,

under the direction of, or under the supervision of a licensed physician who has provided written instructions for a patient and disease specific drug therapy which may include ordering, changing, substituting therapies or ordering tests. Only a pharmacist approved by the Pharmacy Board and the Medical Board may legally identify himself as a CPP.

(5) "Supervising Physician" means a licensed physician who, by signing the CPP agreement, is held accountable for the on-going supervision and evaluation of the drug therapy management performed by the CPP as defined in the physician, patient, pharmacist and disease specific written agreement. Only a physician approved by the Medical Board may legally identify himself or herself as a supervising physician.

(6) "Approval" means authorization by the Medical Board and the Pharmacy Board for a pharmacist to practice as a CPP in accordance with this Rule.

(7) "Continuing Education or CE" is defined as courses or materials which have been approved for credit by the American Council on Pharmaceutical Education.

(8) "Clinical Experience approved by the Boards" means work in a clinical pharmacy practice setting which includes experience consistent with the following components as listed in Parts (b)(2)(A), (B), (C), (D), (E), (H), (I), (J), (N), (O), and (P) of this Rule. Clinical experience requirements must be met only through activities separate from the certificate programs referred to in Parts (b)(1)(B) of this Rule.

(b) CPP application for approval.

(1) The requirements for application for CPP approval include that the pharmacist:

(A) has an unrestricted and current license to practice as a pharmacist in North Carolina;

(B) meets one of the following qualifications:

(i) has earned Certification from the Board of Pharmaceutical Specialties, is a Certified Geriatric Pharmacist or has completed an American Society of Health System Pharmacists (ASHP) accredited residency program, which includes two years of clinical experience approved by the Boards; or

(ii) has successfully completed the course of study and holds the academic degree of Doctor of Pharmacy and has three years of clinical experience approved by the Boards and has completed a North Carolina Center for Pharmaceutical Care (NCCPC) or American Council on Pharmaceutical Education (ACPE) approved certificate program in the area of practice covered by the CPP agreement; or

(iii) has successfully completed the course of study and holds the academic degree of Bachelor of Science in Pharmacy and has five years of clinical experience approved by the Boards and has completed two NCCPC or ACPE approved certificate programs with at least one program in the area of practice covered by the CPP agreement;

(C) submits the required application, a written endorsement from the Pharmacy Board and the fee to the Medical Board;

(D) submits any information deemed necessary by the Medical Board in order to evaluate the application; and

(E) has a signed supervising physician agreement.

If for any reason a CPP discontinues working in the approved physician arrangement, both Boards shall be notified in writing within 10 days and the CPP's approval shall automatically terminate or be placed on an inactive status until such time as a new application is approved in accordance with this Subchapter.

(2) All certificate programs referred to in Part (2)(a)(ii) of the Rule must contain a core curriculum including at a minimum the following components:

(A) communicating with healthcare professionals and patients regarding drug therapy, wellness, and health promotion;

(B) designing, implementing, monitoring, evaluating, and modifying or recommending modifications in drug therapy to insure effective, safe, and economical patient care;

(C) identifying, assessing and solving medication-related problems and providing a clinical judgment as to the continuing effectiveness of individualized therapeutic plans and intended therapeutic outcomes;

(D) conducting physical assessments, evaluating patient problems, ordering and monitoring medications and laboratory tests in accordance with established standards of practice;

(E) referring patients to other health professionals as appropriate;
(F) administering medications;
(G) monitoring patients and patient populations regarding the purposes, uses, effects and pharmacoeconomics of their medication and related therapy;
(H) counseling patients regarding the purposes, uses, and effects of their medication and related therapy;
(I) integrating relevant diet, nutritional and non-drug therapy with pharmaceutical care;
(J) recommending, counseling, and monitoring patient use of non-prescription drugs, herbal remedies and alternative medicine practices;
(K) using, ordering, and instructing on the use of devices, and durable medical equipment;
(L) providing emergency first care;
(M) retrieving, evaluating, utilizing, and managing data and professional resources;
(N) using clinical data to optimize therapeutic drug regimens;
(O) collaborating with other health professionals;
(P) documenting interventions and evaluating pharmaceutical care outcomes;
(Q) integrating pharmacy practice within healthcare environments;
(R) integrating national standards for the quality of healthcare; and
(S) conducting outcomes and other research.

(3) The completed application for approval to practice as a CPP shall be reviewed by the Medical Board upon verification of a full and unrestricted license to practice as a pharmacist in North Carolina.
(A) The application shall be approved and at the time of approval the Medical Board shall issue a number which shall be printed on each prescription written by the CPP; or
(B) The application shall be denied; or
(C) The application shall be approved with restrictions.

(c) Annual Renewal.
(1) Each CPP shall register annually on the anniversary of his or her birth date by:
(A) verifying a current Pharmacist license;
(B) submitting the renewal fee as specified in Subparagraph (j)(2) of this Rule;
(C) completing the Medical Board's renewal form; and
(D) reporting continuing education credits as specified by the Medical Board.
(2) If the CPP has not renewed within 30 days of the anniversary of the CPP's birth date, the approval to practice as a CPP shall lapse.

(d) Continuing Education.
(1) Each CPP shall earn 35 hours of practice relevant CE each year approved by the Pharmacy Board.
(2) Documentation of these hours shall be kept at the CPP practice site and made available for inspection by agents of the Medical Board or Pharmacy Board.

(e) The supervising physician who has a signed agreement with the CPP shall be readily available for consultation with the CPP and shall review and countersign each order written by the CPP within seven days.

(f) The written CPP agreement shall:
(1) be approved and signed by both the supervising physician and the CPP and a copy shall be maintained in each practice site for inspection by agents of either Board upon request;
(2) be specific in regard to the physician, the pharmacist, the patient and the disease;
(3) specify the predetermined drug therapy which shall include the diagnosis and product selection by the patient's physician; any modifications which may be permitted, dosage forms, dosage schedules and tests which may be ordered;
(4) prohibit the substitution of a chemically dissimilar drug product by the CPP for the product prescribed by the physician without first obtaining written consent of the physician;
(5) include a pre-determined plan for emergency services;
(6) include a plan and schedule for weekly quality control, review and countersignature of all orders written by the CPP in a face-to-face conference between the physician and CPP;
(7) require that the patient be notified of the collaborative relationship; and
(8) be terminated when patient care is transferred to another physician and new orders shall be written by the succeeding physician.

(g) The supervising physician of the CPP shall:
(1) be fully licensed, engaged in clinical practice, and in good standing with the Medical Board;
(2) not be serving in a postgraduate medical training program;
(3) be approved in accordance with this Subchapter before the CPP supervision occurs; and
(4) supervise no more than three pharmacists.

(h) The CPP shall wear a nametag spelling out the words "Clinical Pharmacist Practitioner".

(i) The approval of a CPP may be restricted, denied or terminated by the Medical Board or the Pharmacy Board and the pharmacist's license may be restricted, denied, or terminated by

the Pharmacy Board, in accordance with provisions of G.S. 150B if the appropriate Board finds one or more of the following:

(1) the CPP has held himself or herself out, or permitted another, to represent the CPP as a licensed physician;

(2) the CPP has engaged, or attempted to engage, in the provision of drug therapy management other than at the direction of, or under the supervision of, a physician licensed and approved by the Medical Board to be that CPP's supervising physician;

(3) the CPP has performed, or attempted to provide, medical management outside the approved drug therapy agreement or for which the CPP is not qualified by education and training to perform;

(4) the CPP is adjudicated mentally incompetent;

(5) the CPP's mental or physical condition renders the CPP unable to safely function as a CPP; or

(6) the CPP has failed to comply with any of the provisions of this Rule.

Any modification of treatment for financial gain on the part of the supervising physician or CPP shall be grounds for denial of Board approval of the agreement.

(j) Fees:

(1) An application fee of one hundred dollars ($100.00) shall be paid at the time of initial application for approval and each subsequent application for approval to practice.

(2) The fee for annual renewal of approval, due on the CPP's anniversary of birth date is fifty dollars ($50.00).

(3) No portion of any fee in this Rule is refundable.

Authority G.S. 90-6; 90-18; 90-18.4; 90-85.3; 90-85.18; 90-85.26A.

SECTION .3200 - PEER REVIEW AGREEMENTS

21 NCAC 46 .3202 PEER REVIEW AGREEMENTS

Peer review activities shall include investigation, review and evaluation of records, reports, complaints, litigation, and other information about the practices and practice patterns of pharmacists licensed by the ~~Board.~~ Board and pharmacy technicians registered by the Board. Peer review activities shall also include programs for impaired ~~pharmacists.~~ pharmacists and pharmacy technicians. Peer review agreements may cover some or all of these activities, as deemed appropriate by the Board.

Authority G.S. 90-85.6; 90-85.41.

21 NCAC 46 .3203 DUE PROCESS

Any action taken pursuant to a peer review agreement must afford the subject pharmacist or pharmacy technician all due process rights enumerated in the Administrative Procedure Act, G.S. 150B.

Authority G.S. 90-85.6; 90-85.41.

21 NCAC 46 .3204 RECEIPT AND USE OF INFORMATION OF SUSPECTED IMPAIRMENT

(a) Information concerning suspected impairments may be received by the Program through reports by pharmacists, pharmacy technicians, family members, and others, and through self-referral.

(b) Upon receipt of information of a suspected impairment, the Program shall initiate an investigation.

(c) The Program may conduct routine inquiries regarding suspected impairments.

(d) Pharmacists or pharmacy technicians suspected of impairment may be required to submit to personal interviews before any person authorized by the Program.

Authority G.S. 90-85.6; 90-85.41.

21 NCAC 46 .3205 INTERVENTION AND REFERRAL

(a) When, following an investigation, impairment is confirmed, an intervention shall be conducted using techniques designed to assist the pharmacist or pharmacy technician in acknowledging responsibility for dealing with the impairment. The pharmacist or pharmacy technician shall be referred to a treatment source.

(b) Methods and objectives of interventions shall be decided on a case-by case basis.

(c) Interventions shall be arranged and conducted as soon as possible. In cases referred by the Board a representative of the Board may be present.

(d) Treatment sources shall be evaluated before receiving case referrals from the Program.

(e) Intervention outcomes, including treatment contracts that are elements of an intervention, shall be recorded by the Program.

Authority G.S. 90-85.6; 90-85.41.

21 NCAC 46 .3207 MONITORING REHABILITATION AND PERFORMANCE

(a) Monitoring requirements for each pharmacist or pharmacy technician shall be designated by the Program. Pharmacists and pharmacy technicians may be tested regularly or randomly, on Program demand.

(b) Treatment sources may be required to submit reports regarding a pharmacist's or pharmacy technician's rehabilitation and performance to the Program.

(c) Impaired pharmacists and pharmacy technicians may be required to submit to periodic personal interviews before any person authorized by the Program.

(d) Case records shall be maintained by the Program.

Authority G.S. 90-85.6; 90-85.41.

21 NCAC 46 .3209 REPORTS OF INDIVIDUAL CASES TO THE BOARD

(a) Upon investigation and review of a pharmacist licensed by the ~~Board,~~ Board or pharmacy technician registered by the Board, the Program shall report immediately to the Board detailed information about any pharmacist or pharmacy technician as required under G.S. 90-85.41(d).

(b) The Program shall submit quarterly a report to the Board on the status of all pharmacists and pharmacy technicians then involved in the Program who have been previously reported by

the Board. The Program shall submit monthly to the Board a report on the status of any pharmacist or pharmacy technician previously reported to the Board then in active treatment.

Authority G.S. 90-85.6; 90-85.41.

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.

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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

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STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF PENDER	**02 EHR 1794**

GLENN SASSER, **Petitioner,**	)	
v.	)	**DECISION**
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF COASTAL MANAGEMENT **Respondent.**	)	

This matter came on for hearing before Fred G. Morrison Jr., Senior Administrative Law Judge, on June 9, 2003, in Surf City, North Carolina.

APPEARANCES

Petitioner: Stephen D. Coggins, Esquire
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Post Office Box 1409
Wilmington, NC 28402

Respondent: David G. Heeter, Esquire
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
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ISSUES

Issue 1. Whether the Surf City Local Permit Officer properly found that Mr. Sasser's August 16, 2002, application for a Coastal Area Management Act (CAMA) minor development permit to construct a pedestal house on his lot and extend a protective berm oceanward was inconsistent with:

> Rule 15A N.C.A.C. 7H .0306(a)(1) which requires any development to be landward of the frontal dune or long-term erosion setback whichever is farthest from the first line of stable natural vegetation or measurement line if applicable; and Rule 15A N.C.A.C. 7H .0308(b)(2) which prohibits broadening or extending existing frontal dunes in an oceanward direction in the absence of an emergency or beach renourishment project?

Issue 2. Whether the Surf City Local Permit Officer properly found that Mr. Sasser's CAMA permit application should be denied under N.C. Gen. Stat. 113A-120(a)(8) because the proposed development was inconsistent with the rules of the Coastal Resources Commission?

Issue 3. Whether N.C. Gen. Stat. 113A-121.1(a) of the CAMA limits Mr. Sasser to challenging "the decision on his application" by the Surf City Local Permit Officer within 20 days of the permit decision, but bars him from challenging other decisions by the Town of Surf City or the Division of Coastal Management which were made more than 20 days previously or which were not permit decisions or both?

Issue 4. Whether N.C. Gen. Stat. 113A-123(b) of the CAMA, which provides that any person who has an interest in land within an area of environmental concern affected by a final decision of the Coastal Resources Commission may petition the Superior Court for "a jury trial on all issues of fact" to determine whether his property has been taken without compensation, provides an "exclusive remedy" which cannot be determined in any other proceeding, and bars Mr. Sasser from raising any regulatory or physical taking claim under CAMA or other constitutional issues in a contested case proceeding?

FACTS FROM 1996 ACQUISITION OF LOT TO 1997 RECOMMENDED DECISION UPHOLDING DENIAL OF CAMA PERMIT FOR RESIDENCE

AND DENYING VARIANCE REQUEST

1. Petitioner Glenn Sasser ("Sasser") is the owner of a lot which is located on Topsail Island at 1502 North Shore Drive, Town of Surf City, Pender County. The lot is located between North Shore Drive and the Atlantic Ocean. The Town of Surf City ("Surf City") is a municipality formed under the laws of the State of North Carolina ("the State") whose geographic limits are in both Pender and Onslow Counties.

2. Under the Coastal Area Management Act (CAMA), the Coastal Resources Commission (CRC) promulgates policies and regulations to manage development and protect coastal resources in various areas of environmental concern (AECs). N.C. Gen. Stat. 113A-100 *et seq*. The Division of Coastal Management (DCM), N.C. Department of Environment and Natural Resources, reviews CAMA permit applications and grants or denies permits on behalf of the CRC. The Town of Surf City has the authority to review and grant or deny applications for CAMA minor development permits because it has a program approved by the CRC.

3. In the present contested case, Mr. Sasser is challenging the denial on September 30, 2002, by the Surf City Local Permit Officer, of his application for a CAMA minor development permit to construct a pedestal house on his lot at Surf City and extend an existing frontal dune oceanward.

4. The history of this matter extends back to 1996 when Mr. Sasser first purchased the lot with a residence on it. As addressed more fully below, an Administrative Law Judge issued a Recommended Decision on December 30, 1997, upholding the denial of a CAMA minor development permit sought by Mr. Sasser to rebuild his residence after it was destroyed by Hurricane Fran. The 1997 Recommended Decision also found that Mr. Sasser had failed to show that he should be granted a variance from the Coastal Resources Commission's erosion setback requirement. The Recommended Decision was not contested by Mr. Sasser and became final by operation of the law.

5. More recently, in January of 2003, the Commission denied Mr. Sasser's petition for a variance to allow his current development proposal. He has not sought judicial review of the Commission's decision in Superior Court.

6. The dimensions of the lot as platted are 60 feet wide along the road and beach frontage by 125 feet deep along the sides from the road to the seaward boundary. For purposes of this proceeding, the parties have no position regarding the present location of the oceanward boundary of the lot.

7. The Sasser lot is located within the Ocean Hazard Area of Environmental Concern designated by the Coastal Resources Commission (CRC) in Rule 15A N.C.A.C. 7H .0304.

8. Glenn Sasser acquired the lot and single-family residence thereon in March of 1996, and used the house as a primary residence until it was destroyed in September of 1996, as a result of Hurricane Fran

9. The residence on the Sasser lot was built well before the effective date of the CAMA. [The 1997 Recommended Decision from the prior contested case between Mr. Sasser and the Division of Coastal Management says the residence was built some "40 years ago".]

10. At the time Mr. Sasser purchased the lot in 1996, the first line of stable natural vegetation on the lot was proximate to or landward of the oceanward side of the residence, thus making the residence a nonconforming structure as defined in Rule 15A N.C.A.C. 7J .0211, and a new residence could not have been located on the Sasser lot consistent with the minimum 60 foot erosion setback from at least 1992 onwards.

11. Mr. Sasser contends that he did not know of the erosion setback requirement when he purchased the lot and residence.

12. The CRC adopted an erosion setback requirement which is set forth in Rule 15A N.C.A.C. 7H .0306(a). The Commission sought to protect private (and public) oceanfront structures from damage by gradual erosion over a life span of 30 years. Thirty years is significant because this is the life of many mortgages. The erosion setback is computed at 30 times the average annual erosion rate. By protecting structures from gradual erosion over 30 years, the Commission sought to reduce the likelihood that the structures will have to be moved prematurely, keep the public beach free from damaged structures and debris, and minimize public expenditures for cleanup and repair. The Commission also sought to protect life and property from overwash, accelerated erosion, and debris during storm events.

13. If the annual erosion rate for a stretch of beach is two feet or less per year, which is the rate where Mr. Sasser's lot is located, an erosion setback of 60 feet (30 years times two feet) is required for small structures, such as single-family residences.

14. The erosion setback is measured from the first line of stable natural vegetation with certain exceptions which are not relevant here. "This line represents the boundary between the normal dry sand beach which is subject to constant flux due to waves, tides, storms and wind and the more stable upland areas. It is generally located at or immediately oceanward of the seaward toe of the frontal dune or erosion escarpment."

15. During Hurricane Bertha in July of 1996, there was extensive erosion and overwash on the Sasser lot and in the general vicinity.

16. As a result of Hurricane Bertha, the first line of stable natural vegetation was eroded away on the Sasser lot and on both sides for a distance of several blocks.

17. During Hurricane Fran in September of 1996, the residence on the Sasser lot was destroyed, except for a number of pilings.

18. Following Hurricane Fran, the Sasser lot was a flat beach area extending from the ocean to the road at the rear of the lot, and the high tides sometimes flowed over the road.

19. Following Hurricane Fran, the Federal Emergency Management Agency (FEMA) paid for an emergency berm (post-Fran emergency berm) to provide temporary protection to the residences, roads, and other structures which remained on the oceanfront at Surf City. Since this was a Federal project, it required a consistency determination, not a CAMA permit.

20. Following Hurricane Fran, there was no first line of stable natural vegetation on the Sasser lot or on the adjacent lots from which the erosion setback could be measured. Aerial photography taken on August 8, 1996, between Hurricanes Bertha and Fran, showed no vegetation on a long stretch of oceanfront, including Sasser's lot, from which a vegetation line could be located.

21. Glenn Sasser applied to the Surf City Local Permit Officer on May 2, 1997, for a CAMA minor development permit to reconstruct a residence on his lot, and the Local Permit Officer denied his application in a letter dated June 19, 1997, because a residence could not be located on the lot consistent with the minimum 60 foot erosion setback..

22. Mr. Sasser commenced a contested case proceeding in the Office of Administrative Hearings to challenge the denial of his May 2, 1997, permit application. He also requested a variance from the Coastal Resources Commission, which matter was heard before the Office of Administrative Hearings because the parties could not stipulate to the relevant facts.

23. The Administrative Law Judge recommended upholding the denial of Mr. Sasser's permit application and denying his variance request, and this Recommended Decision became final by operation of the law. Sasser did not seek review of the Recommended Decision in 97 EHR 0763, and it was never considered by the Coastal Resources Commission. To the extent they are relevant here, the Findings of Fact and Conclusions of Law in the 1997 Recommended Decision are *res judicata* with regards to the factual and legal issues disputed during the prior permit appeal and variance request.

FACTS REGARDING SURF CITY'S CONSTRUCTION OF TWO PROTECTIVE SAND DUNES IN 1998 AND 1999 AND DAMAGE FROM HURRICANE FLOYD IN 1999

24. On October 16, 1997, the Town of Surf City applied for a CAMA permit to construct a post-Fran protective dune along 6.2 miles of beachfront in Surf City. The Town represented in its permit application that based on the advice of the Attorney General "permission from individual property owners will be solicited to perform the dune restoration activities that occur on private property." On January 20, 1998, the DCM issued CAMA Major Development Permit No. 8-98 to Surf City authorizing the "one time" construction of the dune restoration project, and the Town completed the project.

25. During Hurricane Floyd in 1999, there was extensive sand erosion and overwash on the Sasser lot and in the general vicinity, and what remained of the previous protective dune was destroyed. The damage extended northward over a number of lots almost into Pender County.

26. Following Hurricane Floyd, the Sasser lot was part of a flat beach area extending from the ocean back to the road.

27. The majority of the sand which had eroded from the beach and the protective dune was on the road and under the houses landward of the road.

28. At the request of Surf City, Steve Benton, Geologist and Coastal Hazards Specialist, Division of Coastal Management, accompanied by Steve Padgett, Local Permit Officer for Surf City, staked the alignment of the protective dune which the Town constructed after Hurricane Floyd.

29. The goal was to align the post-Fran protective sand dune so that it would provide the best possible storm protection. Where the dune was staked depended on the conditions along each stretch of beach, but the desired alignment of the dune was 65 feet or more landward of the wet sand beach (high tide line) to allow sufficient distance to dissipate the wave energy, but oceanward of any remaining houses, streets and utility lines. Maintaining public travel and access along the beach was also a consideration. Upon reconsideration, Mr. Sasser agreed that the dune alignment was 60 or 65 feet from the wet sand.

30. The Town applied for a minor modification to CAMA Major Development Permit No. 8-98 authorizing another "one time" construction of the protective dune.

31. On September 28, 1999, the DCM issued a minor modification to CAMA Major Development Permit No. 8-98 authorizing a "one-time" construction by the Town of Surf City of the protective dune destroyed during Hurricane Floyd. The Town constructed a new dune of somewhat larger dimensions than the previous one. Beach bulldozing was also authorized.

32. The dune crossed the oceanward end of the Sasser lot, but the parties make no stipulation as to whether the Town gave notice to, or obtained the consent of, Mr. Sasser prior to constructing it. Mr. Sasser contends that the Town proceeded without notice or his consent.

SEPTEMBER 30, 2002, DENIAL OF PERMIT APPLICATION FOR CAMA PERMIT FOR PEDESTAL HOUSE AND DUNE EXTENSION AND RESULTING PERMIT APPEAL AND VARIANCE REQUEST

33. Because of erosion, the oceanward side of the post-Floyd protective dune across the Sasser lot is steeper than when it was constructed, but the landward side of the dune corresponds to the CAMA depiction of what it should be.

34. Mr. Padgett agreed that the protective dune tended to be steeper and higher on the landward side than a natural dune.

35. The post-Floyd protective dune which the Town constructed across Mr. Sasser's lot has eroded somewhat since it was constructed, as evidenced by the sharp erosion escarpment and the grass which has recently fallen on the beach.

36. There is presently a first line of stable natural vegetation along the crest of what remains of the protective dune most recently constructed by the Town of Surf City and Jim Gregson of the Division of Coastal Management drew a line on two photographs to show where this current line is located.

37. The first line of stable natural vegetation is located along the oceanward side of the crest of the protective dune immediately landward of a sharp erosion escarpment between the dune and the beach.

38. There is some vegetation on the oceanward slope of the dune which consists of pioneer species. The erosive forces in this area are too great for enough stable vegetation to become established to constitute a first line of stable natural vegetation.

39. In a permit application dated August 16, 2002, Mr. Sasser applied to the Surf City Local Permit Officer for a CAMA minor development permit to construct a pedestal house on his lot landward of the protective dune, to extend the protective dune oceanward by bringing in suitable fill sand from off the site, and to establish a new first line of stable natural vegetation oceanward of the present line. The present protective dune and vegetation line would not be disturbed.

40. Because he did not have enough information upon which to act, Mr. Padgett, the Surf City Local Permit Officer, helped Mr. Sasser prepare a drawing showing the vegetation line in relation to the proposed development.

41. On September 30, 2002, Mr. Padgett denied the permit application because it was inconsistent with Rules 15A N.C.A.C. 7H .0306(a)(3) and .0308(b)(2) of the CRC.

42. Rule 15A N.C.A.C. 7H .0306(a)(3) provides that if there is no primary dune, but a frontal dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the frontal dune or landward of the long-term erosion setback line, whichever is the farthest from the first line of stable natural vegetation or measurement line, if applicable.

43. The Coastal Resources Commission established a measurement line in Onslow and Pender Counties after Hurricane Fran which allowed the use of some aerial photography taken after Hurricane Bertha to determine where the erosion setback line should be measured from. Since the vegetation line has recovered, it is now used to determine where the erosion setback should be measured from.

44. Rule 15A N.C.A.C. 7H .0305(e) defines a "frontal dune" as "the first mound of sand located landward of the ocean beach having sufficient vegetation, height, continuity, and configuration, all for protective value."

45. The post-Fran protective dune is a frontal dune, but given Mr. Sasser's permit application, it makes no difference whether the protective dune is a "frontal dune" since his proposed house was landward of the toe of the dune.

46. The erosion setback for small structures should be 60 feet if the annual long-term erosion rate is two feet or less per year.

47. The parties agree that the erosion setback on the Sasser lot is 60 feet measured landward from the first line of stable natural vegetation.

48. The Division of Coastal Management and Town of Surf City determined that the first line of stable natural vegetation on the Sasser lot is located approximately 46 feet oceanward of the road right-of-way, so that the minimum 60 foot erosion setback as measured landward from the vegetation line falls on the paved road itself.

49. The parties agree that a residence cannot presently be located on the Sasser lot consistent with the minimum 60 foot erosion setback as determined by the Respondent.

50. Under the rules of the CRC, the protective dune constructed by Surf City is of no significance in determining whether Mr. Sasser may build a residence on his lot.

51. What is controlling is the location of the first line of stable natural vegetation from which the erosion setback is measured. The vegetation line just happens to be currently located on the protective dune.

52. There is nothing in the record showing that the vegetation line which is on the crest of the protective dune was planted by the Town of Surf City or the DCM.

53. Rule 15A N.C.A.C. 7H .0308(b)(2) provides that "Existing primary and frontal dunes shall not, except for beach nourishment and emergency situations, be broadened or extended in an oceanward direction."

54. Mr. Sasser's permit application did not say there was any emergency, and the Local Permit Officer and the Division's District Management did not know of any.

55. Mr. Sasser proposes to place fill material on the oceanward side of the existing protective dune and to plant native vegetation to stabilize the fill area and create a new first line of stable natural vegetation oceanward of the present vegetation line.

56. Mr. Sasser wants to establish a new vegetation line far enough oceanward so that he can locate his proposed residence on it consistent with the minimum 60 foot erosion setback.

57. Much of the fill material would be placed oceanward of the existing protective dune on what is now the upper side of the beach in an area overwashed by high tides.

58. The post-Fran protective dune has eroded away wherever it was aligned oceanward of the remaining houses, and whenever property owners have sought to expand the protective berm by pushing up sand, the sand has quickly eroded away.

59. No sand has been pumped in the course of a publicly-financed beach renourishment program on the Sasser lot or between the lot and the ocean. The feasibility of a beach renourishment project is under study.

60. Beach renourishment consists of the town-wide or area-wide pumping of sand to raise the elevation and width of the beach. Mr. Sasser's permit application does not propose any beach renourishment.

61. On October 21, 2002, Mr. Sasser applied to the Coastal Resources Commission for a variance allowing him to construct a pedestal house on his lot and to expand the protective dune oceanward. The variance request was presented to the CRC based upon extensive facts stipulated to by the parties.

62. Several days before an April, 2003, meeting of the Coastal Resources Commission, Mr. Sasser submitted a modified development proposal to the Commission which the Commission decided not to consider because it was not timely filed under its rules. Also, the Local Permit Officer never considered the modified proposal so there is no way of knowing whether he would have granted or denied a permit.

63. On April 23, 2003, the Coastal Resources Commission denied Mr. Sasser's request for a variance from Rules 15A N.C.A.C. 7H .0306(a) and .0308(b) upon finding that he had failed to satisfy the four variance criteria set forth in N.C. Gen. Stat. 113A-120.1.

64. On October 21, 2002, Mr. Sasser also commenced a contested case proceeding in the Office of Administrative Hearings to challenge the denial of his most recent permit application.

65. In testimony on June 9, 2003, Mr. Sasser basically contended: (1) that the Commission's erosion setback and oceanfront development regulations are predicated upon the existence of certain natural features which do not exist at Surf City where the predominant features are the result of governmental actions; and (2) that there are regulatory and physical obstacles which result from actions of the State, the Town, and both acting in concert, which unfairly limit the use of his lot, along with natural forces.

66. Hiram Williams, a local realtor and contractor, testified that Topsail Island "virtually had no sand dunes left on it after Hurricane Bertha. . . . What we had even before Hurricane Bertha were dunes that had been established by man. That's the case."

67. Mr. Williams testified that the "beach" in the area of Mr. Sasser's lot is somewhat steep and consists of shelly (coquina) sand which makes it difficult to drive on, although there are other places which are equally as bad. Mr. Sasser has not proposed driving on the "beach".

68. If Mr. Sasser cannot locate a residence on his lot consistent with the erosion setback requirement, CAMA would allow a parking area, swimming pool, campsite, temporary amusement stand, storage shed, elevated deck, gazebo, and walkway thereon without him having to comply with the Commission's erosion setback. The parties do not stipulate whether such uses would be allowed under other applicable laws or would be physically or economically feasible.

69. Mr. Williams agreed that it was physically possible to build a structure on Mr. Sasser's lot, such as an amusement stand or gazebo.

70. When asked if he was aware of any "physical characteristics" on the Sasser lot which make it any more difficult to build on than the nearby lots, Mr. Padgett answered "No, sir."

71. Mr. Williams testified that it would be difficult to build atop the "berm" because of "its height and inability to get a machine on it." Mr. Sasser is proposing to construct a house landward of the "berm", not atop it, and has not submitted any development proposal to build on top of the berm.

72. Mr. Williams testified that it was economically impossible to construct an amusement stand, storage shed, elevated deck, gazebo, or walkway on the "berm". On cross-examination, he said "but it would still cost me more to build a structure there than it would right down beside the street." Mr. Williams also said "I'm somewhat confused by the question myself, but if you went up on top of the dune, if it were permissible, yes, you could build a structure up there. . . ."

73. He agreed that if you went to another lot with an identical berm it would cost more to build on than a flat lot.

74. Mr. Williams also agreed that he was expressing his opinion about economic feasibility without knowing the requirements which would be included in any permits, and such requirements would influence the cost.

75. Under Rule 15A N.C.A.C. 7H .0309(a), certain structures, including an amusement stand, parking area, storage shed, elevated deck, swimming pool, gazebo, or walkway, may be allowed seaward of the erosion setback but landward of the vegetation line subject to certain conditions. Mr. Sasser failed to offer any evidence to show that such conditions could not be satisfied on his lot.

76. Mr. Williams testified that if coquina sand is pushed up on a lot, it does not revegetate as quickly as a lot with fine sand, but this is not an issue since the parties stipulated that there is presently a first line of stable natural vegetation atop the protective berm constructed by the Town. He recognized that a man-made berm could become a stable naturalized dune over time.

77. Mr. Williams could not recall whether he observed the staking of the present post-Floyd protective dune.

78. Immediately to the south of the Sasser lot, there is a 20 foot wide public beach access with a wooden walkway which runs from North Shore Drive to the public beach. DENR provided funding for construction of the beach crossover.

79. Mr. Sasser testified that the Town of Surf City had placed gravel on his lot and introduced photographs showing the gravel.

80. Mr. Padgett says gravel was placed on the right-of-way on either side of the street and in front of the beach access, but was not purposely placed on Mr. Sasser's lot.

81. The Town of Surf City put a sign on the beach access next to Mr. Sasser's lot which said "Keep Off the Dunes. $500.00 Fine." It also placed such signs at other beach access points. The signs pertained to the town's property.

82. Some property owners purchased "Keep Off the Dunes" signs from the Town and placed them on their lots.

83. Mr. Sasser had never asked the Town of Surf City to remove the segment of the protective dune located across his lot. No sand was put on the lot of one landowner who objected.

84. The protective dune across Mr. Sasser's lot has undergone some erosion, and it has eroded away where it went around the oceanward side of houses. In areas where people have pushed up sand oceanward of the dune for protective purposes, the sand has washed away.

85. The evidence shows that any more oceanward alignment of the dune across Mr. Sasser's lot would have resulted in it eroding away.

86. The protective dune was constructed in those areas which were breached by the ocean during Hurricane Floyd.

87. Mr. Sasser says "There's a lot of people that got permits didn't have 60 feet."

88. Jim Gregson asserts that after Hurricane Floyd three houses were constructed in Surf City which did not comply with the 60 foot erosion setback because permits had already been issued for them, the erosion setback had been determined, and there was no significant change to the shoreline. Another house was completed after Hurricane Floyd because the Commission's rules allow a house to be completed once a permit has been issued, the erosion setback has been determined, and substantial progress is made towards its construction.

89. The Town has not issued any CAMA permits to construct houses in the areas where it constructed the post-Fran and Bertha protective dune or the post-Floyd protective dune, but it has issued permits for houses in other areas along the oceanfront.

90. The Town did construct some beach access points after Hurricane Floyd.

91. Beach bulldozing may be allowed under Rule 15A N.C.A.C. 7H .0308(a)(4) to repair a damaged dune subject to certain conditions. If beach bulldozing is proposed under this Rule to enhance the dune system, the bulldozing must also comply with the restrictions on dune expansion in Rule 15A N.C.A.C. 7H .0308(b).

92. Other lots in the vicinity of Sasser's have been eroded to varying degrees and been overwashed by the tides as a result of Hurricanes Bertha, Fran, Bonnie, and Floyd.

93. Other houses in the vicinity of Mr. Sasser's lot were destroyed during Hurricane Fran, and some of those houses cannot be rebuilt consistent with the Commission's minimum erosion setback requirement.

94. If the first line of stable natural vegetation becomes established far enough seaward that the CAMA permit officer determines that the erosion setback requirement will be complied with, Mr. Sasser will be able to obtain a CAMA minor development permit for his proposed residence provided that all the other applicable development standards are complied with.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of Mr. Sasser's appeal of the denial of his permit application.

2. Glenn Sasser's contested case petition was timely filed to challenge the September 30, 2002, denial of his permit application by the Surf City Local Permit Officer.

3. The Surf City Local Permit Officer and Division of Coastal Management properly applied the rules of the Coastal Resources Commission in determining that there is a first line of stable natural vegetation on the crest of the protective dune on the Sasser lot, that the erosion setback should be 60 feet based on the annual long-term erosion rate, and that the 60 foot erosion setback should be measured landward from the vegetation line. The fact that the protective dune is also a frontal dune does not affect how the erosion setback should be determined under the circumstances.

4. There is substantial evidence in the form of the stipulations of the parties, the testimony of the witnesses, and the exhibits of the parties, to show that the Surf City Local Permit Officer with the assistance of the Division of Coastal Management properly determined that:

a. The pedestal house proposed by Glenn Sasser in his August 16, 2002, CAMA permit application was located seaward, not landward, of the 60 foot erosion setback line, and thus was inconsistent with Rule 15A N.C.A.C. 7H .0306(a)(3);

b. The extension of the post-Floyd protective dune in an oceanward direction as proposed by Mr. Sasser in his August 16, 2002, permit application constituted the oceanward extension of an existing frontal dune in the absence of an emergency or beach renourishment project, and thus was inconsistent with Rule 15A N.C.A.C. 7H .0308(b)(5); and

c. Mr. Sasser's August 16, 2002, permit application should be denied under N.C. Gen. Stat. 113A-120(a)(8) because the proposed development was inconsistent with the rules of the Coastal Resources Commission.

5. To prevail in this proceeding, Mr. Sasser must show some substantive or procedural error in the denial of his August 16, 2002, permit application.

6. Mr. Sasser seeks to challenge the denial of his permit application by showing that the rules of the Coastal Resources Commission are predicated upon the existence of certain natural features which do not exist at Surf City where the predominant features are the result of governmental action. The record shows that the Town, the State, the Federal government, and private individuals have modified the oceanfront at Surf City for many years in an effort to protect private and public property. However, the post-Floyd protective berm provides no support for Mr. Sasser's argument because a first line of stable natural vegetation has formed atop this protective dune and this vegetation line is the point from which the erosion setback is measured. Also, the protective dune serves as a frontal dune and provides protection to Mr. Sasser's lot from storms. He has not shown any basis for reversing the denial of his permit application for this reason.

7. Mr. Sasser also seeks to challenge the denial of his permit application by showing that there are regulatory and physical obstacles which result from actions of the State, the Town, and both acting in concert, which unfairly limit the use of his lot along with natural forces. His claims with regards to physical obstacles and natural forces are inappropriate issues in a permit appeal, but might be appropriate in a proceeding for a hardship variance. Under N.C. Gen. Stat. 113A-120.1(a)(2), a petitioner for a variance must show, among other things, that "The hardships result from conditions which are peculiar to the property, such as the location, size, or topography of the property." Any limitations on the use of his property as a result of natural forces might be appropriate evidence to show "unnecessary hardships" justifying a variance. N.C. Gen. State 113A-120.1(a)(1). These issues are irrelevant to whether his application was properly denied.

8. The day-to-day wind and waves, as well as the four hurricanes, which have affected Mr. Sasser's lot since 1996, are natural forces which affect all oceanfront properties, and they are a risk taken by all oceanfront property owners. A residence could not have been constructed on the Sasser lot consistent with the erosion setback requirement when he purchased it in 1996 and could not have been constructed from 1992 until today. These natural forces do not support granting him a permit which is inconsistent with the Commission's erosion setback requirement and would potentially result in the harms to the public safety and general welfare which the Commission seeks to avoid.

9. Mr. Sasser's attempts to show that his permit denial should be reversed because of certain actions of the Town, such as placement of gravel along the street, posting "Keep Off The Dunes" signs at beach access points, making "Keep Off The Dunes" signs available to private persons to post on their property, allowing other persons to build houses on lots not complying with the 60 foot setback, and permitting other persons to bulldoze beach sand to protect their threatened property, are also unsupported by the evidence or irrelevant or both.

10. Mr. Sasser also seeks to show that the Division of Coastal Management used an unscientific and arbitrary method in staking the alignment of the post-Floyd protective dune. In Webb v. N.C. DEHNR, 102 N.C. App. 767, 404 S.E.2d 29 (1991), the use of "natural indicators" and observance of site conditions was found to be an acceptable method of determining the "mean high water". Here the Division used the "wet sand beach" which is a natural indicator to help align the protective berm. Given the conditions which existed along the oceanfront after Hurricane Floyd and the need to protect private and public property from further damage, the method used by the Division to stake the post- Floyd dune alignment was reasonable.

11. Mr. Sasser has failed to show that it is physically and economically impossible to use his property for any of the uses allowed under Rule 15A N.C.A.C. 7H .0309(a) as exceptions to the erosion setback requirement. There is insufficient evidence to show that it is physically impossible to use the lot, particularly the flat area of the lot adjacent to the street, for a campsite, parking area, elevated deck, beach accessway, gazebo, storage shed, or temporary amusement stand. While Mr. Williams' opinion that it is

not economically feasible to build on the lot is entitled to some weight, he admitted that he did not know what restraints would be imposed by any permits and that he would need this information to determine the cost of a project.

12. N.C. Gen. Stat. 113A-121.1(a) gives Mr. Sasser the right to commence a contested case proceeding on "the decision on his application . . . within 20 days after the decision is made." He has appealed the denial of his permit application under this subsection.

13. However, to contest the decision on someone else's permit application, Mr. Sasser must file a third party hearing request under N.C. Gen. Stat. 113A-121.1(b) within 20 days of the "*decision to grant or deny a minor or major development permit*." [Emphasis added.] He has never filed a third party hearing request with the Commission under this provision. This is the only way he can challenge the decision on someone else's permit application. He is thus barred by the passage of time from raising any challenge to the 1996 Federal consistency determination by the Division of Coastal Management regarding the post-Fran emergency berm, the 1998 decision by the Division to issue CAMA Major Development Permit No. 8-98 authorizing the construction of a protective dune, the 1999 decision by the Division to modify CAMA Major Development Permit No. 8-98 authorizing the post-Floyd protective dune, and any other decisions made by the Town of Surf City or the Division of Coastal Management. In addition, the 1996 consistency determination was not a permit decision since it involved a Federal agency.

14. N.C. Gen. Stat. 113A-123(b) provides that any person who has an interest in land within an area of environmental concern affected by a final decision of the Coastal Resources Commission may petition the Superior Court to determine whether his property has been taken without compensation. " *Either party shall be entitled to a jury trial on all issues of fact. . . .*" This subsection further provides that *"The method provided in this subsection . . . shall be exclusive and such issue shall not be determined in any other proceeding*." [Emphasis added.] The Office of Administrative Hearings and Coastal Resources Commission therefore lack subject matter jurisdiction over Mr. Sasser's claims to the extent that he seeks to show that his property has been taken without compensation.

15. The Commission's decision not to consider Mr. Sasser's last minute modification to his development proposal and variance request at its April 23, 2003, meeting was a final agency decision under N.C. Gen. Stat. 113A-120.1, is subject to judicial review under N.C. Gen. Stat. 113A-123(a), is not subject to review in this contested case proceeding, and is not entitled to any evidentiary weight here.

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

DECISION

The decision by the Local Permit Officer of the Town of Surf City to deny Mr. Sasser's application for a CAMA minor development permit to construct a pedestal house and extend his lot oceanward should be UPHELD.

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, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The 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 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 N.C. Coastal Resources Commission.

This the 28th day of August, 2003.

_____

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF DURHAM	**02 OSP 1001**

CAROLYN DAVIS **Petitioner,** **v.** **DURHAM MENTAL HEALTH/DEVELOPMENTAL DISABILITIES/SUBSTANCE ABUSE AREA AUTHORITY d/b/a THE DURHAM CENTER** **Respondent.**	)	**FINAL DECISION**

On February 27, 2003, and March 17, 24, and 27, 2003, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Durham, North Carolina. Pursuant to Respondent's Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim, the undersigned **GRANTED** Respondent's Motion as follows:

APPEARANCES

Petitioner: Janet Lennon
Attorney at Law
Frasier & Alston
100 East Parrish Street, Suite 350
Durham, NC 27701-3336

Respondent: Lucy Chavis
Assistant County Attorney
Office of the County Attorney
P.O. Box 3508
Durham, NC 27702

EXHIBITS

For Petitioner: 1-6, 9, 11-19, 22, 26, 28, 29, 31, 42-43

For Respondent: 37, pp 55-60; 38, 40, 41

ISSUES

1. Whether Petitioner applied for the position of Interim Area Director, and therefore, had standing to bring a cause of action against Respondent for denying her a promotion to the Interim Area Director position for failing to give her priority consideration, failing to follow Area guidelines in filling the Interim Area Director position, and discriminating against her based upon her race and color?

2. Whether Petitioner failed to state a cause of action upon which relief can be granted, and whether the Office of Administrative Hearings has subject matter jurisdiction to hear this contested case?

3. Whether Respondent's policy vests Petitioner with a property right in the Acting Area Director position?

FINDINGS OF FACT

Background Facts

1. Petitioner is an African-American female.

2. From November 1977 until 1985, Petitioner worked as a substance abuse counselor, and then a program director for

Respondent (T pp 28-29). In 1985, Respondent promoted Petitioner to Assistant or Deputy Area Director. (T pp 29-30) At all times relevant to this proceeding, Petitioner held the position of Deputy Area Director.

3. Respondent provides mental health, developmental disability, and substance abuse services to individuals and families in Durham County, North Carolina. Respondent's Area Board of Directors ("the Area Board") is Respondent's governing body.

4. Pursuant to its policies, Respondent's Area Board has the authority to, and is responsible for, appointing an Area Director, Acting Area Director, or Interim Area Director. Specifically, Respondent's Area Board policy, "Delegation of Authority In Absence of The Area Director," provides in pertinent part:

> **I. PURPOSE/INTENT**
>
> To insure availability and continuity of the Chief Executive/Area Director authorities and responsibilities in his/her absence.
>
> **II. POLICY STATEMENT**
>
> . . .
>
> B. Separation of the Area Director (ex. Retirement, resignation, termination) - delegation of authority and responsibility
>
> 1. The Area Board Executive Committee, **per majority vote of those present at the meeting for this purpose,** will designate a Deputy Area Director as Acting Area Director, with full Area Director authorities and responsibilities, to serve in that capacity until such time as a new Area Director is hired and begins work.

(Emphasis added, Resp Exh 40)

Area Director Vacancy

5. On January 12, 2002, Dr. Steven B. Ashby, (hereinafter, "Dr. Ashby"), Area Director for Respondent, announced to Respondent's Area Board that he was resigning from his position effective March 24, 2002.

6. In January and February 2002, Petitioner was the only Deputy Director employed by Respondent as the other Deputy Area Director had left employment with Respondent in 2001. (T pp 52, 107) When Petitioner learned of Dr. Ashby's resignation, she approached Harold Batiste, Chairman of the Area Board, expressed her interest in the Interim Area Director position, and asked to meet with Batiste about that position. (T pp 104-105, 124)

7. On February 7, 2002, Chairman Batiste met with Petitioner. (Resp Exh 36, p 44) During this meeting, Petitioner reiterated her interest in becoming the Interim Area Director of The Durham Center. She specifically informed Chairman Batiste of her plans and vision for The Durham Center for the interim period between Dr. Ashby's resignation and the hiring of a new Area Director, should she be named the Interim Area Director. (T p 108) Petitioner advised Batiste that she wanted to talk with the Board's Personnel Committee (a.k.a. Human Resources Committee) to:

> give them an opportunity to get to know me and to talk to me individually so that they could see who I was. And I was trying to really sell myself for the position of Interim Area Director. I wanted them to be comfortable with me in that role. I thought I was going to get the job. I thought they might as well be comfortable with me and get to know me.

(Resp Exh 36, p 48) Petitioner also told Batiste that she desired Dr. Ashby's salary if she became Interim Area Director.

Batiste informed Petitioner that he would arrange a meeting for her with the Board's Personnel Committee. Batiste also told Petitioner that as Interim Area Director, she would not make the same salary as Dr. Ashby, because Ashby's salary was based upon his years of work experience. (T p 107)

8. At all relevant times of this proceeding, the Personnel Committee consisted of the Area Board's Executive Committee, plus the Personnel Committee chairman. That is, the Personnel committee included Executive Committee members Doug Wright (Board Vice-Chair), Nancye Bryan, Chairman Batiste, Phillip Golden; and Personnel Committee chairman Hugh Wright. (T pp 322, 804)

9. Before meeting with the Personnel Committee, Petitioner contacted individual members of the Personnel Committee, and expressed her interest in the Interim Area Director position, told each committee member about herself, and explained to each committee member, her plans for The Durham Center. (T p 244)

10. Petitioner believed that "Acting" Area Director and "Interim" Area Director was the same position, in that the words "acting" and "interim" were synonymous in meaning. (T p 107) Petitioner strongly believed, and expected, that pursuant to the Board's "Delegation of Authority In Absence of The Area Director" policy, she would automatically be designated as the Acting or Interim Area Director. (T pp 106-124)

11. On February 12, 2002, Petitioner met with the Personnel Committee and Chairman Batiste in an informal meeting to discuss her "candidacy and interest in the Interim Area Director position." (T p 202) There were no other persons being considered for the position of Interim Area Director at that time.

Specifically, Petitioner explained her goals and vision for The Durham Center, including improving employee morale, and requested that she be paid $20,188 more than her current annual salary of $69,000, or $92,000.00 annually, to perform the position of Interim Area Director. (T p 111) Petitioner believed she deserved to receive a $20,188 pay raise to perform this position, because a previous Area Board had given Petitioner's coworker a $20,188 pay raise when they appointed that coworker to Interim Area Director in 1985. (T pp 204-211) However, the Area Board at that time consisted of different members than the current Area Board.

12. The Personnel Committee and Chairman Batiste expected that "we would just talk with her, and then we'll make a recommendation to the board to just go ahead and move her up into the position." (T p 507) Yet, after talking with Petitioner, and considering Petitioner's interest in the Interim Area Director position, the Personnel Committee did not make a decision whether to recommend to the full area Board that Petitioner be designated as the "Acting" Area Director of The Durham Center.

13. On February 18, 2002, the full Area Board conducted a meeting. Before the meeting began, Chairman Batiste informed Petitioner that she would not make a presentation to the full Board as she had been previously advised, and the Area Board would not be appointing an Interim Area Director at that meeting. (T pp 115, 117-118) Petitioner had expected the Area Board to name her as Interim Area Director at that meeting. (T pp 115, 117-118)

a. During that Board meeting, Petitioner addressed the Area Board during the public comment period about the fairness and integrity of the Interim Area Director selection process. The Board invited Petitioner to speak with them in closed session, and Petitioner did so. During the closed session, Petitioner expressed her interest in the Interim Area Director position, discussed her plans for The Durham Center if she became Interim Area Director, pointed out the Board's policy on "Delegation of Authority In Absence Of The Area Director," and advised the Board of her $92,000 annual salary "requirement" (T p 193) to perform such job.

b. After Petitioner left the Board's closed session, each member of the Personnel Committee and Chairman Batiste (ie. the Executive Committee) expressed his or her impression of the February 12, 2002 Committee meeting with Petitioner, and how he/she felt about that meeting and about Petitioner, to the full Area Board. (T pp 815, 838) Neither the Personnel Committee nor Chairman Batiste (ie. the Executive Committee) recommended to the full Board that Petitioner be named or designated "Acting" Area Director. (T p 369) After reconvening to open session, Chairman Batiste directed the Personnel Committee seek legal counsel from the County on how the selection "process to procure an Interim Area Director can be opened up." (Pet Exh 12, pp 2-3)

14. On February 19, 2002, Petitioner sent an e-mail to Respondent's staff saying:

> Contrary to the information floating around, I was not, and shall not, be named interim area director . . . It seems my salary request was too high and I was inflexible about it. Those of you interested in the job shall let your desire be known. I stand ready and willing to work for you. I feel the Area Board's conduct was not very honorable toward me in the process, but that's okay. I feel relieved and joyous at the thought of not being designated, and interesting times lies [sic] ahead, and I'm comfortable being an observer rather than a key player. It's all good.

(T pp 203, 224-225; January 10, 2003 Motions' Hearing, T pp 52-54)

15. On February 21, 2002, the Area Board held a closed session meeting to discuss procedures for selecting an Interim Area Director. The Board chose to follow a closed selection process whereby board members would submit qualified candidates' names to Chairman Batiste by February 24, 2002, copies of candidates' resumes would be distributed to board members, and interviews would be scheduled for the week of March 4, 2002.

16. Between February 18 - 21, 2002, pursuant to Chairman Batiste's request, Marie Jones sent an e-mail to all the Board members regarding the "Interim Area Director Position" stating:

> Mr. Batiste requested that I e-mail all Area Board members and ask them if they know anyone interested in the Interim Area Director position. If so, the Board member should contact Mr. Batiste (620-8066) by February 24, 2002 with information on how to contact the interested person.

(Pet Exh 17) This e-mail was also circulated to the Respondent's management team. Because Petitioner was a member of the management team, she received a copy of this e-mail. (T p 127)

17. Petitioner did not respond to Jones' February 2002 e-mail, "either by e-mail or by talking with Jones," (T p 144), or by communicating with anyone else.

18. Between February 18, 2002 and February 21, 2002, Petitioner encouraged colleague Jack Ramsey to apply for the Interim Area Director position. (T pp 130-131)

19. On March 4, 2002 and March 11, 2002, the Area Board interviewed applicants for Jack Ramsey, Scott Bryant Comstock, and Ellen S. Holliman for the Interim Area Director position.

20. On March 4, 2002, Petitioner spoke with Jack Ramsey about his interview for the Interim Area Director position, and discussed Ramsey's interview. (T pp 131-134)

21. At its March 18, 2002 meeting, Respondent's Area Board announced that it had selected Ellen S. Holliman as Interim Area Director, and would negotiate with Holliman regarding her salary.

22. On April 1, 2002, Ms. Holliman reported to work as Respondent's Interim Area Director.

23. On April 22, 2002, Respondent appointed Ellen Holliman as Interim Area Director "as of April 1, 2002" for an "interim appointment of one year" with Holliman receiving the contracted salary of $50.00 per hour.

Contested Case Petition Filed

24. On June 12, 2002, Petitioner filed a petition for a contested case hearing appealing Respondent's decision to hire Ellen Holliman as its Interim Area Director. Petitioner alleged that Respondent wrongfully denied her a promotion to the Interim Area Director position by:

1) failing to give her priority consideration,
2) failing to follow Area guidelines in filling the Interim Area Director position, and
3) discriminating against her based upon her race, age, and color.

25. On February 27, 2003, the undersigned began conducting the contested case hearing in this matter. Before the presentation of her evidence, Petitioner withdrew the age discrimination claim from her appeal.

26. On February 27, 2003, March 17 and 24, 2003, Petitioner presented her case-in-chief.

Motion to Dismiss

27. On March 25, 2003, the undersigned conducted a telephone conference with the parties, and advised the parties that she was concerned whether the facts presented at hearing sufficiently proved that Petitioner had standing, and was a "person aggrieved" who could file a contested case petition.

The undersigned asked the parties to present written briefs with supporting case law, on the following issues:

> (1) Whether Petitioner, under the factual scenario of this case, has standing to be a "person aggrieved" under N.C. Gen. Stat. § 150B,
>
> (2) When did Respondent's formal interview process for the Interim Area Director
>
> (3) Is there a difference between an "interim" and "acting" [Director] position? If there is a difference, then how would Respondent's personnel policies, particularly hiring policies, apply to that difference?

The undersigned further instructed the parties that she would hear oral argument and review any written arguments from the parties on March 27, 2003.

28. On March 27, 2003, the undersigned heard oral argument from both parties on these issues. Petitioner submitted a "Memorandum Supporting Petition," along with accompanying case law, as its argument. Respondent submitted its written argument as a formal Motion to Dismiss. After reviewing Respondent's formal Motion to Dismiss, Petitioner requested additional time to file a written response thereto. Because Respondent's Motion to Dismiss solely responded to the issues the undersigned had requested of the parties, and the undersigned had advised the parties during their March 25, 2003 phone conference of her concerns, the undersigned denied Petitioner's request for additional time to file an additional response to such Motion.

29. On March 28, 2003, the undersigned conducted a telephone conference with the parties, and advised the parties that she was granting Respondent's Motion to Dismiss. The undersigned ruled that Petitioner lacked standing to file a contested case petition, appealing Respondent's decision to hire Ellen Holliman as Interim Area Director, because Petitioner never "applied" for the Interim Area Director position. The undersigned instructed Respondent's counsel to file a proposed Decision.

30. On May 1, 2003, Respondent's counsel filed a proposed Final Decision with the Office of Administrative Hearings. On May 2, 2003, Petitioner's counsel requested an opportunity to file a response to Respondent's proposed Final Decision. On May 5, 2003, the undersigned granted Petitioner's request.

31. On May 20, 2003, Petitioner filed her response to Respondent's proposed Final Decision. On or about July 3, 2003, Chief Administrative Law Judge Julian Mann extended the deadline to file the decision in this case until August 6, 2003.

Analysis

32. In the subject case, Petitioner's claim that she actually applied for the Interim Area Director position was not supported by the evidence. First, Petitioner asserted that the Area Board did not develop any formal application procedures for selecting an Interim Area Director. Yet, evidence presented at the administrative hearing proved that the Area Board met on February 21, 2002 for a budget retreat, and devised a process for selecting an Interim Area Director. (T pp 128-129)

a. During her deposition, Petitioner admitted that she attended the Board's February 21st budget retreat. Petitioner specifically conceded that at the beginning of the retreat, she heard Chairman Batiste state to the board members, "We'll need a few minutes to talk about hiring an interim area director." (Petitioner's deposition, pp 61-63). Later, just before the Board took a break and went into closed session, Petitioner heard Batiste tell the Board members that he needed to talk to them for a few minutes. (Petitioner's deposition, pp 61-63) Thereafter, the Board met in closed session.

Later, Petitioner and the management team received Marie Jones' e-mail instructing Board members to have any persons interested in the Interim Area Director position, contact Chairman Batiste by February 24, 2002. This e-mail not only reminded Board members of the application deadline for the Interim Area Director position, but, by being sent to the management team, also advised Petitioner and the rest of the management team that persons could contact Board members if they were interested in the Interim Area Director position. Based upon this evidence, it is more likely than not, that Petitioner knew the Board had devised application procedures for selecting the Interim Area Director in late February 2002, and knew of the application deadline.

b. Second, there was no evidence presented at the administrative hearing that Petitioner, after learning of the selection process for the Interim Area Director position, formally applied for that position. In fact, a preponderance of the evidence proved that Petitioner believed that she "didn't have to go through a formal procedure" to become the Interim Area Director position (T p 203), because the Board's "Delegation of Authority In Absence of The Area Director" policy required the Board's Executive Committee designate Petitioner as the Acting or Interim Area Director until the Board hired a permanent Area Director. In essence, Petitioner thought her designation to the Interim Area Director position was a "done deal," and the only remaining item to be addressed was a negotiation of her salary to perform such job.

During the administrative hearing, Petitioner admitted that after leaving the February 12, 2002 meeting with the Personnel Committee, she thought the Area Board was going to appoint her as Acting Area Director, given the Board's policy on "Delegation of Authority In Absence of The Area Director." Yet, when Petitioner did not believe the Board would meet her salary "requirements" of $20,188 more than her current salary, she voluntarily withdrew from pursing the Interim Area Director position, and did not apply for the Interim Area Director position. Petitioner advised the staff of her decision by her February 19, 2002 e-mail specifically stating, "Those of you interested in the job shall let your desire be known. I stand ready and willing to work for you." She also encouraged coworker Jack Ramsey to apply for the Interim Area Director position.

c. Third, Petitioner admitted that she approached Chairman Batiste, expressed interest in the Interim Area Director position, and advised him of her desire to talk with the Personnel Committee to:

> give them an opportunity to get to know me and to talk to me individually so that they could see who I was. **And I was trying to really sell myself for the position of Interim Area Director. I wanted them to be comfortable**

> **with me in that role. I thought I was going to get the job.** I thought they might as well be comfortable with me and get to know me.

(Emphasis added) (Resp Exh 36, p 48) Here, the most important fact was that Petitioner initiated contact with Chairman Batiste, and called the individual Personnel Committee members to express her interest in the Interim Area Position. At this time, neither the Executive Committee, Personnel Committee, nor the full Area Board had yet devised their selection and application process for the Interim Area Director position. When Petitioner learned of the Board's application process by Marie Jones' e-mail, she failed to apply for the subject position.

33. Further, Petitioner's claim that she applied for the Interim Director position is contradicted by the fact that she also claimed that the Board's Executive Committee was required to designate her as the Acting Area Director. Petitioner admitted that she prepared a presentation to address the Area Board at its February 18, 2002 meeting to "sell herself" to the Board and prove why she should be named the Acting or Interim Area Director. Yet, at the same time, she contended that the Board's subject policy required that she, as the only Deputy Director, be designated the Acting Area Director.

Giving the word "designate" its common and ordinary meaning, it is reasonable to say that if a governing body was "designating" an Acting Area Director, then it would not require persons to "apply" to be designated as the Acting Area Director. In addition, the Board's subject policy did not state that in designating a Deputy Director to be the Acting Area Director, the Deputy Director must "apply" for that position.

34. Moreover, Petitioner also failed to prove that the Board intended that the "Acting" Area Director position mentioned in its "Delegation of Authority in the Absence of Area Director" policy, to be the same position as the "Interim" Area Director position. Thus, Petitioner failed to prove the Board's subject policy applied to an Interim Area Director position.

a. Instead, the evidence at the administrative hearing tended to prove otherwise. At hearing, Board Vice-Chair Doug Wright opined that the difference between "Acting" and "Interim" Director was:

> Acting [Area Director] is someone who works when the area director is gone for a period of time – it may be [that] he's out sick, maybe he's resigned, it may be that he's terminated – until a decision is made to either hire an interim director or a regular director. An interim director is usually hired for an interim . . . period of time.

(T pp 826-827) Mr. Wright further explained that Petitioner was:

> acting director while there was no interim director. . . I don't know [if] she was designated, other than she knew that, that was her responsibility, was to act as director in the absence of the director because she was the deputy director. (T p 827 - 828)

b. Similarly, Chairman Batiste indicated that Petitioner was in charge of The Durham Center for approximately one or two weeks (T pp 492-494) after Dr. Ashby left, and before Holliman began working as Interim Area Director on April 1, 2002. In addition, Batiste held a management team meeting, and informed the team that Petitioner "would be in charge and I expected them to function as managers and keep things rolling until we get squared away with whatever we were going to do." (T p 494)

35. Lastly, in asserting that the Board's Executive Committee "will" designate her as Acting Area Director, Petitioner assumed that a "majority" of the Board's Executive Committee would actually vote to designate her as "Acting" Area Director. Pursuant to the subject policy, the Executive Committee had to "per majority vote" designate a Deputy Director to become the Acting Area Director, in order to designate Petitioner as the Respondent's Acting Area Director. Petitioner failed to produce evidence that the Executive Committee "per majority vote," voted to designate her as the Acting Area Director.

36. A preponderance of the evidence proved that Petitioner did not apply for the Interim Area Director position at The Durham Center in February and March 2002, and therefore, Petitioner could not claim that she suffered injury for not being hired for that position.

CONCLUSIONS OF LAW

1. This contested case is subject to dismissal pursuant to N.C. Gen. Stat. § 150B-33(b)(10) and -36(c), and 26 NCAC 03 .0105 and .115.

2. The federal courts developed standing as a "justiciability doctrine" to give meaning to the United States Constitution's "case or controversy" requirement. U.S. Const. Art. 3, 2. The term "standing" refers to whether a party has a "sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." Neuse Foundation, Inc., 574 S.E. 2d at 51. (Citing Sierra Club v. Morton, 405 U.S. 727, 731-32, 92 S.Ct. 1361, 1364-65, 31 L.E.2d 636, 641 (1972)

3. North Carolina courts are not limited by the "case or controversy" requirement of Article III of the U.S. Constitution. In the 1960's and 1970's, our courts began using the term "standing" to refer generally to a party's right to have a court decide the merits of a dispute. Neuse Foundation, Inc., 574 S.E. 2d at 51. "Standing" most often turns on whether a party has alleged "injury in fact" in light of the applicable statutes or case law. See Empire Power Co. v. North Carolina Dep't of E.H.N.R., 337 N.C. 569, 447 S.E.2d 768 (1994)

4. The North Carolina Court of Appeals has held that "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." Aubin v. Susi, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)

5. A lack of standing is properly challenged by a motion to dismiss for failure to state a claim. Peacock v. Shinn, 533 S.E.2d 842 (N.C. App. 2000).

6. As the party invoking jurisdiction, plaintiffs [here Petitioner] have the burden of proving the elements of standing. Neuse Foundation, Inc. et al. v. Smithfield Foods, Inc. et. al., – N.C. App. – , 574 S.E. 2d 48, 51 (2002)

7. Petitioner contended that Respondent denied her a promotion to the Interim Area Director position by failing to give her priority consideration, by discriminating against her based upon her race and color, and by failing to follow Area guidelines in filling the Interim Area Director position. Specifically, she claimed that she had standing to contest the hiring of Ellen Holliman as Interim Area Director, because she applied for the Interim Area Director position, and because the Board's policy on "Delegation of Authority in the Absence of Area Director" required the Board's Executive Committee to designate her as Interim Area Director.

8. Because Petitioner did not actually apply for the position of Interim Area Director, she suffered no "injury in fact," and thus, lacked standing to bring a cause of action pursuant to N.C. Gen. Stat. § 150B-23 against Respondent for wrongfully denying her a promotion based on failure to receive priority consideration, for race and color discrimination, and for failure to follow policy and procedure.

9. Because Petitioner lacked standing to file a petition for such claims, Petitioner failed to state a claim upon which relief can be granted, and this Court lacks subject matter jurisdiction to hear Petitioner's claims.

10. Based on the foregoing, the undersigned will not address any further issues concerning the interpretation of the Board's definition and/or distinction between "Acting" versus "Interim" Area Director, the Board's intent or application of its "Delegation of Authority in the Absence of Area Director" policy to an Interim Area Director position, if that policy vested Petitioner with a property right in the Acting or Interim Area Director position, and if Respondent violated such policy.

DECISION

Based on the above Findings Of Fact and Conclusions Of Law, the undersigned hereby **DISMISSES** this contested case **with prejudice**.

NOTICE

This is a Final Decision under the authority of G.S. 150B-36(c). Pursuant to G.S. 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. Pursuant to G.S. 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 6th day of August, 2003.

_____

Melissa Owens Lassiter
Administrative Law Judge