NORTH CAROLINA

REGISTER

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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification 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. Subchapters are optional classifications to be used by agencies when appropriate.

NCAC TITLES	
1	ADMINISTRATION
2	AGRICULTURE & CONSUMER SERVICES
3	AUDITOR
4	COMMERCE
5	CORRECTION
6	COUNCIL OF STATE
7	CULTURAL RESOURCES
8	ELECTIONS
9	GOVERNOR
10A	HEALTH AND HUMAN SERVICES
11	INSURANCE
12	JUSTICE
13	LABOR
14A	CRIME CONTROL & PUBLIC SAFETY
15A	ENVIRONMENT &NATURAL RESOURCES
16	PUBLIC EDUCATION
17	REVENUE
18	SECRETARY OF STATE
19A	TRANSPORTATION
20	TREASURER
21*	OCCUPATIONAL LICENSING BOARDS
22	ADMINISTRATIVE PROCEDURES (REPEALED)
23	COMMUNITY COLLEGES
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25	STATE PERSONNEL
26	ADMINISTRATIVE HEARINGS
27	NC STATE BAR
28	JUVENILE JUSTICE AND DELINQUENCY PREVENTION

TITLE 21 LICENSING BOARDS	
1	Acupuncture
2	Architecture
3	Athletic Trainer Examiners
4	Auctioneers
6	Barber Examiners
8	Certified Public Accountant Examiners
10	Chiropractic Examiners
11	Employee Assistance Professionals
12	General Contractors
14	Cosmetic Art Examiners
16	Dental Examiners
17	Dietetics/Nutrition
18	Electrical Contractors
19	Electrolysis
20	Foresters
21	Geologists
22	Hearing Aid Dealers and Fitters
25	Interpreter/Transliterator (Reserved)
26	Landscape Architects
28	Landscape Contractors
29	Locksmith Licensing
30	Massage & Bodywork Therapy
31	Marital and Family Therapy
32	Medical Examiners
33	Midwifery Joint Committee
34	Funeral Service
36	Nursing
37	Nursing Home Administrators
38	Occupational Therapists
40	Opticians
42	Optometry
44	Osteopathic Examination (Repealed)
45	Pastoral Counselors, Fee-Based Practicing
46	Pharmacy
48	Physical Therapy Examiners
50	Plumbing, Heating & Fire Sprinkler Contractors
52	Podiatry Examiners
53	Professional Counselors
54	Psychology
56	Professional Engineers & Land Surveyors
57	Real Estate Appraisal
58	Real Estate Commission
60	Refrigeration Examiners
61	Respiratory Care
62	Sanitarian Examiners
63	Social Work Certification
64	Speech & Language Pathologists & Audiologists
65	Therapeutic Recreation Certification
66	Veterinary Medical
68	Substance Abuse Professionals
69	Soil Scientists

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1	Housing Finance
2	Agricultural Finance Authority
3	Safety & Health Review Board
4	Reserved
5	State Health Plan Purchasing Alliance Board

Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.

NORTH CAROLINA REGISTER
Publication Schedule for January 2004 – December 2004

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
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
18:13	01/02/04	12/08/03	01/17/04	03/02/04	03/22/04	05/01/04	05/10/04	09/28/04
18:14	01/15/04	12/19/03	01/30/04	03/15/04	03/22/04	05/01/04	05/10/04	10/11/04
18:15	02/02/04	01/09/04	02/17/04	04/02/04	04/20/04	06/01/04	01/26/05	10/29/04
18:16	02/16/04	01/26/04	03/02/04	04/16/04	04/20/04	06/01/04	01/26/05	11/12/04
18:17	03/01/04	02/09/04	03/16/04	04/30/04	05/20/04	07/01/04	01/26/05	11/26/04
18:18	03/15/04	02/23/04	03/30/04	05/14/04	05/20/04	07/01/04	01/26/05	12/10/04
18:19	04/01/04	03/11/04	04/16/04	06/01/04	06/21/04	08/01/04	01/26/05	12/27/04
18:20	04/15/04	03/24/04	04/30/04	06/14/04	06/21/04	08/01/04	01/26/05	01/10/05
18:21	05/03/04	04/12/04	05/18/04	07/02/04	07/20/04	09/01/04	01/26/05	01/28/05
18:22	05/17/04	04/26/04	06/01/04	07/16/04	07/20/04	09/01/04	01/26/05	02/11/05
18:23	06/01/04	05/10/04	06/16/04	08/02/04	08/20/04	10/01/04	01/26/05	02/26/05
18:24	06/15/04	05/24/04	06/30/04	08/16/04	08/20/04	10/01/04	01/26/05	03/12/05
19:01	07/01/04	06/10/04	07/16/04	08/30/04	09/20/04	11/01/04	01/26/05	03/28/05
19:02	07/15/04	06/23/04	07/30/04	09/13/04	09/20/04	11/01/04	01/26/05	04/11/05
19:03	08/02/04	07/12/04	08/17/04	10/01/04	10/20/04	12/01/04	01/26/05	04/29/05
19:04	08/16/04	07/26/04	08/31/04	10/15/04	10/20/04	12/01/04	01/26/05	05/13/05
19:05	09/01/04	08/11/04	09/16/04	11/01/04	11/22/04	01/01/05	01/26/05	05/29/05
19:06	09/15/04	08/24/04	09/30/04	11/15/04	11/22/04	01/01/05	01/26/05	06/12/05
19:07	10/01/04	09/10/24	10/16/04	11/30/04	12/20/04	02/01/05	05/00/06	06/28/05
19:08	10/15/04	09/24/04	10/30/04	12/14/04	12/20/04	02/01/05	05/00/06	07/12/05
19:09	11/01/04	10/11/04	11/16/04	12/31/04	01/20/05	03/01/05	05/00/06	07/29/05
19:10	11/15/04	10/22//04	11/30/04	01/14/05	01/20/05	03/01/05	05/00/06	08/12/05
19:11	12/01/04	11/05/04	12/16/04	01/31/05	02/21/05	04/01/05	05/00/06	08/28/05
19:12	12/15/04	11/22/04	12/30/04	02/14/05	02/21/05	04/01/05	05/00/06	09/11/05

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
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.

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

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

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

U.S. Department of Justice

Civil Rights Division

JDR:TCH:VNR:jdh
DJ 166-012-3
2003-4542

Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, D.C. 20530

February 10, 2004

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

Dear Mr. Bartlett:

This refers to revisions to the English and Spanish versions of the voter registration application/update forms for the State of North Carolina, submitted to the Attomey General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on December 12, 2003; supplemental information was received on February 2, 2004.

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

Sincerely,

Joseph D. Rich
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:JBG:JEM:par
DJ 166-012-3
2003-0205

Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, D.C. 20530

February 17, 2004

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

Dear Mr. Bartlett:

This refers to the schedule for the March 23, 2004, special vacancy election for the City of Goldsboro in Wayne County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on January 21, 2004.

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

Sincerely,

Joseph D. Rich
Chief, Voting Section

STATE OF NORTH CAROLINA | **BEFORE THE TAX REVIEW BOARD**

COUNTY OF WAKE
IN THE MATTER OF:

The Proposed Assessment of Unauthorized Substance Tax dated March 13, 2002 by the Secretary of Revenue of North Carolina 1996 by the Secretary of Revenue
vs.

Karen Leigh Lawing Bostic
Taxpayer

ADMINISTRATIVE DECISION
Number: 415

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, on Tuesday, April 22, 2003, upon a petition filed by **Karen Leigh Lawing Bostic** (hereafter "Taxpayer") for administrative review of the Final Decision of the Assistant Secretary of Revenue entered on August 29, 2002, sustaining the proposed assessment of unauthorized substance tax for the period at issue.

Pursuant to N.C. Gen. Stat. § 105-113.111(a) and N.C. Gen. Stat. § 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer by Agent E. T. Brown, Enforcement Agent of the Unauthorized Substance Tax Division, assessing $8,008.00 tax, $3,203.20 penalty and $40.04 interest, for a total liability of $11,251.24. The assessment alleged that on March 8, 2002, the Taxpayer possessed 2,288 grams of marijuana without the proper tax stamps affixed to the substance.

ISSUES

1. Did the Taxpayer have actual/or constructive possession of marijuana without proper tax stamps affixed?
2. Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

FINDINGS OF FACT

After considering the petition, brief, record and matters of record, the Board makes the following finding of fact:

1. An Assessment of Unauthorized Substance Tax was made against the Taxpayer on March 13, 2002, in the sum of $8,008.00 tax, $3,203.20 penalty and $40.04 interest, for a total liability of $11,251.24, based upon the possession of 2,288 grams of marijuana.
2. The Taxpayer made a timely objection and application for hearing.
3. The Taxpayer did not submit any arguments or evidence in support of her objection to the assessment.
4. On March 8, 2002, the Taxpayer possessed 2,288 grams of marijuana.
5. No tax stamps were purchased for or affixed to the marijuana as required by law.

CONCLUSIONS OF LAW

The Board reviewed the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption.
3. The Taxpayer had constructive possession of 2,288 grams of marijuana on March 8, 2002, and was therefore a dealer as that term is defined in N.C.G.S. 105-106 (3).
4. The Taxpayer is liable for tax in the sum of $8,008.00 tax, $3,203.20 penalty and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Board conducts a hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

The Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the record and the final decision, concludes that the findings of fact contained in the Assistant Secretary's final decision are supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law are fully supported by the findings of fact; therefore the Assistant Secretary's final decisions should be confirmed.

WHEREFORE, THE TAX REVIEW BOARD ORDERS that the Assistant Secretary final decision sustaining the proposed tax assessment together with interest against the Taxpayer be and is hereby **Confirmed**.

Made and entered into the 18th day of November 2003.

TAX REVIEW BOARD

Signature____________________
Richard H. Moore, Chairman
State Treasurer

Signature____________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature____________________
Noel L. Allen, Attorney at Law
Appointed Member

STATE OF NORTH CAROLINA		BEFORE THE TAX REVIEW BOARD
COUNTY OF WAKE IN THE MATTER OF:		
The Proposed Assessment of Unauthorized Substance Tax date January 7, 2002 by the Secretary of Revenue of North Carolina vs. Charles Edward Rice, II Taxpayer	)))))))	ADMINISTRATIVE DECISION Number: 416

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, on Tuesday, April 22, 2003, upon a petition filed by **Charles Edward Rice, II** (hereafter "Taxpayer") for administrative review of the Final Decision of the Assistant Secretary of Revenue entered on August 15, 2002, sustaining the proposed assessment of unauthorized substance tax for the period at issue.

Pursuant to N.C. Gen. Stat. § 105-113.111(a) and N.C. Gen. Stat. § 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer on January 7, 2002 by Enforcement Agent T. L. Staley, of the Unauthorized Substance Tax Division, assessing $500.00 tax, $200.00 penalty and $1.89 interest, for a total liability of $701.89. The assessment alleged that Taxpayer possessed 9.5 grams of crack cocaine on January 7, 2002, without the proper tax stamps affixed to the substance.

ISSUES

1. Did the Taxpayer have actual/or constructive possession of crack cocaine without proper tax stamps affixed?
2. Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

FINDINGS OF FACT

After considering the petition, brief, record and matters of record, the Board makes the following finding of fact:

1. An Assessment of Unauthorized Substance Tax was made against the Taxpayer on January 7, 2002, in the sum of $500.00 tax, $200.00 penalty and $1.89 interest, for a total proposed liability of $701.89, based upon the possession of 9.5 grams of crack cocaine on December 14, 2001.
2. The Taxpayer made a timely objection and application for hearing.
3. The State Bureau of Investigation's lab analysis reported that the evidence submitted for testing was 7.7 grams of crack cocaine.
4. The Taxpayer was in constructive possession of 7.7 grams of crack cocaine on December 14, 2001, without proper tax stamps affixed to the substance.

CONCLUSIONS OF LAW

The Board reviewed the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption.
3. The Taxpayer constructively possessed 7.7 grams of crack cocaine on December 14, 2001, and was therefore a dealer as that term is defined in N.C.G.S. 105-106.
4. The Taxpayer is liable for tax in the sum of $400.00, penalty in the sum of 160.00, and accrued interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Board conducts a hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

The Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the record and the final decision, concludes that the findings of fact contained in the Assistant Secretary's final decision are supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law are fully supported by the findings of fact; therefore the Assistant Secretary's final decisions should be confirmed.

WHEREFORE, THE TAX REVIEW BOARD ORDERS that the Assistant Secretary final decision sustaining the proposed tax assessment together with interest against the Taxpayer be and is hereby **Confirmed**.

Made and entered into the 18th day of November 2003.

TAX REVIEW BOARD

Signature ____________________
Richard H. Moore, Chairman
State Treasurer

Signature ____________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature ____________________
Noel L. Allen, Attorney at Law
Appointed Member

STATE OF NORTH CAROLINA | **BEFORE THE TAX REVIEW BOARD**

COUNTY OF WAKE
IN THE MATTER OF:

The proposed Assessment of Sales and	)	
Use Tax for the periods of June 1, 1997	)	
Through March 31, 2000 by the Secretary of Revenue	)	**ADMINISTRATIVE DECISION**
vs.	)	**Number: 417**
	)	
Coreslab Structure, Inc.	)	
Taxpayer	)	

This matter was heard before the Regular Tax Review Board (hereinafter "Board" in the City of Raleigh, Wake County, North Carolina on Tuesday, June 17, 2003 upon a petition filed pursuant to N.C. Gen. Stat. § 105-241.2(a)(2) by Coreslab Structure, Inc. (hereinafter "Taxpayer") for administrative review of the adverse decision entered by the Secretary of Revenue on October 21, 2003, sustaining the Department's denial of Taxpayer's claim for refund of sales and use tax for the period of June 1, 1997 through March 31, 2000.

STATEMENT OF CASE

Pursuant to G.S. §105-241.2(a)(2), Coreslab Structure, Inc. (hereinafter "Taxpayer") petitions the Tax Review Board (hereinafter "Board") for administrative review of the adverse decision entered by the Secretary of Revenue on October 21, 2002 upon remand of Taxpayer's original appeal. On March 20, 2002, the Board conducted a hearing on the petition filed for administrative review of the final decision of the Secretary of Revenue entered on August 28, 2001 sustaining the denial of refund of sales and use tax for the period of June 1, 1997 through March 31, 2000. On June 17, 2002, the Board issued Administrative Decision No. 384 and remanded this matter to the Secretary for a further proceeding.

Without conducting a hearing on the above referenced remand, the Assistant Secretary issued a final decision on October 21, 2002. In that decision, the Assistant Secretary made findings that the Taxpayer's invoices "match" the dates upon its applications for progress payments, but that the "dollar amount" for the invoices were different because the greater number of invoices. The Assistant Secretary also found that $23,926 of a possible $26,468 had been refunded to nonprofits. The Assistant Secretary also determined that any refunds allowed to the Taxpayer would be subject to income tax in the year received.

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, and other materials that the Secretary of Revenue received prior to issuing the October 21, 2002 final decision. From a review of this record, the Board finds that the Assistant Secretary issued his final decision without conducting a formal hearing on the remand of this matter. The record also reflects that the Assistant Secretary received additional documentation, which the Taxpayer did not review or respond to prior to the Assistant Secretary's issuance of the October 21, 2002 final decision.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

In the October 21, 2002 final decision, the Assistant Secretary made findings that Taxpayer's invoices "match" the dates upon its applications for progress payments, but that the "dollar amount" for the invoices were different because the greater number of invoices. The Assistant Secretary also found that $23,926 of a possible $26,468 had been refunded to nonprofits. The Assistant Secretary also determined that any refunds allowed the Taxpayer would be subject to income tax in the year received.

The Taxpayer is a corporation that produces and erects customized concrete structural buildings and components, such as those used in buildings, stadiums, and parking garages. Taxpayer is basically a manufacturer and subcontractor and produces these items for general contractors and erects them for the general contractors. Taxpayer submits a bid to the general contractor that only lists the total contract price for the project and finished materials. The Taxpayer calculated "sales tax" on manufacturing labor and marked-up the cost of the tangible personal property used in the performance contracts. The sales tax was separately stated on the

invoices that the Taxpayer provided to its customers. The Taxpayer submitted a refund claim in the amount of $79,100.88 for sales tax billed and collected on tangible personal property used in its performance contracts.

N.C. Gen. Stat. § 105-164.11, "Excessive and erroneous collections" provides that "When the tax collected for any period is in excess of the total amount that should have been collected, the total amount collected must be paid to the Secretary. When tax is collected for any period on exempt or nontaxable sales the tax erroneously collected shall be remitted to the Secretary and no refund shall be made to the taxpayer unless the purchaser has received credit for or has been refunded the amount of tax erroneously charged. The provision shall be constructed with other provisions of this Article and given effect so as to result in the payment to the Secretary of the total amount collected as tax if it is in excess of the amount that should have been collected."

In its Petition, the Taxpayer argues that it did not collect any excise tax from the general contractors under the performance contracts. The Taxpayer contends that when it calculated the tax due, it failed to use the actual cost of the raw materials that were used to perform the contracts. Instead, the Taxpayer used a lump sum, which was equal to the actual cost of raw materials, labor, overhead and profit. Thus, the Taxpayer is requesting a refund in the amount of $79,100.88.

For sales and use tax purposes, the Taxpayer is a contractor consuming tangible personal property through its execution of performance contracts. Under N.C. Gen. Stat. § 105-164.6, it is required to pay a "use" tax to the Secretary based upon the cost price of the personal property consumed in its construction projects. Even though this statute directs the Taxpayer to pay use tax, the Taxpayer collected "sales" taxes from its customers with respect to its lump sum performance contracts. From a review of the record, the Taxpayer added and collected sales tax to the invoices delivered to the customers.

The Board, after reviewing this matter on Taxpayer's petition regarding the Assistant Secretary's October 21, 2002 final decision, remands this matter back to the Assistant Secretary and Orders that a formal hearing be conducted for the limited purpose of rendering a determination regarding the following issues:

1. If the Taxpayer issued specific invoices simultaneously with the applications for payment when it billed its customers under the performance contracts, and
2. The specific amount that the Secretary has already refunded to nonprofits, and the income tax consequences of the amount of refund claimed by the taxpayer for the period at issue.

In remanding this matter, the Board grants the Taxpayer an opportunity to present evidence regarding the above referenced issues and allows the Taxpayer an opportunity to review and respond to the documentation that the Assistant Secretary received and considered prior to issuing the October 21, 2002 final decision.

THEREFORE, it is the decision of the Board to **Remand** this matter to the Assistant Secretary for a Hearing to address the issues set forth above.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature________________________________
Richard H. Moore, Chairman
State Treasurer

Signature________________________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature________________________________
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA | **BEFORE THE TAX REVIEW BOARD**

COUNTY OF WAKE
IN THE MATTER OF:

The Refund Claims for Installment Paper Dealer Tax for the period beginning July 1, 1997 through June 30, 2000 filed by

CONSECO FINANCE SERVICING CORP.
vs.

NORTH CAROLINA DEPARTMENT OF REVENUE
Taxpayer

ADMINISTRATIVE DECISION
Number: 418

This matter was heard before the Regular Tax Review Board (hereinafter "Board" in the City of Raleigh, Wake County, North Carolina on Tuesday, June 17, 2003 upon a petition filed pursuant to N.C. Gen. Stat. § 105-241.2(a)(2) by **Conseco Finance Servicing Corporation** (hereinafter "Taxpayer") for administrative review of the adverse decision entered by the Secretary of Revenue on April 4, 2002, sustaining the auditors' adjustment of the refund claimed on installment paper purchased from out-of-state dealers.

Conseco Finance Servicing Corporation ("Taxpayer") is engaged in the business of buying installment paper. Taxpayer is a subsidiary of Conseco Finance Corporation ("Finance") which is in business of financing mobile homes and other tangible personal property. Taxpayer has several offices in North Carolina, including Winston-Salem, Charlotte, Raleigh and Asheville. Taxpayer filed installment paper dealer tax returns for the period beginning July 1, 1997 through June 30, 2000.

Conseco ("Taxpayer") appeals from an adverse decision of the Assistant Secretary of Revenue entered on April 4, 2002 that sustained the Department of Revenue's partial denial of Taxpayer's claims for refund of installment paper dealer tax. Taxpayer submitted claims for a partial refund totaling $313,425.68 for the overpayment of "Installment Paper Tax" purportedly assessed and paid pursuant to N.C. Gen. Stat. § 105-83 for the period at issue. During the course of examining Taxpayer's claim, the auditors discovered certain errors and reduced the claim by $5,201.27. The Taxpayer does not dispute the adjustment. The auditors also discovered that the Taxpayer had under-reported its tax liability on its installment paper dealer tax returns by failing to include the face value of certain installment paper it had purchased. The refund claim was further reduced by $129,220.67. The Taxpayer timely protested this adjustment and requested a hearing that was held by the Assistant Secretary on December 4, 2001. On April 4, 2002, the Assistant Secretary issued his final decision that sustained the partial denial of the refund claim. Thereafter, the Taxpayer timely filed a petition for administrative review of the final decision with the Tax Review Board.

ISSUE

Is the Taxpayer required to include the face value of installment paper on property located in North Carolina and secured by a lien in this State in the calculation of the installment paper dealer tax if the property is purchased from an out-of-state retailer?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. Based upon the Board's review of the documentation, that evidence is incorporated by reference and is made a part of this administrative decision.

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. Taxpayer (f/k/a Green Tree Financial Servicing Corporation) is a Delaware corporation engaged in the business of financing and leasing various types of tangible personal property, and purchasing installment paper.

2. Taxpayer is a subsidiary of Conseco Finance Corporation ("Conseco"), which is in the business of financing mobile homes and other tangible personal property.
3. Taxpayer has several offices in North Carolina, including Winston-Salem, Charlotte, Raleigh, and Asheville.
4. The Department conducted an audit at the corporate headquarters of Conseco in St. Paul, Minnesota.
5. During the audit, the Taxpayer provided copies of its Installment Paper Dealer Tax returns for the quarters ending September 1997 through 2000 along with the details for the tax returns including: listing region, territory, account number, state code, date of transaction, loan type, proceeds, and total amount financed.
6. Taxpayer also submitted two claims for partial refund of taxes paid during the period beginning July 1, 1997 through September 30, 1997 and the period beginning October 1, 1997 through June 30, 2000 in the amount of $21,367.60 and $292,058.08, respectively, pursuant to N.C. Gen. Stat. § 105-266.1.
7. Taxpayer claimed there were three categories of overpayment and provided the auditor with three separate schedules (A, B, and C) for each category, described as follows:

   Schedule A lists payments of tax on contracts in which the buyer resided outside of North Carolina (property must be located in this State to be subject to the Installment Paper Dealer tax on the contract for the property);

   Schedule B lists payments of tax on contracts with no dealer involvement (refinancing of existing contracts, where no third party from whom contract is purchased exists); and

   Schedule C lists payments of tax on the finance charges on the installment contract (finance charges are not part of the face value or amount financed, upon which tax is due.)
8. The auditors requested a sample of contracts to confirm which type of overpayment was represented and examined the original installment paper tax returns to verify that the value of the installment paper had actually been included in those returns.
9. The auditors also examined motor vehicle titles registered with the North Carolina Division of Motor Vehicles (DMV). These motor vehicle titles showed the existence of a lien on the tangible personal property, and their title numbers were used to obtain names and dates of liens in order to request additional contracts to examine.
10. During the examination, the auditors determined that some of the installment paper in Taxpayer's Schedule A had been included in that refund category in error, since examination of the relevant documents showed that the purchaser had a North Carolina address.
11. An additional sample of that type of contract was requested and examined, and an error rate was determined on the basis of the errors found in the sample. The rate was applied to that refund category and the refund was reduced by $5,201.37.
12. The auditors also discovered a number of liens associated with installments paper, which had not been reported on any of the Taxpayer's installment paper tax returns. The installment paper in this group involved property purchased by North Carolina residents from out-of-state dealers.
13. The auditors concluded that the unreported installment paper should have been included in Taxpayer's return since the property upon which the lien is taken was located in this State.
14. The auditors then further reduced the refund by $129,220.67, the amount of the computed tax on the improperly excluded contracts.
15. In the final audit report dated August 14, 2001, the claim for refund was partially denied in the total amount of $134,422.04.
16. The Taxpayer accepted the $5,201.37 adjustment, but timely protested the adjustment of $129,220.67 in its letter dated September 12, 2001.

CONCLUSIONS OF LAW

The Board reviewed and considered the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. N.C. Gen. Stat. § 105-83 states: "Every person engaged in the business of dealing in, buying, or discounting installment paper, notes, bonds, contracts, or evidences of debt for which, at the time of or in connection with the execution of the instruments, a lien is reserved or taken upon personal property located in this State to secure the payment of the obligations, shall submit to the Secretary…a full, accurate, and complete statement, verified by the officer, agent, or person making the statement, of the total face value of the obligations dealt in, bought, or discounted within the preceding three calendar months and, at the same time, shall pay a tax of two hundred seventy-seven thousandths of one percent (.277%) of the face value of these obligations."
2. Pursuant to N.C. Gen. Stat. § 105-33(a), taxes imposed under Article 2 are imposed for the privilege of carrying on the business, exercising the privilege, or doing the act named.

3. The installment paper dealer tax levied under N.C. Gen. Stat. § 105-83 is a privilege tax imposed upon persons engaged in the business of dealing in, buying or discounting installment paper for the privilege of engaging in such business.
4. The business of "dealing in, buying, or discounting installment paper" neither begins nor ends with Taxpayer's formal acceptance of the installment paper. Instead, it encompasses the entire range of conduct in furtherance of Taxpayer's financing business.
5. The installment paper dealer tax is not a transactional tax.
6. Neither the underlying consumer purchase or the purchase of installment paper is the incidence of the tax.
7. The imposition of the privilege tax must be upheld if activity incident to and in furtherance of the business is conducted within the State notwithstanding that documents necessary to the business are executed, accepted, or transferred elsewhere.
8. N.C. Gen. Stat. § 105-83 does not require that the property securing the obligation be purchased in North Carolina.
9. Taxpayer is engaged in the business of dealing in, buying, or discounting installment paper in North Carolina.
10. At the time of or in connection with the execution of all of the instruments included in the calculation of the tax, a lien was reserved or taken upon personal property located in this State to secure the payment of the obligations.
11. Taxpayer is subject to the installment paper dealer tax under N.C. Gen. Stat. § 105-83.
12. Taxpayer is required to include the total face value of all obligations bought which are secured by property located in this State in the calculation of the installment paper dealer tax.
13. A finding that Taxpayer is entitled to a refund of taxes paid on installment paper purchased from out-of-state dealers because the tax violates the Commerce Clause requires a ruling or declaration by the Secretary that N. C. Gen. Stat. § 105-83 operates in an unconstitutional manner as to the Taxpayer.
14. The Secretary has no authority under N.C. Gen. Stat. § 105-266.1 to order the refund of an invalid or illegal tax, since questions of constitutionality are for the courts.
15. N.C. Gen. Stat. § 105-266.1 does not provide an exception to the general rule that voluntary payments of unconstitutional tax are not refundable.
16. The only remedy for challenging a tax provision as being unlawful or invalid as opposed to being excessive or incorrect is found in N.C. Gen. Stat. § 105-267.
17. Taxpayer has the burden of establishing that its claim for refund under N.C. Gen. Stat. § 105-266.1 results from paying an incorrect or excessive tax computed in accordance with the applicable statutory provisions.
18. Taxpayer has not established that the auditors' $129,220.67 reduction of the refund claim was incorrect.
19. The auditors properly adjusted the refund claim to include installment paper purchased from out-of-state dealers secured by property located in North Carolina.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

This case involves the question of whether the face value of installment paper on property located in North Carolina and secured by a lien in this State is includible in the calculation of the installment paper dealer tax imposed under N.C. Gen. Stat. § 105-83 if the property is purchased from an out-of-state retailer.

Taxpayer is in the business of financing and leasing various types of tangible personal property, and purchasing installment paper. Taxpayer has several offices in North Carolina, including Winston Salem, Charlotte, Raleigh, and Asheville.

The Taxpayer contends that the installment paper purchased from mobile home retailers located outside of North Carolina is beyond the reach of the statute notwithstanding that the property securing the obligation is located in the state. The Taxpayer also contends that, concerning the sales of installment paper at issue, it conducted no activity in North Carolina, which is "incident to the buying and selling of such installment payer." The Taxpayer argues that the incidence of the tax is the assignment of the installment paper, which it contends occurred outside of North Carolina. Thus, the Taxpayer argues that the face value of the installment paper that was assigned to it outside the state should be excluded from the calculation of the tax imposed by N.C. Gen. Stat. § 105-83.

The Department of Revenue, through counsel, argues that the Assistant Secretary properly found that, as an installment paper dealer engaged in business in this state, the Taxpayer was required to include the face value of all installment obligations it bought which were secured by property located in North Carolina in the calculation of the tax imposed by N.C. Gen. Stat. § 105-83. In support of this argument, the Department of Revenue notes that the Court of Appeals has rejected the very same argument raised by the Taxpayer in its Petition in Chrysler Financial Company v. Offerman, 138 N.C. App. 268, 531 S.E.2d 223, rev. denied, 352 N.C. 588, 544 S.E.2d 777 (2000). In that case, the Court recognized that where the assignment of the installment paper occurs is not determinative; and that the activity triggering the tax is not limited to the actual transfer of the paper. The "tax is to be assessed for engaging in the business of dealing in installment paper in North Carolina." Id., 138 N.C. App. at 273, 531 S.E.2d at 226.

It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the whole record and the Assistant Secretary's final decision, concludes that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary's final decision be confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature________________________________
Richard H. Moore, Chairman
State Treasurer

Signature________________________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature________________________________
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA	**BEFORE THE TAX REVIEW BOARD**
COUNTY OF WAKE	
IN THE MATTER OF:	
The Proposed Assessment of Withholding Tax, Penalty and Interest for the Quarters Ending December 31, 1999, March 31, and June 30, 2001 by the Secretary of Revenue	**ADMINISTRATIVE DECISION**
vs.	**Number: 419**
DeHaven's Transfer & Storage of Raleigh	
Taxpayer	

This matter was heard before the Regular Tax Review Board (hereinafter "Board" in the City of Raleigh, Wake County, North Carolina on Tuesday, June 13, 2003 upon a petition filed pursuant to N.C. Gen. Stat. § 105-241.2(a)(2) by **DeHaven's Transfer & Storage of Raleigh** (hereinafter "Taxpayer") for administrative review of the adverse decision entered by the Secretary of Revenue on April 11, 2002, (Docket Number 2001-611) sustaining the proposed assessment of withholding tax, penalty and interest for the quarters ending December 31, 1999, March 31, 2001 and June 30, 2001 in the total amount of $36,415.18.

During calendar year 1999, Taxpayer paid North Carolina income tax withheld of $460.30. On February 29, 2000, the Taxpayer filed its annual withholding reconciliation for 1999 reflecting total North Carolina income tax withheld of $23,609.46. A Notice of Tax Assessment for the underpayment of tax withheld of $23,149.16 ($23,609.46-$460.30) plus accrued interest was mailed to the Taxpayer on June 27, 2001. Because the Taxpayer did not pay the proposed assessment and did not request a hearing within 30 days, the late payment penalty of ten percent of the tax was assessed under N.C. Gen. Stat. § 105-236(4).

Taxpayer also filed income tax withholding returns for the quarters ended March 31, and June 30, 2001, reflecting income tax withheld of $4,348.01 and $5,348.48 respectively, but did not include payment with the returns. On August 1, 2001, Taxpayer made a payment of $4,348.01 for the taxes withheld for the quarter ended March 31, 2001. Thereafter the Department issued Notices of Withholding-Immediate Jeopardy Tax Assessment for the periods at issue. Taxpayer objected to the proposed assessment and timely requested a hearing before the Secretary of Revenue. The Taxpayer also objected to the reasonableness of the jeopardy assessment and requested the Secretary to review that matter pursuant to N.C. Gen. Stat. § 105-241.1(g). Upon review, the Secretary ruled that the jeopardy assessments were reasonable and proper and issued the final assessment on October 18, 2001. On April 11, 2002, the Assistant Secretary issued the final decision sustaining the proposed assessment against the Taxpayer. Thereafter, the Taxpayer filed a petition for administrative review of the April 11, 2002 final decision with the Board.

ISSUE

Are the withholding tax assessments proposed against the Taxpayer lawful and proper?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, and evidence that the parties presented at the hearing before the Assistant Secretary. The Board, after reviewing these documents, incorporates the documents by reference in this decision.

FINDINGS OF FACT

The Board reviewed and considered the findings of fact entered by the Assistant Secretary in his decision regarding this matter and upon review; the Board incorporates the findings of fact by reference in this decision.

CONCLUSIONS OF LAW

The Board reviewed and considered the conclusions of law made by the Assistant Secretary in his decision regarding this matter and upon review; the Board incorporates the conclusions of law by reference in this decision.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

(b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the Taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

N.C. Gen. Stat. § 105-236(4) provides that the Secretary may assess a ten percent penalty for the failure to pay tax when due, provided there is no intent to evade the tax. The penalty does not apply in connection with an amended return if the tax is paid when the return is filed, or if a tax due but not shown on a return, is paid within 30 days after the proposed notice of assessment. N.C. Gen. Stat. § 105-237 states that the Secretary may reduce or waive penalties but does not mandate reduction or waiver of penalties under any circumstances.

In the Petition, the Taxpayer argues that since reasonable cause for late payment is present, the Taxpayer should be excused from the late payment penalty assessed. The Taxpayer also argues that there were no grounds for issuance of a jeopardy assessment in this case and that since the Assistant Secretary found that the late payment penalties on the jeopardy assessment of tax were improperly assessed, the entire jeopardy assessment should be found incorrect.

The record shows that the Taxpayer withheld certain amounts of income tax and failed to remit payment of the tax to the Department of Revenue. The record also shows that the Taxpayer has not presented any substantial basis for its objection to the proposed assessment. Thus, the Taxpayer failed to provide evidence to show that the assessment, including the late payment penalty, was not properly assessed in this matter. The Board will not address Taxpayer's jeopardy assessment argument because it does not have jurisdiction over that issue.

Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the documents of record and the Assistant Secretary's final decision, concludes that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary's final decision be confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature__________________________________
Richard H. Moore, Chairman
State Treasurer

Signature__________________________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature__________________________________
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA	**BEFORE THE** **TAX REVIEW BOARD**
COUNTY OF WAKE **IN THE MATTER OF:**	
The Proposed Assessment of Individual Income Tax and Interest for the 2000 tax year by the Secretary of Revenue	
vs.	**ADMINISTRATIVE DECISION** **Number: 420**
David A. McGowan, **Taxpayer**	

This matter was heard before the Regular Tax Review Board (hereinafter "Board" in the City of Raleigh, Wake County, North Carolina on Tuesday, June 17, 2003 upon a petition filed pursuant to N.C. Gen. Stat. § 105-241.2(a)(2) by **David A. McGowan** (hereinafter "Taxpayer") for administrative review of the adverse decision entered by the Assistant Secretary of Revenue on November 25, 2002, sustaining the proposed assessment of individual income tax and interest in the total amount of $1,249.83 for the period at issue.

Taxpayer was employed by Procter & Gamble Paper Products Company, (hereinafter "Procter") at its plant located in Greenville, NC. Procter sold the plant to Paper-Pak Products, Inc. (hereinafter "Buyer"). Some employees were not retained by Buyer and were paid severance wages. Others employees, including the Taxpayer, were retained by the Buyer and signed an "Incentive to Stay Agreement and Release." Under this contract, an employee was paid one-half of an incentive stay allowance as soon as practical after the employee signed the agreement and the remaining one-half was paid as soon as practical after the employee's last day of employment, provided the employee's employment had started with the Buyer. Effective January 1, 2000, the Taxpayer was employed by the Buyer at the Greenville plant. Taxpayer's returns show that he received the first payment of $16,184 from the Employer in tax year 1999 and the second payment of $15,996 in tax year 2000. Taxpayer had claimed a deduction for severance wages of these amounts on his 1999 and 2000 tax returns.

Upon examination of the Taxpayer's 2000 individual income tax return, the Department of Revenue adjusted Taxpayer's tax return to disallow the deduction that he claimed for severance wages. On April 12, 2002, a Notice of Individual Income Tax Assessment was mailed to the Taxpayer. Taxpayer objected to the proposed assessment and timely requested a hearing before the Secretary of Revenue. On October 16, 2002, Eugene J. Cella, Assistant Secretary, conducted a hearing upon Taxpayer's timely application and objection to the proposed assessment. On November 25, 2002, Assistant Secretary issued a final decision sustaining the proposed assessment against the Taxpayer. Thereafter, the Taxpayer timely filed a petition for administrative review of the final decision with the Board.

ISSUES

1. Is the Taxpayer entitled to the deduction for severance wages for tax year 2000?
2. Is the individual income tax assessment proposed against the Taxpayer for taxable year 2000 lawful and proper?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. The Board, after reviewing these documents, incorporates the documents by reference in this decision.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the Taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

N.C. Gen. Stat. § 105-134.6(b)(11) provides that "severance wages received by a taxpayer from an employer as the result of the taxpayer's permanent, involuntary termination from employment through no fault of the employee" shall be deducted from taxable income in order to determine North Carolina taxable income.

The Taxpayer contends that all of the money received from Procter & Gamble was severance wages, regardless of how it was referenced in the agreement between Procter & Gamble and the Taxpayer, and is therefore deductible from federal adjusted gross income under the provisions of N.C. Gen. Stat. § 105-134.6(b)(11). The Department of Revenue allowed the first payment received by the Taxpayer in tax year 1999 as a severance wage deduction because that payment was contingent upon Taxpayer ceasing employment with Procter & Gamble. The Department of Revenue disallowed the second payment because it was due, pursuant to the agreement, only if the Taxpayer started work with the new employer. In disallowing the second payment, the Department of Review noted that the second payment was characterized as "incentive to stay" allowance, not as a "severance allowance" in the agreement between the Taxpayer and Procter & Gamble.

Upon review of the record, the Board concludes that the Taxpayer failed to furnish evidence to show that the assessment is not proper. Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the documents of record and the Assistant Secretary's final decision, concludes that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary's final decision be confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature____________________________________
Richard H. Moore, Chairman
State Treasurer

Signature____________________________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature____________________________________
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

COUNTY OF WAKE
IN THE MATTER OF:

BEFORE THE
TAX REVIEW BOARD

The Proposed Assessment of Unauthorized
Substance Tax dated February 8, 2002
By the Secretary of Revenue
vs.

Juan Carlos Ramirez Sales
Taxpayer

ADMINISTRATIVE DECISION
Number: 421

This matter was heard before the Regular Tax Review Board (hereinafter "Board" in the City of Raleigh, Wake County, North Carolina on Tuesday, June 17, 2003 upon a petition filed pursuant to N.C. Gen. Stat. § 105-241.2(a)(2) by **Juan Carlos Ramirez Sales** (hereinafter "Taxpayer") for administrative review of the adverse decision entered by the Secretary of Revenue on December 20, 2002, that reduced the proposed assessment of unauthorized substance tax imposed against the Taxpayer for the period at issue.

Pursuant to G.S. § 105-113.111(a) and G.S. § 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer by Enforcement Agent Brian Zieverink of the Unauthorized Substance Tax Division, assessing $1,650.00 tax, $660.00 penalty and $6.33 interest, for a total liability of $2,316.33. The assessment alleged that on June 7, 2002, the Taxpayer had unauthorized possession of 33 grams of cocaine without the proper tax stamps affixed to the substance. The Taxpayer protested the assessment and requested a hearing before the Secretary of Revenue. On September 18, 2002, Eugene J. Cella, Assistant Secretary conducted a hearing upon Taxpayer's timely application and objection to the proposed assessment. The Assistant Secretary issued a final decision reducing the proposed assessment against the Taxpayer to $1,500.00 plus penalty and interest for unauthorized possession of 30 grams of cocaine. Thereafter, the Taxpayer timely filed a petition for administrative review of the final decision with the Board.

ISSUES

1. Did the Taxpayer have actual and/or constructive possession of cocaine without the proper tax stamps affixed?
2. Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. Based upon the Board's review of the documentation, that evidence is incorporated by reference and is made a part of this administrative decision.

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. Assessment of Unauthorized Substance Tax was made against the Taxpayer on June 12, 2002, in the sum of $1,650.00 tax, $660.00 penalty and $6.33 interest, for a total proposed liability of $2,316.33, based upon possession of 33 grams of cocaine on June 7, 2002.
2. The Taxpayer made timely objection and application for a hearing.
3. The Taxpayer was present at the apartment when Suspect #1 came to the apartment with the cocaine. The Taxpayer said Suspect #1 had purchased jewelry, but no jewelry was found on Suspect #1 upon his apprehension.
4. After the call from Suspect #1 to the Taxpayer's apartment, while Suspect #1 was being chased by the police, the Taxpayer and all the occupants of his apartment were seen leaving the apartment in haste.
5. The crime lab determined the substance at issue was cocaine weighing 30 grams.
6. The Taxpayer had actual and/or constructive possession of 30 grams of cocaine on June 7, 2002, without proper tax stamps affixed to the substance.

CONCLUSIONS OF LAW

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption, and that burden was not met.
3. The Taxpayer had actual and/or constructive possession of 30 grams of cocaine on June 7, 2002, and was therefore a dealer as that term is defined in G.S. 105-113.106.
4. The Taxpayer is liable for tax in the sum of $1,500.00, penalty in the sum of $600.00, and accrued interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase
> the assessment or decision of the Secretary."

Assessments of tax are presumed to be correct and the taxpayer has the burden to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary.

Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the Taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper.

The Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the whole record and the Assistant Secretary's final decision, concludes that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decision of the Assistant Secretary should be confirmed.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary's final decision be confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature____
Richard H. Moore, Chairman
State Treasurer

Signature____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature____
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

COUNTY OF WAKE

BEFORE THE TAX REVIEW BOARD

IN THE MATTER OF:

The Proposed Assessment of Unauthorized Substance Tax dated August 9, 2002 by the Secretary of Revenue of North Carolina 1996 by the Secretary of Revenue

vs.

Delcina McMillion
Taxpayer

ADMINISTRATIVE DECISION
Number: 422

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, on Tuesday, June 17, 2003, upon a petition filed by **Delcina McMillion** (hereafter "Taxpayer") for administrative review of the Final Decision of the Assistant Secretary of Revenue entered on November 27, 2002, sustaining the proposed assessment of unauthorized substance tax for the period at issue.

Pursuant to N.C. Gen. Stat. § 105-113.111(a) and N.C. Gen. Stat. § 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer on August 9, 2002 by Enforcement Agent Dennis O' Dell of the Unauthorized Substance Tax Division, assessing $500.00 tax, $200.00 penalty and $4.50 interest, for a total liability of $704.50. The assessment alleged that on June 16, 2002, the Taxpayer was in unauthorized possession 9.27 grams of cocaine without the proper tax stamps affixed to the substance.

ISSUES

1. Did the Taxpayer have actual/or constructive possession of cocaine without proper tax stamps affixed?
2. Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. An Assessment of Unauthorized Substance Tax was made against the Taxpayer on August 9, 2002, in the sum of $500.00 tax, $200.00 penalty and $4.50 interest, for a total proposed liability of $704.50, based upon the possession of 9.7 grams of cocaine.
2. The Taxpayer made a timely objection and application for hearing.
3. Neither the Taxpayer nor anyone representing the Taxpayer appeared at the hearing to offer arguments or evidence in support of the obligation to the assessment.
4. The weight of the cocaine at issue is 7.7 grams.
5. On June 16, 2002, the Taxpayer possessed 7.77 grams of cocaine.
6. No tax stamps were purchased for or affixed to the cocaine as required by law.

CONCLUSIONS OF LAW

The Board reviewed the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption, and that burden was not met.
3. The Taxpayer constructively possessed 7.7 grams of cocaine on June 16, 2002, and was therefore a dealer as that term is defined in N.C. Gen. Stat. § 105-106(3).
4. The Taxpayer is liable for tax in the sum of $400.00, penalty in the sum of 160.00, and accrued interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Board conducts a hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

The Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the record and the final decision, concludes that the findings of fact contained in the Assistant Secretary's final decision are supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law are fully supported by the findings of fact; therefore the Assistant Secretary's final decisions should be confirmed.

WHEREFORE, THE TAX REVIEW BOARD ORDERS that the Assistant Secretary's final decision be and is hereby confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature______________________________
Richard H. Moore, Chairman
State Treasurer

Signature______________________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature______________________________
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

COUNTY OF WAKE
IN THE MATTER OF:

BEFORE THE
TAX REVIEW BOARD

The Proposed Assessment of Unauthorized Substance Tax dated March 7, 2002 by the Secretary of Revenue of North Carolina
vs.

Kip Aaron Bartlett and Laura M. Bartlett
Taxpayer

ADMINISTRATIVE DECISION
Number: 423

This matter was heard before the Regular Tax Review Board (hereinafter "Board" in the City of Raleigh, Wake County, North Carolina on Tuesday, June 17, 2003 upon a petition filed pursuant to N.C. Gen. Stat. § 105-241.2(a)(2) by **Kip Aaron Bartlett and Laura M. Bartlett** (hereinafter "Taxpayers") for administrative review of the adverse decision entered by the Secretary of Revenue on November 27, 2002, sustaining the proposed assessment of unauthorized substance tax in the total amount of $24,717.00, plus penalty and interest for the period at issue.

Pursuant to N.C. Gen. Stat. § 105-113.111(a) and N.C. Gen. Stat. § 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayers by Enforcement Agent Tim Townsend, of the Unauthorized Substance Tax Division, assessing $24,717.00 tax, $9,886.80 penalty and $123.59, interest, for a total liability of $34,727.39. The assessment alleged that on March 4, 2002, the Taxpayers had actual and/or constructive possession of 7,062 grams of marijuana that did not have the proper stamps affixed thereto. This assessment was an amendment to a prior assessment that was issued on March 5, 2002, which reflected the weight of marijuana to be 8,896 grams.

The Taxpayers objected to the assessment and requested a hearing before the Secretary of Revenue. After conducting a hearing, the Assistant Secretary issued his final decisions affirming the proposed assessment against the Taxpayers on November 27, 2002. Thereafter, the Taxpayers timely filed a petition for administrative review of the final decisions with the Board.

ISSUES

1. Did the Taxpayers have actual and/or constructive possession of marijuana without proper tax stamps affixed?
2. Are the Taxpayers subject to the assessment of unauthorized substance excise tax?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. The evidence is listed as follows:

1. US-1 Form BD-10, "Notice of Unauthorized Substance Tax Assessment," dated March 7, 2002.
2. US-2 Letter from the Taxpayers' attorney, dated March 13, 2002, requesting a hearing.
3. US-3 Letter to the Taxpayers' attorney, dated March 26, 2002, requesting a hearing.
4. US-4 Form BD-4, "Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped) Controlled Substances," naming the Taxpayer as the possessor of the controlled substance.
5. US-5 Case report by the New Hanover County Sheriff's Office and a statement by Enforcement Agent Tim Townsend of the Unauthorized Substances Tax Division.
6. US-6 Memorandum from E. Norris Tolson, Secretary of Revenue, dated May 16, 2002, delegating to Eugene J. Cella, Assistant Secretary of Administrative Hearings, the authority to hold any hearing required or allowed under Chapter 105 of the North Carolina General Statutes.

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decisions regarding these matters:

1. Assessment of Unauthorized Substance Tax was made against the Taxpayers on March 7, 2002, in the sum of $24,717.00 tax, $9,886.80 penalty and $123.59 interest, for a total proposed liability of $34,727.39, based on possession of 7,062 grams of marijuana.
2. The Taxpayers made timely objection and application for a hearing.

3. The correct method of determining the weight of growing marijuana plants is to cut off the root ball and weigh the rest of the plant. The stems and stalks of intact, growing marijuana plants clearly are not "separated from and …not mixed with any other parts of the … plant" in such a way that would confer on those stems and stalks the tax rate of $.40 per gram authorized in N.C. Gen. Stat. § 105-113.107(a)(1).
4. The unauthorized substance tax is imposed on the quantity of controlled substance possessed by a dealer. The marijuana at issue was weighed the day after its seizure on calibrated scales at a company that manufactures calibrated scales. The weight determined on these scales was 7,062 grams. The SBI lab weighed the marijuana 65 days after it was seized and concluded it weighed 1,905 grams. Clearly the 79 growing marijuana plants dried out during the 65-day period before the SBI weighed the plants. Therefore, the best information available indicates the quantity of marijuana possessed by the Taxpayer was 7,062 grams.
5. The Taxpayers' briefs contained a critical misstatement of law on Page 5. The brief states that G.S. 105-241.2-1(g)(sic) requires that within five working days after a jeopardy assessment is made under Article 2D the Secretary must provide the Taxpayer with a written statement of the information upon which the Secretary relied in making the assessment. On the contrary, N.C. Gen. Stat. § 105-241.1(g) specifically *excludes* Article 2D assessments from the "written statement" provision.
6. Although exempt from the aforementioned "written statement" requirement, the taxpayer was issued such a document. Form BD-4, "Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped) Controlled Substances," serve as the "written statement" for the assessment proposed against Mr. Bartlett. A copy of Form BD-4 was provided to the Taxpayer with his notice of assessment and a letter that accompanied the notice advised the Taxpayer that Form BD-4 constituted the written statement.
7. The Taxpayers' briefs further allege that the Taxpayers were not notified that the assessment was a jeopardy assessment. On the contrary, the notice of assessment, Form BD-10, expressly states the following: "In the event you fail to respond immediately to this proposed assessment by remitting the full amount shown due or by posting a bond, collection may proceed pursuant to G.S. 105-241.1(g) or G.S. § 105-242 without regard to whether you have requested a hearing."
8. On March 4, 2002, the Taxpayers had actual and/or constructive possession of 7,062 grams of marijuana.
9. No tax stamps were purchased for or affixed to the marijuana as required by law.

CONCLUSIONS OF LAW

The Board reviewed and considered the conclusions of law entered by the Assistant Secretary in his decisions regarding these matters:

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayers who object to an assessment to overcome that presumption, and that burden was not met.
3. An Administrative Tax Hearing lacks the statutory authority to rule on alleged constitutional violations.
4. Per N.C. Gen. Stat. § 105-241.1(a), the Secretary must base a proposed assessment on the best information available. While one can argue that the SBI lab's scales are more accurate than the calibrated scales upon which the marijuana was first weighed, the possible difference in accuracy is offset by the fact that the two scales essentially did not weigh the same substance. The calibrated scales weighed marijuana plants that had been harvested the previous day. The SBI scales weighed dried vegetable matter that two months earlier had been freshly harvested marijuana plants. The best information regarding the weight of the marijuana possessed by the Taxpayers is clearly the 7,062 grams determined by the calibrated scales on March 5, 2002.
5. The Taxpayers received all notices required by statute as well as a "written statement of information" that was not required by statute.
6. The Taxpayers had actual and/or constructive possession of 7,062 grams of marijuana on March 5, 2002, and were therefore dealers as that term is defined in N.C. Gen. Stat. § 105-113.106(3).
7. The Taxpayers are liable for $24,717.00 tax, $9,886.80 penalty and interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Tax Review Board conducts an administrative hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase
> the assessment or decision of the Secretary."

It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary. Pursuant to N.C. Gen. Stat. § 105-241.1(a), a

proposed tax assessment is presumed to be correct and the burden is on the Taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper. Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the briefs, the whole record and the Assistant Secretary's final decisions, concluded that the findings of fact made by the Assistant Secretary were supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law were fully supported by the findings of fact; therefore the decisions of the Assistant Secretary should be confirmed.

WHEREFORE, THE BOARD ORDERS that the Assistant Secretary's final decisions be confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature________________________________
Richard H. Moore, Chairman
State Treasurer

Signature________________________________
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature________________________________
Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA **BEFORE THE TAX REVIEW BOARD**

COUNTY OF WAKE
IN THE MATTER OF:

The Proposed Assessment of Unauthorized Substance Tax dated February 8, 2002 by the Secretary of Revenue of North Carolina
vs.

Lillian Rena Fishback
Taxpayer

ADMINISTRATIVE DECISION
Number: 424

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, on Friday September 26, 2003, upon a petition filed by **Lillian Rena Fishback** (hereafter "Taxpayer") for administrative review of the Final Decision of the Assistant Secretary of Revenue entered on February 28, 2003, sustaining the proposed assessment of unauthorized substance tax for the period at issue.

Pursuant to N.C. Gen. Stat. § 105-113.111(a) and N.C. Gen. Stat. § 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer on February 8, 2002 by Enforcement Agent Buddy Mozingo of the Unauthorized Substance Tax Division, assessing $60,368.00 tax, $24,147.20 penalty and $301.48 interest, for a total liability of $84,817.04. The assessment alleged that on February 8, 2002, the Taxpayer was in unauthorized possession of 17,248 grams of marijuana without the proper tax stamps affixed to the substance.

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. Based upon the Board's review of the documentation, the evidence presented is incorporated by reference and is made a part of this decision.

ISSUES

1. Did the Taxpayer have actual/or constructive possession of cocaine without proper tax stamps affixed?
2. Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. Assessment of Unauthorized Substance Tax was made against the Taxpayer on February 8, 2002, in the sum of $60,368.00 tax, $24,147.20 penalty and $301.84 interest, for a total proposed liability of $84,817.04, based upon possession of 17,248 grams of marijuana on February 8. 2002.
2. The Taxpayer made timely objection and application for a hearing.
3. The marijuana was located in a vehicle operated by the Taxpayer.
4. The Taxpayer's nervousness and the inconsistencies between her statements and those of her passenger as to their travels and the nature of their relationship tend to corroborate the presumption that the Taxpayer, as driver, was fully aware of the contents of the vehicle.
5. The Taxpayer was in constructive possession of the vehicle and the marijuana on February 8, 2002.
6. The SBI lab confirmed the substance at issue as marijuana weighing 36.9 pounds (16,737.84 grams).
7. The Taxpayer was in constructive possession of 16,737.84 grams of marijuana on February 8, 2002, without proper tax stamps affixed to the substance.

CONCLUSIONS OF LAW

The Board reviewed and considered the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. An assessment of tax is presumed to be correct.

2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption, and that burden was not met.
3. The Taxpayer had constructive possession of 16,737.84 grams of marijuana on February 8, 2002, and was therefore a dealer as that term is defined in G.S. 105-113.106.
4. The Taxpayer is liable for tax in the sum of $58,583.00, penalty in the sum of $23,433.20, and accrued interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Board conducts a hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

Pursuant to G.S. 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the Taxpayer to rebut that presumption. In order to rebut that presumption, the Taxpayer must offer evidence to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary.

Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the record and the final decision, concludes that the findings of fact contained in the Assistant Secretary's final decision are supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law are fully supported by the findings of fact; therefore the Assistant Secretary's final decisions should be confirmed.

WHEREFORE, THE TAX REVIEW BOARD ORDERS that the Assistant Secretary's final decision be and is hereby confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature____
Richard H. Moore, Chairman
State Treasurer

Signature____
Jo Anne Sanford, Member
Chair, Utilities Commission

Signature____
Noel L. Allen, Attorney at Law
Appointed Member

STATE OF NORTH CAROLINA — **BEFORE THE TAX REVIEW BOARD**

COUNTY OF WAKE
IN THE MATTER OF:

The Proposed Assessment of Unauthorized Substance Tax dated June 5, 2002 by the Secretary of Revenue of North Carolina

vs.

Sherry J. Roberts
Taxpayer

ADMINISTRATIVE DECISION
Number: 425

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, on Friday September 26, 2003, upon a petition filed by **Sherry J. Roberts** (hereafter "Taxpayer") for administrative review of the Final Decision of the Assistant Secretary of Revenue entered on March 6, 2003, sustaining the proposed assessment of unauthorized substance tax for the period at issue.

Pursuant to N.C. Gen. Stat. § 105-113.111(a) and N.C. Gen. Stat. § 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer on June 5, 2002 by Enforcement Agent James Spence of the Unauthorized Substance Tax Division, assessing $82,512.50 tax, $33,005.00 penalty and $0 interest, for a total liability of $115,517.50. The assessment alleged that on June 5, 2002, the Taxpayer was in unauthorized possession of 528 grams of cocaine 15,875 grams of marijuana and 102 dosages of ecstasy without the proper tax stamps affixed to the substance.

ISSUES

1. Did the Taxpayer have actual/or constructive possession of cocaine, marijuana and ecstasy without proper tax stamps affixed?
2. Is the Taxpayer subject to the assessment of unauthorized substance excise tax?

EVIDENCE

Pursuant to N.C. Gen. Stat. § 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary. Based upon the Board's review of the documentation, the evidence presented is incorporated by reference and is made a part of this decision.

FINDINGS OF FACT

The Board reviewed and considered the following findings of fact entered by the Assistant Secretary in his decision regarding this matter:

1. Assessment of Unauthorized Substance Tax was made against the Taxpayer on June 5, 2002, in the sum of $82,512.50 tax, $33,005.00 penalty and $0 interest, for a total proposed liability of $115,517.50 based upon possession of 528 grams of cocaine, 15,875 grams of marijuana and 102 dosages of ecstasy.
2. The Taxpayer made timely objection and application for a hearing.
3. The codefendant's claim that he had taken the drugs and weapons to the Taxpayer's house on June 5, 2002, after 8:00 a.m., with the intention of removing them before the Taxpayer returned from work at 4:00 p.m., is not credible since:
   - The drugs were located in numerous locations about the house: three baggies of tan, rock-like substance, one baggie of white powder, one baggie of 2 1/2 white pills, and the .38 caliber Smith and Wesson in the top dresser drawer in the master bedroom; an 11 1/2 pound taped bundle of marijuana, four one-pound packages of marijuana and two quarter-pound packages of marijuana in the computer room closet; 16 one-pound packages of marijuana in a duffel bag on the computer room floor; two baggies of tan rock-like substance and two baggies of white pills in a plastic box in the computer desk in the computer room; and the shotgun in the master bedroom closet.
   - Not counting the duffel bag containing marijuana on the floor in the computer room, there were 16 individual packages of controlled substances in three different locations. It is illogical to believe that the codefendant would bring the drug and weapons to the Taxpayer's house and spread them all over the place if he intended to remove them later the same day.

- The codefendant's statement indicates he expected the Taxpayer to return from work at about 4:00 p.m., by which time he intended to have the drugs and weapons removed from the house. Law enforcement did not make entry to execute the search warrant until 7:21 p.m., meaning that the codefendant did not just miss his alleged deadline, but that nearly 3 ½ hours later there was still no sign of him. Not only is there no reliable evidence that the codefendant ever returned to the Taxpayer's home on June 5, 2002, there is no evidence that he was ever there to begin with.
- The Taxpayer pleaded guilty to possession of the same weapons that the codefendant stated she knew nothing about, further detracting from the statement's credibility.

4. The informant whose information provided probable cause for the search warrants indicated that the codefendant kept controlled substances at several residences, which further tends to refute any claim that the presence of controlled substance at the Taxpayer's home on June 5, 2002, was a one-time event.
5. The Department has the authority to levy upon and seize a Taxpayer's assets for the purpose of selling them at auction and applying the proceeds to the tax debt. Whether the assets were purchased with legitimate income or proceeds from the drugs sales is irrelevant.
6. On June 5, 2002, the Taxpayer had constructive possession of 528 grams of cocaine, 15,875 grams of marijuana and 102 dosages of ecstasy.
7. No tax stamps were purchased for or affixed to the controlled substances as required by law.

CONCLUSIONS OF LAW

The Board reviewed and considered the following conclusions of law made by the Assistant Secretary in his decision regarding this matter:

1. An assessment of tax is presumed to be correct.
2. The burden is upon the Taxpayer who objects to an assessment to overcome that presumption, and that burden was not met.
3. The Taxpayer had constructive possession of 528 grams of cocaine, 15,875 grams of marijuana and 102 dosages of ecstasy on June 5, 2002, and was therefore a dealer as that term is defined in G.S. 105-113.106(3).
4. The Taxpayer is liable for tax in the sum of $82,512.50, penalty in the sum of $33,005.00, and accrued interest until date of full payment.

DECISION

The scope of administrative review for petitions filed with the Tax Review Board is governed by N.C. Gen. Stat. § 105-241.2(b2). After the Board conducts a hearing, this statute provides in pertinent part:

> (b2). "The Board shall confirm, modify, reverse, reduce or increase the assessment or decision of the Secretary."

Pursuant to G.S. 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the Taxpayer to rebut that presumption. In order to rebut that presumption, the Taxpayer must offer evidence to show that the assessment is not proper. It is the function of this Board, upon administrative review, to review the record and determine whether the final decision is proper based upon the evidence presented at the hearing before the Assistant Secretary.

Thus, the Board having conducted an administrative hearing in this matter, and having considered the petition, the brief, the record and the final decision, concludes that the findings of fact contained in the Assistant Secretary's final decision are supported by competent evidence in the record; that based upon the findings of fact, the Assistant Secretary's conclusions of law are fully supported by the findings of fact; therefore the Assistant Secretary's final decisions should be confirmed.

WHEREFORE, THE TAX REVIEW BOARD ORDERS that the Assistant Secretary's final decision be and is hereby confirmed in every respect.

Made and entered into the 31st day of December 2003.

TAX REVIEW BOARD

Signature______________________________
Richard H. Moore, Chairman
State Treasurer

Signature______________________________

Jo Anne Sanford, Member
Chair, Utilities Commission

Signature____
Noel L. Allen, Appointed Member

SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY

The Estate of Katherine C. Bell

Pursuant to N.C.G.S. § 130A-310.34, the Estate of Katherine C. Bell has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Charlotte, Mecklenburg County, North Carolina. The Property consists of 0.6 acres and is located at 2935 Griffith Street (a.k.a. 111 New Bern Street). Known environmental contamination, in excess of applicable standards, exists on the Property in groundwater. The Estate of Katherine C. Bell has committed itself to make no use of the Property other than for commercial uses such as warehouse space. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Estate of Katherine C. Bell, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The new Notice of Intent to Redevelop a Brownfields Property is a second one regarding this Property; it has been filed because it was determined that three underground storage tanks could be addressed by the state Brownfields Program, which led to changes in the proposed Brownfields Agreement. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at City of Charlotte, Economic Development, located at 600 East Trade Street, Charlotte, NC 28202 by contacting Carolyn Minnich at that address, at cminnich@ci.charlotte.nc.us, or at (704)336-3499; or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 733-2801, ext. 336, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents. Written public comments, and/or requests for a public meeting, may be submitted to DENR within 30 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY

Wede Corporation, LLC

Pursuant to N.C.G.S. § 130A-310.34, Wede Corporation, 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 Bessemer City, Gaston, County, North Carolina. The Property consists of 10.7 acres and is located at 1111 Oates Road. Environmental contamination exists on the Property groundwater. Wede Corporation, LLC has committed itself to redevelop the Property exclusively for industrial light manufacturing and commercial use. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Wede Corporation, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) 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 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 Rd., Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 733-2801, ext. 336, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents. 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 brownfields 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
Brownfields Program Manager
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 1 – DEPARTMENT OF ADMINISTRATION

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration, State Energy Office intends to adopt the rules cited as 01 NCAC 41C .0101-.0104, .0201-.0211, .0301-.0303.*

Proposed Effective Date: *July 1, 2004*

Public Hearing:
Date: *April 21, 2004*
Time: *2:00 p.m.-4:00 p.m.*
Location: *Auditorium/NC Archives and History/State Library, 109 E. Jones St, Raleigh, NC.*

Reason for Proposed Action: *Legislation section: G.S. 143-345.16; 143-345.17; 143-345.18*

Procedure by which a person can object to the agency on a proposed rule: *Written objections may be submitted to the Director of State Energy Office. Objections will be received by mail, delivery service, hand delivery or facsimile transmission. Objections may be directed to: Larry Shirley, Director, NC State Energy Office. Mail Service Center 1340, Raleigh, NC 27699-1340, Phone (919)733-2230, Fax (919)733-2953, Email larry.shirley@ncmail.net.*

Written comments may be submitted to: *Larry Shirley, NC State Energy Office, MSC 1340, Raleigh, NC 27699-1340, Phone (919)733-2230, Fax (919)733-2953, Email larry.shirley@ncmail.net.*

Comment period ends: *June 1, 2004*

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-STATE ENERGY OFFICE

SUB CHAPTER 41C-ENERGY IMPROVEMENT LOAN PROGRAM

SECTION .0100-GENERAL PROVISIONS

01 NCAC 41C .0101 RESPONSIBILITY
The Department of Administration is responsible for adopting rules as specified in G.S. 143-345.18(b)(3) to facilitate this program and to adopt rules to allow State-regulated financial institutions to provide secured loans for this program pursuant to G.S. 143-345.18(b)(2a).

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0102 SCOPE
This Subchapter shall apply to the revolving loan program mandated by G.S. 143-345.18. Sectors served by the Program are local government organizations, nonprofit organizations, and commercial and industrial businesses pursuant to G.S. 143B, Article 10, Part 14.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0103 RULE MAKING AUTHORITY
Authority for adopting these Rules is found in G.S. 143-18(b)(3) and G.S. 143-345.18(b)(2a).

Authority G.S. 143-345.18(b)(3); 143-345.18(b)(2a).

01 NCAC 41C .0104 DEFINITIONS
For the purposes of this Chapter, the following definitions apply:
(1) "Allowable Costs," origination cost, up front cost, letter of credit fee (first year), engineering design fee, and implementation of eligible energy conservation measure. All allowable costs to be included in the loan must be incurred after the execution date of the Letter of Intent;
(2) "Applicant," any commercial or industrial business applying for a loan under the Program;
(3) "Btu," British thermal unit; the amount of heat required to raise the temperature of one pound

of water one degree Fahrenheit at or near 39.2 degrees F;

(4) "Btu/sq. ft/yr.," Btu per square foot per year; an index of building energy use, calculated by dividing the total annual energy use of a building by its square foot area;

(5) "Commercial or industrial business," a commercial or industrial concern which provides goods or services for profit from a location in North Carolina;

(6) "Credit worthiness", ability of applicant to meet lending institution's standard lending criteria.

(7) "DOA Fiscal Department," the Fiscal Management Department, N. C. Department of Administration;

(8) "Energy conservation measure," a commercially available energy efficient device, technique or technology, designed to reduce energy consumption, peak demand, and/or utility costs at an existing or proposed commercial or industrial business;

(9) "Letter of Intent," written notification of the intent of the Department to originate the Loan, subject to the conditions and limitations of the Program;

(10) "Payback," the total energy conservation measure costs (including installation, equipment and engineering design) divided by the annual estimated utility cost savings;

(11) "Program," the Energy Improvement Loan Program authorized by G.S. 143B, Article 10, Part 14.

(12) "Recycling Projects," projects which extract and reprocess energy, water and/or materials for reuse in buildings, transportation systems, environmental management, consumer products and/or outreach;

(13) "Renewables," solar, wind, biomass and/or hydropower resources;

(14) "Repayment Schedule," a schedule of periodic payments based upon simple payback as projected in the TA, rounded to the next quarter. Prepayments shall reduce the term of the loan with periodic payments remaining unchanged;

(15) "State Energy Office," the State Energy Office, N. C. Department of Administration;

(16) "Technical Analysis," a report that identifies and analyzes in detail cost-effective capital energy conservation improvements that the applicant wishes to implement. The Technical Analysis need address only the specific energy conservation measures for which the loan is being requested. Each energy conservation measure analyzed should be the subject of a single, focused recommendation incorporating technical and economic analyses of the measure, considering building, process and equipment characteristics and energy use patterns pertinent to the improvement. The Technical Analysis must include the estimated cost of the implementation, a construction schedule, and expected energy savings;

(17) "Technical analyst," a professional engineer or architect registered in accordance with the provisions of G. S. 89C or G. S. 83A as applicable having demonstrated experience in energy conservation to conduct technical analysis for the purposes of this article;

(18) "Third Party Technical Analyst", a technical analysis performed by a professional engineer or registered architect who has neither financial interest in the commercial business, non-profit institution, local government institution, or industrial business nor in the sale and installation of any proposed energy conservation measure; however, the Technical Analyst is permitted to provide construction management services to an approved applicant.

(19) "Unallowable costs," costs associated with Technical Analysis preparation, costs associated with pre-application conference, costs incurred prior to execution date of Letter of Intent, costs associated with loan application (i.e., consultation fees, Technical Analysis modifications); and

(20) "Up front cost," the prepaid charge, if any, at a rate to be determined by the DOA Fiscal Department sufficient to cover the costs of administering and servicing the program.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

SECTION .0200 – LOANS

01 NCAC 41C .0201 ELIGIBILITY

The following classes of applicants in descending order of priority are eligible to apply for loans:

(1) A local government organization, nonprofit organization, commercial or industrial business located in North Carolina that owns the existing building or site of planned construction where the energy conservation measures will be made, or which has a lease or management agreement for such proposed building site or building extending beyond the term of the loan; provided, however, that where the owner of the building authorizes the approved energy conservation measures, the lease or management agreement need not extend beyond the term of the loan.

(2) A local government organization, nonprofit organization, commercial or industrial business translocating to North Carolina that owns the site of planned construction where the energy conservation measures will be made, or which has a lease or management agreement for such proposed building or

building site extending beyond the term of the loan; provided, however, that where the owner of the building or building site authorizes the approved energy conservation measures, the lease or management agreement need not extend beyond the term of the loan.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0202 CRITERIA FOR ENERGY CONSERVATION LOANS

Energy conservation projects for which the loans are desired must meet the following criteria:

(1) The building site where the measures are to be installed must be in North Carolina;
(2) The project must demonstrate the ability to conserve energy through efficient energy use or the utilization of renewable energy resources which results in energy savings based upon a net reduction in the use of nonrenewable resources;
(3) To keep interest rates low, with a maximum total loan indebtedness of five hundred thousand dollars ($500,000) for a single local government organization, nonprofit organizations, commercial business or industrial business at any given time;
(4) The project must utilize existing, proven reliable commercially available technologies recognized by the State Energy Office;
(5) Experimental or research-related technologies are not eligible for funding;
(6) Each energy conservation measure must address energy efficiency;
(7) The installation of the energy conservation measure may, at the discretion of the applicant, commence after DOA Fiscal Office issues the Letter of Intent; however, the applicant places itself at risk and is reminded that origination of the Loan is subject to the conditions and limitations of the Program;
(8) The energy conservation measure must demonstrate a simple payback period of 10 years or less;
(9) Each energy conservation measure must have a useful life at least equal to its estimated simple payback;
(10) Eligible energy conservation measures shall fall under one of the following categories:
    (a) lighting systems;
    (b) heating, ventilation, and air conditioning systems;
    (c) electrical distribution systems (motors, variable speed drives, fans, etc.);
    (d) energy management systems;
    (e) boiler efficiency systems;
    (f) energy recovery systems, including on-site generation of electricity;
    (g) alternate/renewable energy systems;
    (h) building envelope (doors, windows, roofs, etc.);
    (i) industrial process or fabrication systems;
    (j) load management systems;
    (k) fuel conversion projects provided that the simple payback calculations shall be based on the cost of the current fuel;
    (l) other cost-effective demand or rate-based improvements; and
    (m) recycling projects;
(11) The energy conservation measure shall meet applicable state air and water quality standards; and
(12) The energy conservation measure shall be based on a current Technical Analysis report as defined in Section .0300 of this Subchapter.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0203 CONDITIONS AND LIMITATIONS

Loans are made subject to the following conditions and limitations:

(1) Interest shall be charged at the rate of 3% per annum and 1% for renewable and recycling projects;
(2) The amount of the loan shall not exceed allowable costs;
(3) The repayment schedule shall be based on the estimated payback as shown in the Technical Analysis report;
(4) Payments shall be made at a frequency of not less than once per month;
(5) The total amount of the loan, or any portion thereof may be repaid at any time without penalty;
(6) Rebates received through other program offerings of the State Energy Office for projects undertaken from loan proceeds shall be used to reduce the amount of principal;
(7) The borrower shall warrant that all work or construction done with the proceeds of a loan under this program shall comply with all building codes and standards;
(8) Project implementation should begin within 90 days after approval of the application. If delays are encountered following loan closing, any arbitrage profits will be repaid to the revolving fund;
(9) Loans may not be used to replace an existing loan;
(10) Loan payments or drafts shall be sent or delivered to the DOA Fiscal Department at its current address as stated in the loan agreement;
(11) A letter of credit from a bank approved to do business in North Carolina and acceptable to the Secretary of Administration shall secure

the loan against non-payment and also serve as a quarterly drafting mechanism for loan repayment from the bank; and

(12) No loans shall be forgiven.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0204 PRE-APPLICATION CONFERENCE

(a) At least one week prior to submission of a project application a pre-application conference will be convened by email, telephone or office visit.
(b) Parties present at the pre-application conference will include representatives from the DOA Fiscal Division, the State Energy Office, the applicant, and/or the applicant's engineer.
(c) The purpose of the conference is to help ensure the application procedures are clearly understood and that the application and technical analysis, when accepted, will be complete.
(d) The applicant shall offer verbal, and if available, written project descriptions.
(e) The applicant will address environmental impact of the project.
(f) When final, copies of water and air permits will be provided in addition to the technical analysis.
(g) Another purpose of this conference will be to reach an understanding among all parties that the project is of the type that may be considered for approval.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0205 APPLICATION PROCEDURES

Application forms are provided by the DOA Fiscal Department and must contain, at a minimum, the following information:

(1) The name and complete mailing address, including the county, of the applicant;
(2) The address, building name (where applicable) or site description including photographs to locate where the energy conservation measure(s) will be installed;
(3) The name of a contact person, including title and telephone number;
(4) The amount of the loan requested;
(5) The estimated dates of start and completion of the project;
(6) A copy of the Technical Analysis approved by the State Energy Office as fulfilling the energy aspects of the proposed energy conservation measures;
(7) Identification of the commercial lending institution that is providing letter of credit, depository and repayment services;
(8) All applicants shall provide financial data on which to base a determination of the applicant's creditworthiness. Documentation may include the following:
(a) Recent financial statements; and
(b) Profit and loss statements.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0206 APPLICATION REVIEW

Application review shall consist of the following two phases:

(1) The administrative review shall be conducted by the DOA Fiscal Department and may include any data or information needed to complete that review.
(2) The technical review shall be conducted of the Technical Analysis by the State Energy Office.
(3) The technical review may occur concurrently with application submittal to the DOA Fiscal Department.
(4) The technical review shall consider each energy conservation measure for which funding is requested and shall include the accuracy and sufficiency of calculations, engineering principles considered, and labor and material costs relative to the current local market.
(5) Following acceptance, the State Energy Office will approve those Energy Conservation Measures that were found to meet the energy aspects of the Program.
(6) No application shall be accepted for consideration by the DOA Fiscal Department without the acceptance of the Technical Analysis by the State Energy Office.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0207 LOAN APPROVAL

Applications shall be considered for loan approval upon completion of the administrative and technical review. Approval shall be based upon the following:

(1) Results of the administrative and technical review documenting energy efficiency; and
(2) Creditworthiness of the applicant.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0208 LOAN AGREEMENT AND PROMISSORY NOTE

After an application for a loan is approved, a loan agreement shall be executed between the DOA Fiscal Department and the borrower. The loan agreement shall include a standard North Carolina promissory note and other necessary documents including, but not limited to, security agreements, mortgages, recordings; and shall contain the covenants and representations as to the borrower's qualification to borrow for the loan, intended use of the loan proceeds, conditions under which the loan will be repaid and events requiring the acceleration, rights and responsibilities of the parties and the terms and conditions of the loan. The requirements to secure the loan shall be included in the loan agreement. Loans shall be secured through bank Letter of Credit.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0209 REPORTS

Reports must be submitted as follows:

(1) Progress reports must be submitted quarterly to the State Energy Office during the period implementation or construction is in progress and must include a description of the current status, any problems, and forecast of expectations or deviations from the planned schedule; and
(2) A final report certified by the technical analyst with professional registration seal affixed must be submitted to the State Energy Office upon completion of the project. The report must include a description of the measures implemented; the actual cost of each measure, and the adjusted estimated payback, based on the actual cost.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0210 MONITORING

The DOA Fiscal Department shall monitor the use of the funds under this program through continuous review of reports. The State Energy Office shall monitor those buildings/projects where the energy conservation projects are in progress to verify the installation of the energy conservation measures conforms to the original Technical Analysis. At least one visit shall be made to the site of each energy conservation project during the life of the loan.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0211 DEFAULT

If the borrower violates any of the terms of the loan agreement, the DOA Fiscal Department may place the borrower in default. Borrowers determined to be in default shall be notified by certified mail and the letter of credit provided as security invoked to protect the interest of the State of North Carolina.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

SECTION .0300 - TECHNICAL ANALYSIS

01 NCAC 41C .0301 TECHNICAL ANALYSIS REQUIRED

An application for an energy conservation loan must be accompanied by a Technical Analysis that has been conducted by a qualified third party technical analyst and certified by the State Energy Office as fulfilling the energy aspects of the Program.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0302 TECHNICAL ANAYLYST QUALIFICATIONS

To be qualified to conduct the Technical Analysis required by this article, a technical analyst must meet the following requirements:

(1) Have experience in energy conservation in building construction, mechanical systems and/or manufacturing processes;
(2) Be a registered architect or registered professional engineer licensed under the regulatory authority of the State of North Carolina, or be an architect-engineer team, the principal members of which are licensed under the regulatory authority of the State of North Carolina;
(3) Comply with the licensing provisions of the "Architects" Act (G.S. 83A) and/or the "Engineering and Land Surveying" Act (G.S. 89C), to the extent to which one or both may be applicable; and
(4) Have neither financial interest in the commercial business, non-profit institution, local government institution, or industrial business nor in the sale and installation of any proposed energy conservation measure; however, the Technical Analyst is permitted to provide construction management services to an approved applicant.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

01 NCAC 41C .0303 REPORT REQUIRED

A qualified third party technical analyst shall submit three copies of the results of a Technical Analysis in writing in a format acceptable to the State Energy Office. The report must include the following:

(1) A description of facility characteristics and energy data, including the operational characteristics of the energy-using systems;
(2) A description and engineering analysis of each identified energy conservation measure, including the following:
   (a) A detailed estimate of the cost of design, acquisition, and installation, including monitoring equipment to assess the performance of the measure discussing pertinent assumptions as necessary;
   (b) An estimate of the annual energy and energy cost savings by fuel type using generally accepted engineering standards and practices, including all formulae, data and assumptions clearly presented in arriving at the estimate;
   (c) The results of a combustion efficiency test, if furnace or boiler modifications or replacements are being implemented;
   (d) The simple payback period of each energy conservation measure, calculated by dividing the estimated total cost of the measure by the estimated annual energy cost saving;
   (e) A proposed construction schedule for each energy conservation measure; and

(f) The payback period of each energy conservation measure;
(3) The energy use and cost data for each fuel type used for the prior 12-month period, by month or in accordance with the usual billing cycle;
(4) A certification bearing the registration seal, number and original signature and stating that the contents of the Technical Analysis conform to the provisions of the Program; and
(5) An outline of qualifications of the analyst documenting previous experience in energy conservation in building construction, mechanical systems, and/or manufacturing processes.

Authority G.S. 143-345.18(b)(2a); 143-345.18(b)(3).

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TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Division of Facility Services (DFS) intends to adopt the rules cited as 10A NCAC 14C .3801-.3805 and amend the rule cited as 10A NCAC 14C .0203.*

Proposed Effective Date: *October 1, 2004*

Public Hearing:
Date: *May 28, 2004*
Time: *10:00 a.m.*
Location: *Council Building, Room 201, Dorothea Dix Campus, 701 Barbour Dr., Raleigh, NC*

Reason for Proposed Action: *One of the subject matters contained in the 2004 State Medical Facilities Plan (SMFP) is the filing deadline for Certificate of Need (CON) applications. The 2004 SMFP notes that deadline to be 5:30 p.m. 10A NCAC 14C .0203 must be amended to ensure that its reference to the filing deadline be consistent with the SMFP. The other subject matter pertains to the SMFP in relation to acute care beds. Certificate of Need (CON) rules are needed to implement the new need determinations for acute care beds in the 2004 SMFP.*

Procedure by which a person can object to the agency on a proposed rule: *A person may object to the agency on the proposed rule by submitting written comments on the proposed rule. They may also object by attending the public hearing and personally voice their objections during that time.*

Written comments may be submitted to: *Nadine Pfeiffer, NCDFS, 2711 Mail Service Center, Raleigh, NC 27699-2711, phone (919) 733-7461, fax (919) 733-8274, and email Nadine.pfeiffer@ncmail.net.*

Comment period ends: *June 1, 2004*

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 14 - DIRECTOR, DIVISION OF FACILITY SERVICES

SUBCHAPTER 14C - CERTIFICATE OF NEED REGULATIONS

SECTION .0200 - APPLICATION AND REVIEW PROCESS

10A NCAC 14C .0203 FILING APPLICATIONS
(a) An application shall not be reviewed by the agency until it is filed in accordance with this Rule.
(b) An original and a copy of the application shall be received by the agency no later than ~~5:00~~ 5:30 p.m. on the 15th day of the month preceding the scheduled review period. In instances when the 15th of the month falls on a weekend or holiday, the filing deadline is ~~5:00~~ 5:30 p.m. on the next business day. An application shall not be included in a scheduled review if it is not received by the agency by this deadline. Each applicant shall transmit, with the application, a fee to be determined according to the following formula:
(1) With each application proposing the addition of a sixth bed to an existing or approved five bed intermediate care facility for the mentally retarded, the proponent shall transmit a fee in the amount of two thousand dollars ($2,000).
(2) With each application, other than those referenced in Subparagraph (b)(1) of this Rule, proposing no capital expenditure or a capital expenditure of up to, but not including, one million dollars ($1,000,000), the proponent shall transmit a fee in the amount of three thousand five hundred dollars ($3,500).
(3) With each application, other than those referenced in Subparagraph (b)(1) of this Rule, proposing a capital expenditure of one million dollars ($1,000,000) or greater, the proponent shall transmit a fee in the amount of three thousand five hundred dollars ($3,500), plus

an additional fee equal to .003 of the amount of the proposed capital expenditure in excess of one million dollars ($1,000,000). The additional fee shall be rounded to the nearest whole dollar. In no case shall the total fee exceed seventeen thousand five hundred dollars ($17,500).

(c) After an application is filed, the agency shall determine whether it is complete for review. An application shall not be considered complete if:

(1) the requisite fee has not been received by the agency; or

(2) a signed original and copy of the application have not been submitted to the agency on the appropriate application form.

(d) If the agency determines the application is not complete for review, it shall mail notice of such determination to the applicant within five business days after the application is filed and shall specify what is necessary to complete the application. If the agency determines the application is complete, it shall mail notice of such determination to the applicant prior to the beginning of the applicable review period.

(e) Information requested by the agency to complete the application must be received by the agency no later than ~~5:00~~ 5:30 p.m. on the last working day before the first day of the scheduled review period. The review of an application shall commence in the next applicable review period that commences after the application has been determined to be complete.

Authority G.S. 131E-177; 131E-182.

SECTION .3800 - CRITERIA AND STANDARDS FOR ACUTE CARE BEDS

10A NCAC 14C .3801 DEFINITIONS

The following definitions shall apply to all rules in this Section:

(1) "Acute care beds" means acute care beds licensed by the Division of Facility Services in accordance with standards in 10A NCAC 13B .6200, and located in hospitals licensed pursuant to G.S. 131E-79.

(2) "Average daily census" means the number of inpatient acute care days of care provided in licensed acute care beds in a given year divided by 365 days.

(3) "Campus" shall have the same meaning as defined in G.S. 131E-176(2c).

(4) "Service Area" means the single or multi-county area as used in the development of the acute care bed need determination in the applicable State Medical Facilities Plan.

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .3802 INFORMATION REQUIRED OF APPLICANT

(a) An applicant that proposes to develop new acute care beds shall complete the Acute Care Facility/Medical Equipment application form.

(b) An applicant proposing to develop new acute care beds shall submit the following information:

(1) the number of acute care beds proposed to be licensed and operated following completion of the proposed project;

(2) documentation that the proposed services shall be provided in conformance with all applicable facility, programmatic, and service specific licensure, certification, and JCAHO accreditation standards;

(3) documentation that the proposed services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies;

(4) if adding new acute care beds to an existing facility, documentation of the number of inpatient days of care provided in the last operating year in the existing licensed acute care beds by medical diagnostic category, as classified by the Centers for Medicare and Medicaid Services according to the list set forth in the applicable State Medical Facilities Plan;

(5) the projected number of inpatient days of care to be provided in the total number of licensed acute care beds in the facility, by county of residence, for each of the first three years following completion of the proposed project, including all assumptions, data and methodologies;

(6) documentation that the applicant shall be able to communicate with emergency transportation agencies 24 hours per day, seven days per week;

(7) documentation that services in the emergency care department shall be provided 24 hours per day, seven days per week, including a description of the scope of services to be provided during each shift and the physician and professional staffing that will be responsible for provision of those services;

(8) copy of written administrative policies that prohibit the exclusion of services to any patient on the basis of age, race, sex, creed, religion, disability or the patient's ability to pay;

(9) a written commitment to participate in and comply with conditions of participation in the Medicare and Medicaid programs;

(10) documentation of the health care services provided by the applicant, and any facility in North Carolina owned or operated by the applicant's parent organization, in each of the last two operating years to Medicare patients, Medicaid patients, and patients who are not able to pay for their care;

(11) documentation of strategies to be used and activities undertaken by the applicant to attract physicians and medical staff who will provide

care to patients without regard to their ability to pay;

(12) correspondence from physicians and other referral sources that documents their willingness to refer patients to the proposed services to be offered in the new acute care beds; and

(13) documentation that the proposed new acute care beds shall be operated in a hospital that provides inpatient medical services to both surgical and non-surgical patients.

(c) An applicant proposing to develop new acute care beds in a new licensed hospital or on a new campus of an existing hospital shall also submit the following information:

(1) the projected number of inpatient days of care to be provided in the licensed acute care beds in the new hospital or on the new campus, by major diagnostic category as recognized by the Centers for Medicare and Medicaid Services (CMS) according to the list set forth in the applicable State Medical Facilities Plan;

(2) documentation that medical and surgical services shall be provided in the proposed acute care beds on a daily basis within at least five of the major diagnostic categories as recognized by the Centers for Medicare and Medicaid Services (CMS) according to the list set forth in the applicable State Medical Facilities Plan;

(3) copies of written policies and procedures for the provision of care within the new acute care hospital or on the new campus, including but not limited to the following:

(A) the admission and discharge of patients, including discharge planning;

(B) transfer of patients to another hospital;

(C) infection control; and

(D) safety procedures;

(4) documentation that the applicant owns or otherwise has control of the site on which the proposed acute care beds will be located; and

(5) documentation that the proposed site is suitable for development of the facility with regard to water, sewage disposal, site development and zoning requirements; and provide the required procedures for obtaining zoning changes and a special use permit if site is currently not properly zoned.

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .3803 PERFORMANCE STANDARDS

(a) An applicant proposing to develop new acute care beds shall demonstrate that the projected average daily census (ADC) of the total number of licensed acute care beds proposed to be licensed within the service area, under common ownership with the applicant, divided by the total number of those licensed acute care beds is reasonably projected to be at least 66.7 percent when the projected ADC is less than 100 patients, 71.4 percent when the projected ADC is 100 to 200 patients, and 75.2 percent when the projected ADC is greater than 200 patients, in the third operating year following completion of the proposed project or in the year for which the need determination is identified in the State Medical Facilities Plan, whichever is later.

(b) An applicant proposing to develop new acute care beds shall provide all assumptions and data used to develop the projections required in this Rule and demonstrate that they support the projected inpatient utilization and average daily census.

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .3804 SUPPORT SERVICES

(a) An applicant proposing to develop new acute care beds shall document that each of the following items shall be available to the facility 24 hours per day, seven days per week:

(1) laboratory services including microspecimen chemistry techniques and blood gas determinations;

(2) radiology services;

(3) blood bank services;

(4) pharmacy services;

(5) oxygen and air and suction capability;

(6) electronic physiological monitoring capability;

(7) mechanical ventilatory assistance equipment including airways, manual breathing bag and ventilator/respirator;

(8) endotracheal intubation capability;

(9) cardiac arrest management plan;

(10) patient weighing device for a patient confined to their bed; and

(11) isolation capability.

(b) If any item in Paragraph (a) of this Rule will not be available in the facility 24 hours per day, seven days per week, the applicant shall document the basis for determining the item is not needed in the facility.

(c) If any item in Paragraph (a) of this Rule will be contracted, the applicant shall provide correspondence from the proposed provider of its intent to contract with the applicant.

Authority G.S. 131E-177(1); 131E-183.

10A NCAC 14C .3805 STAFFING AND STAFF TRAINING

(a) An applicant proposing to develop new acute care beds shall demonstrate that the proposed staff for the new acute care beds shall comply with licensure requirements set forth in 10A NCAC 13B, Licensing of Hospitals.

(b) An applicant proposing to develop new acute care beds shall provide correspondence from the persons who expressed interest in serving as Chief Executive Officer and Chief Nursing Executive of the facility in which the new acute care beds will be located, documenting their willingness to serve in this capacity.

(c) An applicant proposing to develop new acute care beds in a new hospital or on a new campus of an existing hospital shall provide a job description and the educational and training requirements for the Chief Executive Officer, Chief Nursing Executive and each department head which is required by

licensure rules to be employed in the facility in which the acute care beds will be located.
(d) An applicant proposing to develop new acute care beds shall document the availability of admitting physicians who shall admit and care for patients in each of the major diagnostic categories to be served by the applicant.
(e) An applicant proposing to develop new acute care beds shall provide documentation of the availability of support and clinical staff to provide care for patients in each of the major diagnostic categories to be served by the applicant.

Authority G.S. 131E-177(1); 131E-183.

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TITLE 15A – DEPARTMENT ENVIRONMENT & NATURAL RESOURCES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment & Natural Resources, Coastal Resources Commission intends to adopt the rules citied as 15A NCAC 07H .2601-.2605 and amend the rules cited as 15A NCAC 07H .0304, .0306.*

Proposed Effective Date: *September 1, 2004*

Public Hearing:
Date: *April 28, 2004*
Time: *5:00 p.m.*
Location: *Crystal Coast Civic Center, 3505 Arendell Street, Quad 1 Meeting Room, Morehead City, NC*

Reason for Proposed Action:
***15A NCAC .07H 0304** -The proposed amendment utilizes the CRC's authority to designate storm-damaged sections of the ocean shoreline as temporarily unvegetated. The CRC proposes to designate as unvegetated a section of ocean shoreline in Dare County that was damaged by Hurricane Isabel on September 18th, 2003. This designation will allow the agency to establish a development setback line that will be used to determine where structures can be (re)built, that will be more favorable to oceanfront property owners than the existing hurricane-damaged vegetation line. The CRC previously used this authority following Hurricane Fran in 1996.*
***15A NCAC .07H 0306** -The proposed rule amendment is a clarification to specifically state that "The enclosure of existing roof covered porches shall be exempt from this requirement if the footprint is not expanded, modifications to existing foundations are not required and the existing porch is located landward of the vegetation line or measurement line which ever is applicable."*
***15A NCAC 07H .2601-.2605** –Create a new general permit (GP) that will be available only to the EEP/WRP, and will allow for the construction of wetland, stream, and/or buffer mitigation sites. The general permit shall be applicable only where the restoration, creation, or enhancement of a wetland, stream, and/or buffer system is proposed. The permit shall not apply within the Ocean Hazard Areas of Environmental Concern (AECs) as defined in 15A NCAC 07H .0304, or in waters adjacent to these AECs, with the exception of those portions of shoreline within the Inlet Hazard Area AECs that feature characteristics of estuarine shorelines. Permitted work must result in a net increase in coastal resource functions and values.*

Procedure by which a person can object to the agency on a proposed rule: *Objections can be made by forwarding a typed or handwritten letter indicating your specific reason(s) for your objection(s) to Charles S. Jones, DENR, Coastal Management, 151-B Hwy 24 Hestron Plaza II, Morehead City, NC 28557*

Written comments may be submitted to: *Charles S. Jones, 151-B Hwy 24 Hestron Plaza II, Morehead City, NC 28557*

Comment period ends: *June 1, 2004*

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 07H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0300 - OCEAN HAZARD AREAS

15A NCAC 07H .0304 AECS WITHIN OCEAN HAZARD AREAS
The ocean hazard system of AECs contains all of the following areas:
(1) Ocean Erodible Area. This is the area in which there exists a substantial possibility of excessive erosion and significant shoreline fluctuation. The seaward boundary of this area is the mean low water line. The landward extent of this area is determined as follows:
(a) a distance landward from the first line of stable natural vegetation to the recession line that would be established by multiplying the long-term annual erosion rate times 60, provided that, where there has been no long-term erosion or the rate

is less than two feet per year, this distance shall be set at 120 feet landward from the first line of stable natural vegetation. For the purposes of this Rule, the erosion rates shall be the long-term average based on available historical data. The current long-term average erosion rate data for each segment of the North Carolina coast is depicted on maps entitled "Long Term Annual Shoreline Change Rates updated through 1998" and approved by the Coastal Resources Commission on January 29, 2004 (except as such rates may be varied in individual contested cases, declaratory or interpretive rulings). The maps are available without cost from any local permit officer or the Division of Coastal Management; and

(b) a distance landward from the recession line established in Sub-Item (1)(a) of this Rule to the recession line that would be generated by a storm having a one percent chance of being equaled or exceeded in any given year.

(2) The High Hazard Flood Area. This is the area subject to high velocity waters (including, but not limited to, hurricane wave wash) in a storm having a one percent chance of being equaled or exceeded in any given year, as identified as zone V1-30 on the flood insurance rate maps of the Federal Insurance Administration, U.S. Department of Housing and Urban Development.

(3) Inlet Hazard Area. The inlet hazard areas are natural-hazard areas that are especially vulnerable to erosion, flooding and other adverse effects of sand, wind, and water because of their proximity to dynamic ocean inlets. This area shall extend landward from the mean low water line a distance sufficient to encompass that area within which the inlet will, based on statistical analysis, migrate, and shall consider such factors as previous inlet territory, structurally weak areas near the inlet (such as an unusually narrow barrier island, an unusually long channel feeding the inlet, or an overwash area), and external influences such as jetties and channelization. The areas identified as suggested Inlet Hazard Areas included in the report entitled INLET HAZARD AREAS, The Final Report and Recommendations to the Coastal Resources Commission, 1978, as amended in 1981, by Loie J. Priddy and Rick Carraway are incorporated by reference without future changes are hereby designated as Inlet Hazard Areas except that the Cape Fear Inlet Hazard Area as shown on said map shall not extend northeast of the Baldhead Island marina entrance channel. In all cases, this area shall be an extension of the adjacent ocean erodible area and in no case shall the width of the inlet hazard area be less than the width of the adjacent ocean erodible area. This report is available for inspection at the Department of Environment and Natural Resources, Division of Coastal Management, 1638 Mail Service Center, Raleigh, North Carolina. Small scaled photo copies are available at no charge.

(4) Unvegetated Beach Area. Beach areas within the Ocean Hazard Area where no stable natural vegetation is present may be designated as an unvegetated beach area on either a permanent or temporary basis:

(a) An area appropriate for permanent designation as an unvegetated beach area is a dynamic area that is subject to rapid unpredictable landform change from wind and wave action. The areas in this category shall be designated following detailed studies by the Coastal Resources Commission. These areas shall be designated on maps approved by the Commission and available without cost from any local permit officer or the Division of Coastal Management.

(b) An area that is suddenly unvegetated as a result of a hurricane or other major storm event may be designated as an unvegetated beach area for a specific period of time. At the expiration of the time specified by the Commission, the area shall return to its pre-storm designation. Areas appropriate for such designation are those in which vegetation has been lost over such a large land area that extrapolation of the vegetation line under the procedure set out in Rule .0305(e) of this Section is inappropriate.

The Commission designates as temporary unvegetated beach areas those oceanfront areas in New Hanover, Pender, Carteret and Onslow Counties in which the vegetation line as shown on aerial photography dated August 8, 9, and 17, 1996, was destroyed as a result of Hurricane Fran on September 5, 1996. This designation shall continue until such time as stable, natural vegetation has reestablished or until the area is permanently designated as an unvegetated beach area pursuant to Sub-Item 4(a) of this Rule.

<u>The Commission designates as temporary unvegetated beach areas those oceanfront</u>

areas on Hatteras Island west of the new inlet breach in Dare County in which the vegetation line as shown on NC DOT aerial photographs dated June 2, 2003 or other relevant photography was destroyed as a result of Hurricane Isabel on September 18, 2003 and the remnants of which were subsequently buried by the construction of an emergency berm. This designation shall continue until such time as stable, natural vegetation has reestablished or until the area is permanently designated as an unvegetated beach area pursuant to Sub-Item 4(a) of this Rule.

Authority G.S. 113A-107; 113A-113; 113A-124.

15A NCAC 07H .0306 GENERAL USE STANDARDS FOR OCEAN HAZARD AREAS

(a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in these Rules shall be located according to whichever of the following rules is applicable.

(1) If neither a primary nor 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 erosion setback line. The erosion setback line shall be set at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation or measurement line, where applicable. In areas where the rate is less than two feet per year, the setback line shall be 60 feet from the vegetation line or measurement line, where applicable.

(2) If a primary dune exists in the AEC on or landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary dune or the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line, where applicable. For existing lots, however, where setting the development landward of the crest of the primary dune would preclude any practical use of the lot, development may be located seaward of the primary dune. In such cases, the development shall be located landward of the long-term erosion setback line and shall not be located on or in front of a frontal dune. The words "existing lots" in this Rule shall mean a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership.

(3) If no primary dune exists, but a frontal dune does exist in the AEC on or landward of the lot on which the development is proposed, the development shall be set landward of the frontal dune or landward of the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line, where applicable.

(4) Because large structures located immediately along the Atlantic Ocean present increased risk of loss of life and property, increased potential for eventual loss or damage to the public beach area and other important natural features along the oceanfront, increased potential for higher public costs for federal flood insurance, erosion control, storm protection, disaster relief and provision of public services such as water and sewer, and increased difficulty and expense of relocation in the event of future shoreline loss, a greater oceanfront setback is required for these structures than is the case with smaller structures. Therefore, in addition to meeting the criteria in this Rule for setback landward of the primary or frontal dune or both the primary and frontal dunes, for all multi-family residential structures (including motels, hotels, condominiums and moteliminiums) of more than 5,000 square feet total floor area, and for any non-residential structure with a total area of more than 5,000 square feet, the erosion setback line shall be twice the erosion setback as established in Subparagraph (a)(1) of this Rule, provided that in no case shall this distance be less than 120 feet. In areas where the rate is more than 3.5 feet per year, this setback line shall be set at a distance of 30 times the long-term annual erosion rate plus 105 feet.

(5) Structural additions or increases in the footprint or total floor area of a building or structure represent expansions to the principal structure and both must meet the setback requirements established in Paragraph (a) of this Rule and Rule .0309(a) of this Section. The enclosure of existing roof covered porches ~~will~~ shall be exempt from this requirement if the footprint is not ~~expanded~~ expanded, ~~and~~ modifications to existing foundations are not ~~required.~~ required and the existing porch is located landward of the vegetation line or measurement line which ever is applicable. New development landward of the applicable setback may be cosmetically, but shall not be structurally, attached to an existing structure that does not conform with current setback requirements.

(6) Established common-law and statutory public rights of access to and use of public trust lands and waters in ocean hazard areas shall not be eliminated or restricted. Development shall not encroach upon public accessways nor shall it limit the intended use of the accessways.

(b) In order to avoid weakening the protective nature of ocean beaches and primary and frontal dunes, no development will be

permitted that involves the significant removal or relocation of primary or frontal dune sand or vegetation thereon. Other dunes within the ocean hazard area shall not be disturbed unless the development of the property is otherwise impracticable, and any disturbance of any other dunes shall be allowed only to the extent allowed by Rule .0308(b) of this Section.

(c) In order to avoid excessive public expenditures for maintaining public safety, construction or placement of growth-inducing public facilities to be supported by public funds will be permitted in the ocean hazard area only when such facilities:

(1) clearly exhibit overriding factors of national or state interest and public benefit,
(2) will not increase existing hazards or damage natural buffers,
(3) will be reasonably safe from flood and erosion related damage,
(4) will not promote growth and development in ocean hazard areas.

Such facilities include, but are not limited to, sewers, waterlines, roads, and bridges.

(d) Development shall not cause major or irreversible damage to valuable documented historic architectural or archaeological resources documented by the Division of Archives and History, the National Historical Registry, the local land-use plan, or other reliable sources.

(e) Development shall be consistent with minimum lot size and set back requirements established by local regulations.

(f) Mobile homes shall not be placed within the high hazard flood area unless they are within mobile home parks existing as of June 1, 1979.

(g) Development shall be consistent with general management objective for ocean hazard areas set forth in Rule .0303 of this Section.

(h) Development shall not create undue interference with legal access to, or use of, public resources nor shall such development increase the risk of damage to public trust areas.

(i) Development proposals shall incorporate all reasonable means and methods to avoid or minimize adverse impacts of the project. These measures shall be implemented at the applicant's expense and may include actions that will:

(1) minimize or avoid adverse impacts by limiting the magnitude or degree of the action,
(2) restore the affected environment, or
(3) compensate for the adverse impacts by replacing or providing substitute resources.

(j) Prior to the issuance of any permit for development in the ocean hazard AECs, there shall be a written acknowledgment from the applicant that the applicant is aware of the risks associated with development in this hazardous area and the limited suitability of this area for permanent structures. By granting permits, the Coastal Resources Commission does not guarantee the safety of the development and assumes no liability for future damage to the development.

(k) All relocation of structures requires permit approval. Structures relocated with public funds shall comply with the applicable setback line as well as other applicable AEC rules. Structures including septic tanks and other essential accessories relocated entirely with non-public funds shall be relocated the maximum feasible distance landward of the present location; septic tanks may not be located seaward of the primary structure. In these cases, all other applicable local and state rules shall be met.

(l) Permits shall include the condition that any structure shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration. The structure(s) shall be relocated or dismantled within two years of the time when it becomes imminently threatened, and in any case upon its collapse or subsidence. However, if natural shoreline recovery or beach renourishment takes place within two years of the time the structure becomes imminently threatened, so that the structure is no longer imminently threatened, then it need not be relocated or dismantled at that time. This condition shall not affect the permit holder's right to seek authorization of temporary protective measures allowed under Rule .0308(a)(2) of this Section.

Authority G.S. 113A-107; 113A-113(b)(6); 113A-124.

SECTION .2600 – GENERAL PERMIT FOR CONSTRUCTION OF WETLAND, STREAM AND/OR BUFFER MITIGATION SITES BY THE NORTH CAROLINA ECOSYSTEM ENHANCEMENT PROGRAM OR THE NORTH CAROLINA WETLANDS RESTORATION PROGRAM

15A NCAC 07H .2601 PURPOSE

This general permit will allow for the construction of wetland, stream and/or buffer mitigation sites by the North Carolina Ecosystem Enhancement Program or the North Carolina Wetlands Restoration Program. This permit shall only be applicable where the restoration, creation or enhancement of a wetland, stream and/or buffer system is proposed. This permit shall not apply within the Ocean Hazard System of Areas of Environmental Concern (AEC) or waters adjacent to these AECs with the exception of those portions of shoreline within the Inlet Hazard Area AEC that feature characteristics of Estuarine Shorelines. Such features include the presence of wetland vegetation, lower wave energy, and lower erosion rates than in the adjoining Ocean Erodible Area.

Authority G.S. 113A-107; 113A-118.1.

15A NCAC 07H .2602 APPROVAL PROCEDURES

(a) The applicant must contact the Division of Coastal Management and request approval for development. The applicant shall provide information on site location, a mitigation plan outlining the proposed mitigation activities, and the applicant's name and address.

(b) The applicant must provide either confirmation that a written statement has been obtained signed by the adjacent riparian property owners indicating that they have no objections to the proposed work, or confirmation that the adjacent riparian property owners have been notified by certified mail of the proposed work. Such notice shall instruct adjacent property owners to provide any comments on the proposed development in writing for consideration by permitting officials to the Division of Coastal Management within 10 days of receipt of the notice, and, indicate that no response will be interpreted as no objection. DCM staff will review all comments and detemine,

based on their relevance to the potential impacts of the proposed project, if the proposed project can be approved by a General Permit. If DCM staff finds that the comments are worthy of more in-depth review, the applicant will be notified that an application for a major development permit must be submitted.
(c) DCM staff shall review all comments and determine, based on their relevance to the potential impacts of the proposed project, if the proposed project meets the requirements of the rules in this Section. If DCM staff finds that the comments are worthy of more in-depth review, the applicant will be notified that an application for a major development permit must be submitted.
(d) No work shall begin until a meeting is held with the applicant and appropriate Division of Coastal Management representative. Written authorization to proceed with the proposed development may be issued during this visit. Construction of the mitigation site must be started within 180 days of the issuance date of this permit or the general authorization expires and it shall be necessary to re-examine the proposed development to determine if the general authorization can be reissued.

Authority G.S. 113A-107; 113A-118.1.

15A NCAC 07H .2603 PERMIT FEE
The applicant must pay a permit fee of one hundred dollars ($100.00). This fee may be paid by check or money order made payable to the Department.

Authority G.S. 113A-107; 113A-118.1; 113A-119.1.

15A NCAC 07H .2604 GENERAL CONDITIONS
(a) This permit authorizes only the following activities associated with the construction of wetland, stream or buffer restoration, creation or enhancement projects conforming to the standards herein; the removal of accumulated sediments; the installation, removal and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; the planting of submerged aquatic vegetation; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to remove non-native invasive exotic or nuisance vegetation; and other related activities.
(b) Individuals shall allow authorized representatives of the Department of Environment and Natural Resources (DENR) to make periodic inspections at any time deemed necessary in order to be sure that the activity being performed under authority of this general permit is in accordance with the terms and conditions prescribed herein.
(c) There shall be no unreasonable interference with navigation or use of the waters by the public. No attempt will be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the authorized work.
(d) This permit shall not be applicable to proposed construction where the Department has determined, based on an initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality; air quality; coastal wetlands; cultural or historic sites; wildlife; fisheries resources; or public trust rights.
(e) At the discretion of DCM staff, review of individual project requests may be coordinated with appropriate Division of Marine Fisheries or Wildlife Resources Commission personnel. This coordination may result in a construction moratorium during periods of significant biological productivity or critical life stages.
(f) This permit does not eliminate the need to obtain any other required state, local, or federal authorization.
(g) Development carried out under this permit must be consistent with all local requirements, AEC Guidelines, and local land use plans current at the time of authorization.

Authority G.S. 113A-107; 113A-118.1.

15A NCAC 07H .2605 SPECIFIC CONDITIONS
(a) This general permit shall only be applicable for mitigation site proposals made by the North Carolina Ecosystem Enhancement Program or North Carolina Wetlands Restoration Program.
(b) No excavation or filling of any submerged aquatic vegetation is authorized by this general permit.
(c) The need to cross wetlands in transporting equipment will be avoided or minimized to the maximum extent practicable. If the crossing of wetlands with mechanized or non-mechanized construction equipment is necessary, track and low pressure equipment and/or temporary construction mats shall be utilized for the area(s) to be crossed. The temporary mats shall be removed immediately upon completion of construction.
(d) No permanent structures are authorized by this general permit, except for fences, water control structures, or those structures needed for site monitoring or shoreline stabilization of the mitigation site.
(e) This permit does not convey or imply approval of the suitability of the property for compensatory mitigation for any particular project. The use of any portion of the site as compensatory mitigation for future projects will be determined in accordance with the appropriate regulatory policies and procedures in place at the time such a future project is authorized.
(f) The authorized work must result in a net increase in coastal resource functions and values.
(g) The entire mitigation site shall be protected in perpetuity in its mitigated state and shall be owned by the permittee or its approved designee. An appropriate conservation easement, deed restriction or other appropriate instrument shall be attached to the title for the subject property.
(h) The Division of Coastal Management shall be provided copies of all monitoring reports prepared for the authorized mitigation site.
(i) If water control structures or other hydrologic alterations are proposed, such activities must not increase the likelihood of flooding any adjacent property.

(j) Appropriate sedimentation and erosion control devices, measures or structures must be implemented to ensure that eroded materials do not enter adjacent wetlands, watercourses and property (e.g. silt fence, diversion swales or berms, sand fence, etc.).
(k) If one or more contiguous acre of property is to be graded, excavated or filled, an erosion and sedimentation control plan must be filed with the Division of Land Resources, Land Quality Section, or appropriate government having jurisdiction. The plan must be approved prior to commencing the land-disturbing activity.
(l) All fill material must be clean and free of any pollutants, except in trace quantities.

Authority G.S. 113A-107; 113A-118.1.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Water Treatment Facility Operators Certification Board intends to amend the rules cited as 15A NCAC 18D .0102, .0105, .0201, .0206, .0301-.0304, .0307-.0309, .0403.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *May 12, 2004*
Time: *10:00 a.m.*
Location: *Parker-Lincoln Building, 2728 Capital Blvd, DENR Training Room (1H120), Raleigh, NC 27604*

Reason for Proposed Action:
***15A NCAC 18D .0102** – Provision no longer applicable.*
***15A NCAC 18D .0105** – Addition of a definition.*
***15A NCAC 18D .0201** – Clarification and changes to certification school attendance requirements.*
***15A NCAC 18D .0206** – Clarification on notice requirements.*
***15A NCAC 18D .0301-.0303** – Address change.*
***15A NCAC 18D .0304** – Increase fees.*
***15A NCAC 18D .0307-.0309** – Clarification of text.*
***15A NCAC 18D .0403** – Establish deadline for voluntary certifications and provisions no longer applicable.*

Procedure by which a person can object to the agency on a proposed rule: *If you have any objection(s) to the proposed rules, please forward a typed or handwritten letter indicating your specific reason(s) for your objection(s) to the following address: Tony Arnold, 1635 Mail Service Center, Raleigh, NC 27699-1635.*

Written comments may be submitted to: *Tony Arnold, 1635 Mail Service Center, Raleigh, NC 27699-1635, phone (919) 715-9572, fax (919) 715-2726, and email tony.arnold@ncmail.net.*

Comment period ends: *June 1, 2004*

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** *15A NCAC 18D .0304*
☐ **Substantive** (≥$3,000,000)
☒ **None** *15A NCAC 18D .0102, .0105, .0201, .0206, .0301-.0303, .0307-.0309, .0403*

CHAPTER 18 - ENVIRONMENTAL HEALTH

SUBCHAPTER 18D - WATER TREATMENT FACILITY OPERATORS

SECTION .0100 - GENERAL POLICIES

15A NCAC 18D .0102 ORGANIZATION
~~(a)~~ The Board is organized in accordance with G.S. 90A-21.
~~(b) The vice-chairman and secretary-treasurer are elected from among the membership and shall assume office when elected.~~

Authority G.S. 90A-21.

15A NCAC 18D .0105 DEFINITIONS
The following definitions shall apply throughout this Subchapter:
(1) "Acceptable Experience"
(a) For surface grades means at least 50% of the duties shall consist of active on-site performance of operational duties, including on-site water facility laboratory duties, at a surface water treatment facility. This experience shall be based on the use of mathematics, equipment, materials, maintenance, installation and repair techniques, cross-connection-control and other skills necessary for maintaining and operating a surface water treatment facility. The remaining duties shall be in related fields such as wastewater facility operation, water/wastewater laboratory, water pumping stations, water system design and engineering, wells, distribution systems, or cross-connection-control. The experience of Division of Environmental Health,

Public Water Supply Section personnel shall be acceptable if at least 50% of their job duties include inspection or on-site technical assistance of public water systems.

(b) For well grades means at least 50% of the duties shall consist of active on-site performance of operational duties for public water systems with chemical treatment having one or more wells. This experience shall be based on the use of mathematics, equipment, materials, maintenance, installation and repair techniques, cross-connection-control and other skills necessary for maintaining and operating a treated well water system. The remaining duties shall be in related fields such as wastewater facility operation, water/wastewater laboratory, water pumping stations, water system design and engineering, surface facilities, distribution systems, or cross-connection-control. The experience of Division of Environmental Health, Public Water Supply Section personnel shall be acceptable if at least 50% of their job duties include inspection or on-site technical assistance of public water systems.

(c) For distribution grades means at least 50% of the duties shall consist of active on-site performance of operational duties for distribution systems within public water systems. This experience shall be based on the use of mathematics, equipment, materials, maintenance, installation and repair techniques, cross-connection-control and other skills necessary for maintaining and operating a water distribution system. The remaining duties shall be in related fields such as wastewater facility operation, water/wastewater laboratory, water pumping stations, water system design and engineering, surface facilities, wells, or cross-connection-control. The experience of Division of Environmental Health, Public Water Supply Section personnel shall be acceptable if at least 50% of their job duties include inspection or on-site technical assistance of public water systems.

(d) For cross-connection-control grade means at least 50% of the duties shall consist of on-site performance of cross-connection-control duties for a public water system. This experience shall be based on the use of mathematics, equipment, materials, maintenance, installation and repair techniques, back flow prevention and other skills necessary for maintaining and operating a cross-connection-control program for a public water system. The remaining duties shall be in related fields such as wastewater facility operation, water/wastewater laboratory, water pumping stations, water system design and engineering, surface facilities, or wells. The experience of Division of Environmental Health, Public Water Supply Section personnel shall be acceptable if at least 50% of their job duties include inspection or on-site technical assistance of public water systems.

(2) "Certified Operator" means any holder of a certificate issued by the Board in accordance with the provisions of G.S. 90A-20 to -29.

(3) "College Graduate" means a graduate of a regionally accredited four-year institution awarding degrees on the bachelor level.

(4) "Licensee" means any person who holds a current certificate issued by the water treatment facility operators board of certification.

(5) "Owner" shall mean person, political subdivision, firm, corporation, association, partnership or non-profit corporation formed to operate a public water supply facility.

(6) "Political Subdivision" means any city, town, county, sanitary district, or other governmental agency or privately owned public water supply operating a water treatment facility.

(7) "Secretary" shall mean the Secretary of the Department of Environment and Natural Resources.

(8) "Service Connection" means a water tap made to provide a water connection to the water distribution system.

(9) "Fire Protection System" means dry or wet sprinkler systems or fire hydrant connection to the water distribution system.

(10) "Water Treatment Facility" means any facility or facilities used or available for use in the collection, treatment, testing, storage, pumping, or distribution of water for a public water system.

Authority G.S. 90A-21(c).

SECTION .0200 - QUALIFICATION OF APPLICANTS AND CLASSIFICATION OF FACILITIES

15A NCAC 18D .0201 GRADES OF CERTIFICATION

Applicants for the various grades of certification shall be 18 years old and meet the following educational and experience requirements:

(1) GRADE A-SURFACE shall have one year acceptable experience at a surface water facility while holding a Grade B-Surface certificate and have satisfactorily completed an A-Surface school ~~conducted~~ approved by the Board.

(2) GRADE B-SURFACE shall:

(a) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a surface water ~~facility,~~ facility and have satisfactorily completed a B-Surface school approved by the Board; or

(b) Have one year of acceptable experience at a surface water facility while holding a Grade C-Surface certificate and have satisfactorily completed a B-Surface school ~~conducted~~ approved by the Board.

(3) GRADE C-SURFACE shall:

(a) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a surface water ~~facility,~~ facility and have satisfactorily completed a C-Surface school approved by the Board; or

(b) Be a high school graduate or equivalent, have six months acceptable experience at a surface water facility and have satisfactorily completed a C-Surface school ~~conducted~~ approved by the Board.

(4) GRADE A-WELL shall have one year of acceptable experience at a well water facility while holding a Grade B-Well certificate and have satisfactorily completed an A-Well school ~~conducted~~ approved by the Board.

(5) GRADE B-WELL shall:

(a) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a well water ~~facility,~~ facility and have satisfactorily completed a B-Well school approved by the Board; or

(b) Have one year of acceptable experience at a well water facility while holding a Grade C-Well certificate and have satisfactorily completed a B-Well school ~~conducted~~ approved by the Board.

(6) GRADE C-WELL shall:

(a) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have ~~six~~ three months of acceptable experience at a well water ~~facility,~~ facility and have satisfactorily completed an C-Well school approved by the Board; or

(b) Be a high school graduate or equivalent, have six months of acceptable experience at a well water facility, and have satisfactorily completed a C-Well school ~~conducted~~ approved by the Board, or

~~(c) Have one year of acceptable experience at a well water facility and have satisfactorily completed a C-Well school conducted by the Board, or~~

~~(d)~~(c) Hold a Grade A-Surface certification and have satisfactorily completed a C-Well school ~~conducted~~ approved by the Board.

(7) GRADE D-WELL shall be a high school graduate or equivalent, have three months of acceptable experience at a well water facility, and have satisfactorily completed a C-Well or D-Well school approved by the Board.

~~(a) Be a high school graduate or equivalent, and have six months of acceptable experience at a well water facility, or~~

~~(b) Be a high school graduate or equivalent, have three months of acceptable experience at a well water facility, and have satisfactorily completed a D-Well school conducted by the Board, or~~

~~(c) Have six months of acceptable experience at a well water facility and have satisfactorily completed a D-Well school conducted by the Board.~~

(8) GRADE A-DISTRIBUTION shall have one year of acceptable experience at Class B or higher distribution system while holding a Grade B-Distribution certificate and have satisfactorily completed an A-Distribution school ~~conducted~~ approved by the Board. ~~Board, and hold current cardiopulmonary resuscitation certificate.~~

(9) GRADE B-DISTRIBUTION shall:

(a) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a Class B or higher distribution ~~system,~~ system and have satisfactorily completed an B-Distribution school approved by the Board; or

(b) Have one year of acceptable experience at a Class C or higher distribution system while holding a Grade C-Distribution certificate and have satisfactorily completed a B-Distribution school ~~conducted~~ approved by the Board.

(10) GRADE C-DISTRIBUTION shall hold a certificate of completion of trench shoring training ~~conducted~~ approved by the Board and shall:

(a) Be a college graduate with a bachelor's degree in the physical or natural sciences, or be a graduate of a two year technical program with a diploma in water and wastewater technology, have ~~six~~ three months of acceptable experience at a Class C or higher distribution ~~system,~~ system and have satisfactorily completed an C-Distribution school approved by the Board; or

(b) Be a high school graduate or equivalent, have six months of acceptable experience at a Class D or higher distribution system and have satisfactorily completed a C-Distribution school ~~conducted~~ approved by the Board. ~~Board, or~~

(c) Have one year of acceptable experience at a Class D or higher distribution system and have satisfactorily completed a C-Distribution school conducted by the Board.

(11) GRADE D-DISTRIBUTION shall be a high school graduate or equivalent, have three months of acceptable experience at a distribution system, and have satisfactorily completed a D-Distribution school approved by the Board.

~~(a) Be a high school graduate or equivalent, and have six months of acceptable experience at a distribution system, or~~

~~(b) Be a high school graduate or equivalent, have three months of acceptable experience at a distribution system, and have satisfactorily completed a D-Distribution school conducted by the Board, or~~

~~(c) Have six months of acceptable experience at a distribution system and have satisfactorily completed a D-Distribution school conducted by the Board.~~

(12) GRADE CROSS-CONNECTION-CONTROL shall:

(a) Be a college graduate with a bachelor's degree in the physical or natural sciences, or be a graduate of a two-year technical program with a degree in water and wastewater or civil engineering technology, and have satisfactorily completed a cross connection control school ~~conducted~~ approved by the Board, or

(b) Be a high school graduate or equivalent, have six months of acceptable experience at Class ~~C~~ D -Distribution or higher system or have one year experience in the operations of cross connection control devices and have satisfactorily completed a cross connection control school ~~conducted~~ approved by the Board, or

~~(c) Have one year of acceptable experience at a Class CDistribution or higher system while holding a Grade C-Distribution or higher certificate and have satisfactorily completed a cross connection school conducted by the Board, or~~

~~(d)~~(c) Be a plumbing contractor licensed by the State of North Carolina and have satisfactorily completed a cross connection control school ~~conducted~~ approved by the Board.

Authority G.S. 90A-21(c); 90A-22; 90A-23; 90A-24.

15A NCAC 18D .0206 CERTIFIED OPERATOR REQUIRED

(a) All public water systems shall have a certified operator in responsible charge for each water treatment facility that alters the physical, chemical, or microbiological characteristics of the water; has approved plans for such alterations; or has equipment installed for such alterations. Upon vacancy of a position resulting in noncompliance with this requirement each facility shall notify the Board Office and Regional Office, in writing, within 10 days.

(b) There shall be an operator holding at least a Grade ~~C~~ Surface certification or above assigned to be on duty on the premises when a surface water treatment facility is treating water. Implementation of this requirement is subject to the following provisions:

(1) Upon vacancy of a position resulting in noncompliance with this requirement each

facility shall notify the Board Office within 24 hours or at the start of the next regular business day of such vacancy;

(2) Upon such vacancy the facility shall have 90 days to fill the position with a certified grade C-Surface operator or ~~above operator or shall have pending approval for a temporary certification for the operator;~~ an operator with a temporary C-Surface certification.

~~(3) Within 18 months of vacancy the facility shall have a certified Grade C or above operator assigned to fill the vacancy.~~

(c) There shall be an operator in responsible charge for the distribution portion of the community and non-transient non-community public water systems. ~~systems designated in Subparagraphs (c)(1) and (c)(2) of this Rule.~~ This operator shall possess a valid certificate issued by the Board equivalent to or exceeding the distribution classification of the facility for which he or she is designated. A system serving 100 or fewer service connections is exempt from this requirement if it has an operator in responsible charge as required in Paragraph (a) of this Rule.

~~(1) No later than July 1, 1999 all community public water systems serving greater than 100 service connections shall have a certified distribution operator in responsible charge of the distribution portion of the system.~~

~~(2) No later than July 1, 2001 all community and non-transient non-community public water systems shall have a certified distribution operator in responsible charge of the distribution portion of the system. A system serving 100 or fewer service connections is exempt from this requirement if it has an operator in responsible charge as required in Paragraph (a) of this Rule.~~

(d) By July 1, 2003 there shall be an operator in responsible charge for the cross-connection-control facilities of the distribution system for all public water systems required by 15A NCAC 18C to have five or more testable backflow prevention assemblies. This operator shall possess a valid Grade Cross-Connection-Control certificate issued by the Board.

(e) All operators of community and non-transient non-community public water systems shall follow the standard operating procedures established by the operator in responsible charge. Any decisions about water quality or quantity that affect public health which have not been defined in the standard operating procedures shall be referred to the operator in responsible charge or to the certified operator on duty.

Authority G.S. 90A-20; 90A-28; 90A-29; 90A-32.

SECTION .0300 - APPLICATIONS AND FEES

15A NCAC 18D .0301 APPLICATION FOR EXAM

(a) All applicants for regular exams shall file an application on a form available from: ~~Chairman, North Carolina Water Treatment Facility Operators Certification Board, P.O. Box 27687, Raleigh, North Carolina 27611-7687.~~ Chairman, North Carolina Water Treatment Facility Operators Certification Board, 1635 Mail Service Center, Raleigh, North Carolina 27699-1635.

(b) Applications for certification must be submitted to the Board at least 30 days prior to the date of the examination.

~~(c) The application shall include the following information:~~

~~(1) biographical data;~~

~~(2) place of employment;~~

~~(3) education;~~

~~(4) work experience; and~~

~~(5) date and location of exam.~~

~~(d)~~(c) The applicant shall certify that the information given is correct to the best of his/her knowledge. In addition, the applicant's supervisor shall certify that he/she has reviewed the application and recommends that the applicant be considered for certification by the Board.

~~(e)~~(d) Applicants are required to take the examination at the place and date specified on the application.

Authority G.S. 90A-21(c); 90A-24.

15A NCAC 18D .0302 APPLICATION FOR RECIPROCITY

~~(a)~~ All applicants for reciprocity shall file an application on a form available from: ~~Chairman, North Carolina Water Treatment Facility Operators Certification Board, P.O. Box 27687, Raleigh, North Carolina 27611-7687.~~ Chairman, North Carolina Water Treatment Facility Operators Certification Board, 1635 Mail Service Center, Raleigh, North Carolina 27699-1635.

~~(b) The application shall include the following information:~~

~~(1) biographical data;~~

~~(2) the grade of certificate held;~~

~~(3) the name of the state that issued the certificate;~~

~~(4) the name of the last employer in that state; and~~

~~(5) a record of the applicant's previous employment.~~

Authority G.S. 90A-21(c); 90A-24.

15A NCAC 18D .0303 APPLICATION FOR TEMPORARY CERTIFICATE

~~(a)~~ All applicants for a temporary certificate shall file an application on a form available from: ~~Chairman, North Carolina Water Treatment Facility Operators Certification Board, P.O. Box 27687, Raleigh, North Carolina 27611-7687.~~ Chairman, North Carolina Water Treatment Facility Operators Certification Board, 1635 Mail Service Center, Raleigh, North Carolina 27699-1635.

~~(b) The application shall include the following information:~~

~~(1) Name and address of operator requesting temporary certificate;~~

~~(2) Certification that the person applying for the certificate is employed by the utility;~~

~~(3) Name of treatment facility;~~

~~(4) Date the person was employed by the facility;~~

~~(5) Signature of the town official or utility owner; and~~

~~(6) The date of the application.~~

Authority G.S. 90A-21(c); 90A-24.

15A NCAC 18D .0304 FEE SCHEDULE

(a) The cost of examination and certification shall be ~~thirty dollars ($30.00).~~ fifty dollars ($50.00).
(b) The cost of a temporary certificate shall be ~~twenty-five dollars ($25.00)~~fifty dollars ($50.00) for a new certificate.
(c) The examination and certification fee must be paid to the Board when the application is submitted.
(d) The cost of the annual certification renewal shall be ~~twenty-five dollars ($25.00).~~thirty dollars ($30.00). Renewal fees shall be ~~payable~~ due December 31~~the first~~ of each calendar year and shall be delinquent on the first day of February. ~~February if not paid prior to that date.~~ Delinquent certifications shall be charged an additional fee of thirty dollars ($30.00). ~~($30.00) on the first day of February of each year.~~
~~(e) The operator shall keep the Board informed of his/her current mailing address.~~
(e) The operator shall notify the Board, in writing, within 30 days of any change in his/her address.

Authority G.S. 90A-27.

15A NCAC 18D .0307 EXPIRATION AND REVOCATION OF CERTIFICATE

~~(a) If an operator fails to renew his/her certificate and allows it to lapse two years, his/her certificate shall be revoked.~~
~~(b) If an operator fails to meet the continuing education requirements of Rule .0308(a) of this Section, his/her certificate shall be revoked.~~
~~(c) If an operator in responsible charge fails to meet the requirements of 15A NCAC 18D .0701, his/her certificate may be revoked.~~
~~(d) Any person having a certification revoked for any reason other than Paragraph (a) or (b) of this Rule, shall appear before the Board for approval to be eligible for any further certification or reinstatement of certification~~.
(a) If the operator fails to pay the renewal fee and/or meet the continuing education requirements of Rule .0308(a) of this Section, the certificate shall expire.
(b) If an operator in responsible charge fails to meet the requirements of 15A NCAC 18D .0701, his/her certificate may be revoked.
(c) An individual who has had certification revoked by the Board shall petition the Board for any new certification sought and may not petition the Board for such new certification sooner that two years after the effective date of the revocation.

Authority G.S. 90A-25.1; 90A-26.

15A NCAC 18D .0308 PROFESSIONAL GROWTH HOURS

(a) All certified operators who have held a certificate for the full year shall complete six contact hours of instruction during the year immediately preceding annual certification renewal for each certification renewed. The same contact hours may be credited to all certifications for which the training is relevant. The instruction shall be related to system operation or professional development as needed and determined by the individual operator. ~~With the annual certification renewal application, the operator shall report on the Board's form the contact hours completed during the year.~~ Proof of continuing education shall be submitted to the Board with the annual certification renewal form.
(b) The organization providing the instruction shall give each participant a certificate or other proof of successful completion which includes the name of the provider, the provider's address, and contact person with telephone number. The proof of completion shall identify the name of the participant, the number of contact hours completed, the course name, the instructor's name, and the date of the instruction received. For in-house training, an instructor from outside of the organization shall provide the instruction. If an operator fails to provide proof of the required six contact hours of instruction at the time of annual certification renewal, the certification shall be ~~revoked.~~ expired.

Authority G.S. 90A-25.1; 90A-26.

15A NCAC 18D .0309 CERTIFICATION REINSTATEMENT

~~(a) An operator whose certification has been revoked for failure to renew for two years may have the certification reinstated by passing another certification examination for that grade.~~
~~(b) An operator whose certification has been revoked for failure to obtain six hours of annual continuing education credit may have the certification reinstated by passing another certification examination for that grade.~~
(a) An operator whose certification has expired may seek reinstatement within two years of expiration by paying any renewal fees in arrears, including late fees and passing another examination of that grade.
(b) Any person having a certification expired for more than two years or revoked shall apply to the Board for approval to be eligible for any further certification or reinstatement of certificate.

Authority G.S. 90A-25.1; 90A-26.

SECTION .0400 - ISSUANCE OF CERTIFICATE

15A NCAC 18D .0403 ISSUANCE OF GRADE CERTIFICATE

(a) When the names of the operators and the grade of their current voluntary certificate are known, the Board shall notify the operator involved and upon payment of the license fee issue a grade certificate corresponding to the grade of certification now held by the operator.
~~(b) The existing operator in responsible charge for systems which have no treatment and have fewer than 100 service connections may be granted a grandparented certification valid only for the system or systems that the operator managed on August 2, 2000. The operator shall not be responsible for more than 10 systems without written permission from the Board. All grandparented certifications are site specific, non-transferable, and shall expire on July 1, 2003. If the classification of the plant or distribution system managed changes to a higher level, the grandparented certification shall no longer be valid for the oversight of the system. Grandparented certifications may be issued after July 1, 2001.~~
~~(c)~~(b) To obtain a certificate the applicant shall satisfactorily complete an examination except in the case of a ~~grandparented certificate,~~ temporary certificate ~~or when certification is by~~

~~reciprocity,~~ or when the certificate is being issued to the holder of a current voluntary certificate pursuant to Paragraph (a) of this Rule.
(c) All distribution and cross connection voluntary certification conversions shall be obtained by December 31, 2005.

Authority G.S. 90A-21(c); 90A-23; 90A-25.

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TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 14 – BOARD OF COSMETIC ART EXAMINERS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Cosmetic Art Examiners intends to amend the rules cited as 21 NCAC 14G .0111; 14H .0107.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *April 19, 2004*
Time: *10:00 a.m.*
Location: *NC State Board of Cosmetic Art, 1201-110 Front St., Raleigh, NC*

Reason for Proposed Action: *To make changes in the school curriculum and the water supply in salons and beauty schools.*

Procedure by which a person can object to the agency on a proposed rule: *Any person who objects to these proposed rules should send an explanation of objection to Dee Williams, NC State Board of Cosmetic Art Examiners, 1201-110 Front St., Raleigh, NC 27609.*

Written comments may be submitted to: *Dee Williams, NC State Board of Cosmetic Art Examiners, 1201-110 Front St., Raleigh, NC 27609, (919) 733-4117 ext. 222, fax (919) 733-4127, and email wdee17@yahoo.com.*

Comment period ends: *June 1, 2004*

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 14G - REQUIREMENTS FOR THE ESTABLISHMENT OF COSMETIC ART SCHOOLS

21 NCAC 14G .0111 CHANGE OF LOCATION: OWNERSHIP OR MANGEMENT
If the location of a cosmetic art school changes, or if there is a transfer of majority ownership of a cosmetic art school, whether by sale, lease or otherwise, a new approval application is required.

Authority G.S. 88B-4.

SUBCHAPTER 14H – SANITATION

21 NCAC 14H .0107 WATER SUPPLY
A beauty establishment shall have an adequate and convenient supply of hot and cold ~~water,~~ water in the clinic area, approved by the local health department.

Authority G.S. 88B-4.

*This Section includes the Register Notice citation to rules approved by the Rules Review Commission (RRC) at its meeting January 15, 2004, and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules are published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

APPROVED RULE CITATION				REGISTER CITATION TO THE NOTICE OF TEXT
02	NCAC	48F	.0301-.0302	18:09 NCR
02	NCAC	48F	.0304*	18:09 NCR
08	NCAC	01	.0101	n/a G.S. 150B-21.5(a)(4)
08	NCAC	02	.0101-.0108	17:07 NCR
08	NCAC	02	.0110*	17:07 NCR
08	NCAC	02	.0111	17:07 NCR
08	NCAC	02	.0112*	17:07 NCR
08	NCAC	02	.0113	17:07 NCR
08	NCAC	04	.0101-.0109	17:07 NCR
08	NCAC	04	.0201-.0208	17:07 NCR
08	NCAC	04	.0301-.0303*	17:07 NCR
08	NCAC	04	.0304-.0305	17:07 NCR
08	NCAC	04	.0306-.0307*	17:07 NCR
08	NCAC	06B	.0101-.0105*	17:07 NCR
08	NCAC	07B	.0101-.0102*	17:07 NCR
08	NCAC	09	.0101-.0105	17:07 NCR
08	NCAC	09	.0106-.0109*	17:07 NCR
08	NCAC	10B	.0101	17:07 NCR
08	NCAC	10B	.0102-.0108*	17:07 NCR
08	NCAC	12	.0101-.0110*	17:07 NCR
08	NCAC	12	.0111	17:07 NCR
10A	NCAC	21A	.0201*	18:03 NCR
10A	NCAC	21A	.0602-.0603*	18:03 NCR
10A	NCAC	21A	.0606-.0608*	18:03 NCR
10A	NCAC	21B	.0410*	18:08 NCR
11	NCAC	04	.0427*	18:10 NCR
11	NCAC	11B	.0104	18:10 NCR
11	NCAC	11B	.0106	18:10 NCR
11	NCAC	11B	.0108-.0111	18:10 NCR
11	NCAC	11B	.0113-.0114	18:10 NCR
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11	NCAC	11B	.0139	18:10 NCR
11	NCAC	11B	.0144-.0147	18:10 NCR
11	NCAC	11B	.0149-.0151	18:10 NCR
11	NCAC	11C	.0110	18:10 NCR
11	NCAC	11C	.0122	18:10 NCR
11	NCAC	11C	.0124-.0126	18:10 NCR
11	NCAC	11C	.0131	18:10 NCR
11	NCAC	11C	.0206	18:10 NCR
11	NCAC	11C	.0309	18:10 NCR
11	NCAC	11D	.0115-.0167	18:10 NCR
11	NCAC	11F	.0601-.0605	18:10 NCR
11	NCAC	14	.0415	18:10 NCR
11	NCAC	14	.0705	18:10 NCR
12	NCAC	09G	.0405*	18:08 NCR
12	NCAC	11	.0505*	18:04 NCR
15A	NCAC	01R	.0101*	18:09 NCR

15A	NCAC	18A	.2508*	18:04 NCR
15A	NCAC	18A	.2511*	18:04 NCR
15A	NCAC	18A	.2529	18:04 NCR
15A	NCAC	18A	.2543*	18:04 NCR
19A	NCAC	02D	.0532*	18:09 NCR
21	NCAC	16M	.0101-.0102	18:07 NCR
21	NCAC	29	.0601	18:06 NCR
21	NCAC	29	.0604-.0605*	18:06 NCR
21	NCAC	29	.0606	18:06 NCR
21	NCAC	29	.0608	18:06 NCR
21	NCAC	29	.0609-.0611*	18:06 NCR
21	NCAC	29	.0614-.0616*	18:06 NCR
21	NCAC	34A	.0201*	18:09 NCR
21	NCAC	46	.1317*	18:07 NCR
21	NCAC	46	.1503	18:07 NCR
21	NCAC	46	.1602-.1603	18:07 NCR
21	NCAC	46	.1801	18:07 NCR
21	NCAC	46	.1807	18:07 NCR
21	NCAC	46	.1813*	18:07 NCR
21	NCAC	46	.1818*	18:07 NCR
21	NCAC	46	.2509*	18:07 NCR
21	NCAC	46	.2601*	18:07 NCR
21	NCAC	46	.2612	18:07 NCR
21	NCAC	46	.3101*	18:07 NCR
21	NCAC	46	.3202-.3205	18:07 NCR
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21	NCAC	46	.3209	18:07 NCR
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21	NCAC	58A	.0104*	18:08 NCR
21	NCAC	58A	.0110*	18:08 NCR
21	NCAC	58A	.0302-.0303*	18:08 NCR
21	NCAC	58A	.0401*	18:08 NCR
21	NCAC	58A	.0403*	18:08 NCR
21	NCAC	58A	.0502-.0503*	18:08 NCR
21	NCAC	58A	.0505*	18:08 NCR
21	NCAC	58A	.1702	18:08 NCR
21	NCAC	58C	.0311*	18:08 NCR
21	NCAC	58C	.0603*	18:08 NCR
21	NCAC	58C	.0605	18:08 NCR
21	NCAC	58C	.0608	18:08 NCR
21	NCAC	58E	.0203*	18:08 NCR
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21	NCAC	58E	.0308	18:08 NCR
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21	NCAC	58E	.0510*	18:08 NCR
21	NCAC	61	.0201*	18:09 NCR
21	NCAC	61	.0204*	18:09 NCR
21	NCAC	61	.0303*	18:09 NCR
21	NCAC	61	.0304	18:09 NCR
21	NCAC	61	.0310*	18:09 NCR

TITLE 2 - DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES

02 NCAC 48F .0304 PLANT SPECIES OF SPECIAL CONCERN

(a) Special Concern Endangered Plant Species are those species that appear on both the Endangered Species List and on the Special Concern Species List and that can be offered for propagation to propagators under permit.

(1) Cystopteris tennesseensis - Shaver
Tennessee Bladderfern;

(2) Delphinium exaltatum - Aiton
Tall Larkspur;

(3) Echinacea laevigata - (Boynton & Beadle) Blake Smooth Coneflower;
(4) Gentianopsis crinita - (Froehlich) Ma Fringed Gentian;
(5) Geum radiatum - Michaux Spreading Avens;
(6) Hydrastis canadensis - L. Goldenseal, Orangeroot;
(7) Kalmia cuneata - Michaux White Wicky;
(8) Lilium pyrophilum – Skinner & Sorrie Sandhills bog lily;
(9) Pellaea wrightiana - Hooker Wright's Cliff-brake Fern;
(10) Rhus michauxii - Sargent Michaux's Sumac;
(11) Sarracenia jonesii - Wherry Mountain Sweet Pitcher Plant;
(12) Sarracenia oreophila - (Kearney) Wherry Green Pitcher Plant;
(13) Shortia galacifolia - T. & G. Oconee Bells.

(b) Special Concern Threatened Plant Species are those species that appear on both the Threatened Species List and on the Special Concern Species List and that can be offered for propagation to propagators under permit.
(1) Eupatorium resinosum -- Torr. ex DC. Resinous Boneset;
(2) Helonias bullata - L. Swamp Pink;
(3) Liatris helleri - (Porter) Porter Heller's Blazing Star;
(4) Lilium grayi - Watson Gray's Lily;
(5) Sabatia kennedyana - Fern. Plymouth Gentian;
(6) Schisandra glabra - (Brickel) Rehder Magnolia Vine.

(c) Special Concern Not Endangered or Threatened Plant Species are those species that appear on the Special Concern Species List but do not appear on the Endangered Species List or the Threatened Species List and that are unlawful to distribute, sell or offer for sale except as otherwise provided in 02 NCAC 48F .0305 and .0306.
(1) Dionaea muscipula - Ellis Venus Flytrap;
(2) Panax quinquefolius - L. Ginseng.

History Note: Authority G.S. 106-202.15;
Eff. June 30, 1981;
Amended Eff. March 1, 2004; July 1, 1998; June 1, 1991; August 1, 1990; May 1, 1984.

TITLE 8 - BOARD OF ELECTIONS

08 NCAC 01 .0101 AGENCY NAME: ADDRESS: AND HOURS

The offices of the State Board of Elections are located at 506 North Harrington St., Raleigh, North Carolina, and the operating hours are 8:00 a.m. to 5:00 p.m., Monday through Friday.

History Note: Authority G.S. 163-22;
Eff. March 12, 1976;
Amended Eff. January 1, 2004.

08 NCAC 02 .0110 ACTIONS OF COUNTY BOARD AS TO ELECTION PROTESTS

(a) The county board shall deliver or place in the mail, a copy of an election protest form and any attachments to it, to the State Board of Elections within 24 hours after it is filed. Faxing the protest, with attachments, on that same day it was filed to the State Board shall constitute the required delivery. Sending the protest and attachments, by e-mail, on the same day it was filed shall also constitute the required delivery.
(b) The county board may not consider election protests not filed in time, but shall refer all such untimely protests, along with copies of the protest and attachments, to the State Board of Elections office for consideration of a possible hearing by the State Board of Elections under G.S. 163-182.12.
(c) If after preliminary consideration of a protest, the county board determines that a hearing should be held as authorized by G.S. 163-182.10, the board shall set the hearing no later than ten business days from the date of the preliminary consideration, and shall start no earlier than 8:00 a.m. and no later than 8:00 p.m. at any location set by the county board of elections. The county board may continue hearings for good cause. Only for good cause and upon informing the State Board of Elections office, may a hearing be set on or continued to a weekend day or holiday.
(d) Notice of hearing as required by G.S. 163-182.10 (b)(2) shall be given at least three business prior to the day of the hearing, and the notice required shall be actual notice by any means chosen by the county board. Any oral notice of the hearing shall be followed as soon as possible with a written notice. The oral notice shall constitute valid notice meeting the three-day notice requirement.
(1) Upon a reasonable and relevant request by a protester or interested person, the chair or any two members of the county board may issue subpoenas for persons or documents. Such subpoenas shall be served in the same matter as allowed in the North Carolina Rules of Civil Procedure.
(2) The county board shall notify the person protesting, any affected candidate, and any affected officeholder of its decision in a protest hearing no later than 5:00 p.m. the next day after the conclusion of the hearing itself. The board shall file at the board office a written decision within the mandates of G.S. 163-182.10 (d) by 5:00 p.m. five business days after the oral decision is given to the person filing the protest. Such written decision shall be served by any means of actual delivery upon the protestor and any affected candidate or officeholder within 24 hours after being filed at the board office. Nothing herein shall

discourage more prompt decisions and written orders.

(3) All election protest hearings before county boards shall be recorded by a court reporter. The hearing need not be transcribed unless the board's decision is appealed. Upon notice of appeal to the State Board of an election protest, the county board shall cause the record of the hearing to be transcribed and delivered to the State Board, at the county board's expense, within seven business days of the notice of appeal. A county board may cause hearings, that on their face do not present merit to be recorded by mechanical means and not by court reporter only with prior permission of the Executive Director of the State Board of Elections. Any non-transcripted record of the county hearings may be destroyed 60 days after the date of hearing if not appealed, or 60 days after the entry of any final order or decision in an appealed hearing. Transcripts of hearings shall be kept for two years after their creation.

(4) If the State Board sets an appeal for hearing, it shall designate who shall appear on behalf of the county board.

History Note: Authority G.S. 163-22; 163-182-10;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 02 .0112 APPEAL TO THE STATE BOARD OF ELECTIONS

All appeals of a county board of election protest decision must use the following form:

APPEAL OF ELECTION PROTEST TO STATE BOARD OF ELECTIONS

(Use of this form is required by G. S. 163-182.11 (a))

A copy of this appeal must be given to the county board of elections within 24 hours (weekends and holidays excluded) after the county board files its written decision at its office. This same appeal must be filed with or mailed to the State Board of Elections by the end of the second day following the county board decision if the protest involves a first primary. As to a protest of any other election, this appeal must be filed or deposited in the mail by the end of the fifth day following the county board decision. See G.S. 163-182.11 (a). A copy of the original election protest form with attachments must be filed with this appeal. A copy of the county board decision must be filed with this appeal. The county board will provide the record on appeal. As many additional sheets as are necessary to answer the questions below may be attached, but they must be numbered. Please print or type your answers.

1. Full name, mailing address, home and business phone, fax number, and e-mail address of undersigned.

____

2. Are you the person who filed the original protest, a candidate or office holder adversely affected by the county decision, or someone else whose interest has been adversely affected by the county decision?

____

3. State the date, place, kind of election, and results of the election protested (if different from the information on the election and its results as set out in the attached original protest form).

____

4. State the name, mailing address, home phone, and business phone of all candidates involved in the protested election.

____

5. State the date of the county board hearing____

6. State the legal and factual basis for your appeal.

____

7. Is there any material submitted with this appeal that was not presented to and considered by the county board? Is so, please identify and state why it was not presented to the county board. Why do you think the State Board of Elections should consider it?

____

8. Normally the State Board will make its decision in an appeal based upon the record from the county board. If you desire the record in this matter to be supplemented, additional evidence to be considered, or a completely new hearing, please state such desire and why it should be allowed in this appeal. See G.S. 163-182.11 (b).

____

9. What relief do you seek? Why?

____

10. Have you read and reviewed G.S. 163-182.11 through G.S. 163-182.14 and the current North Carolina State Board of Elections regulations on appeals of election protests?

11. Besides a copy of the original protest and the county board decisions, this appeal includes___ pages of additional answers and__ pages of exhibits and documents not included in the original protest and decision.

____

Signature of Person Appealing Date Appeal Signed

Date appeal received by State Board of Elections

____

(To be entered by the State Board of Elections staff)

Send your appeal to, or it you have questions contact: North Carolina State Board of Elections, P.O. Box 27255, Raleigh, NC 27611-7255, (919) 733-7173.

History Note: Authority G.S.163-22; 163-182.11;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 04 .0301 REQUIREMENTS OF VOTING

SYSTEMS

Any voting system used in any election in North Carolina shall be constructed to fulfill the following requirements:

(1) It shall be designed to reasonably secure secrecy of the voter in the act of voting;
(2) It shall enable the voter to vote a straight party ticket in a general election;
(3) It shall require the voter to vote for the candidates for president and vice-president separately from the straight party vote;
(4) It shall provide capacity for listing of all nominees of all recognized political parties and other lawful candidates;
(5) It shall, except in primary elections, permit the voter to vote for all the candidates of one party, or in part for the candidates of one or more other parties;
(6) It shall permit the voter to vote for only as many persons for an office as the voter chooses and is lawfully entitled to vote for;
(7) It shall prevent the voter from voting for the same persons more than once for the same office;
(8) It shall permit the voter to vote for or against only the question(s) the voter may have the right to vote;
(9) It shall permit each voter in a general election but not in a primary, to write in the name of persons for whom he desires to vote, whose names do not appear upon the ballot, except where prohibited by G.S. 163-123 or other statutes;
(10) It shall be equipped for use in primary elections so that the voter may vote only in the primary election to which the voter is entitled to vote;
(11) When properly operated, it shall correctly register or record, and accurately count all votes cast for all ballot items;
(12) It shall contain a visible public counter that shall show at all times during an election the number of persons who have voted;
(13) It shall clearly indicate to the voter during the act of voting the ballot items the voter has selected;
(14) Vote totals for each ballot item shall be contained by a method that is locked and concealed at all times during the time the polls are open;
(15) It shall meet current Federal Voting System Standards or other applicable Federal Standards;
(16) It shall be suitably designed and durably constructed for the conduct of elections; and
(17) It shall be equipped to provide retrievable ballots during absentee voting where an absentee voter's ballot is linked to that voter for possible retrieval if it becomes necessary to take action as to that cast ballot.

History Note: Authority G.S. 163-22; 163-165.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 04 .0302 APPROVAL OF VOTING SYSTEMS

(a) Before approving a voting system for use in North Carolina, the State Board of Elections shall do all of the following:

(1) Obtain a current financial statement from the proposed vendor and manufacturer's contact information (mail address, telephone and fax numbers, email address);
(2) Cause staff to review and appraise the voting system;
(3) Witness a demonstration of the voting system by the proposed vendor;
(4) Obtain a copy of Independent Testing Authority certification as authorized by National Association of State Elections Directors or Federal Agency;
(5) Ensure that a copy of the system's source code is held in escrow by a third party approved by the State Board of Elections for the purpose of taking custody of all source codes, including all revisions or modifications of source codes. Proprietary information is not subject to North Carolina Public Records laws;
(6) Any discussion of proprietary information by the State Board of Elections shall take place in Closed Session as authorized by the Open Meetings requirements of North Carolina law;
(7) Ensure performance of system complies with North Carolina laws and rules related to voting systems;
(8) Obtain a copy of the manufacturer's instructions and maintenance manual;
(9) Obtain a list of all jurisdictions currently using the voting system; and
(10) Review any other information made available to the Board.

(b) Modifications or Enhancement of Voting Systems. A change to any voting system or unit, including software and hardware modification, shall be submitted in writing for the review of the Executive Director of the State Board of Elections. Following the review, the Executive Director shall determine whether the change is a modification of the voting system as certified by the State Board of Elections. If it is determined to be a modification, the voting system as modified shall be submitted to the State Board of Elections for approval. If the Executive Director shall determine the change is an enhancement that does not substantially alter the voting system as certified by the State Board of Elections, the Executive Director may approve the enhancement and the review of the State Board of Elections shall not be required.

(c) Disapproval of Voting System. The State Board of Elections shall have the right to hear and act on complaints arising by petition or otherwise, on the failure or neglect of a voting system or vendor marketing a system to comply with any part of the election laws of the State of North Carolina or for any other satisfactory cause, including but not limited to, performance of

the system in an election setting. Before exercising this power, the State Board of Elections shall notify the voting system vendor and/or county boards of elections affected and give opportunity to be heard at a hearing to be set by the State Board of Elections.

History Note: Authority G.S. 163-22; 163-165.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 04 .0303 OFFICIAL BALLOT(S) TO BE USED ON VOTING SYSTEM

(a) In Primary Elections:

(1) All voting system ballots for use in any county shall be printed and furnished by the chairman of the county board of elections.

(2) The chairman shall print or cause to be printed on the official ballots for use in the county all ballot items. This shall include the name of each candidate who is to be voted for in that county, as contained on the list of candidates received from the State Board of Elections and from the notices of candidacy filed with the county board of elections.

(3) The names of all of the candidates for each office for each political party shall be printed in the exact order as determined and provided to each county board of elections by the State Board of Elections.

(4) The responsible board of elections shall prepare ballots in a number equal to 100% of the number of registered voters in the primary and shall furnish each precinct voting place with each kind of ballot to be voted in the primary in a number equal to at least 70% of the number of persons registered to vote in the primary or in the precinct, keeping the balance in reserve in such a manner that is secured yet accessible if needed. If a second primary or runoff election is necessary, the responsible board of elections shall prepare and fully distribute, without a reservation, ballots in a number equal to at least twice the number of ballots issued for that particular race in the first primary.

(b) In General Elections:

(1) All voting system ballots for use in any county shall be printed and furnished by the chairman of the county board of elections.

(2) The chairman shall print or cause to be printed on the official ballots for use in the county. This shall include but not be limited to the names of each candidate who is to be voted for in that county, as contained on the list of nominees received from the State Board of Elections and from the notices of candidacy filed with the county board of elections.

(3) The names of all of the nominees for each office shall be printed in the exact order as determined and provided to each county board of elections by the State Board of Elections.

(4) The responsible board of elections shall prepare ballots in a number equal to 100% of the number of registered voters in the election and shall furnish each precinct voting place with each kind of ballot to be voted in the election in a number equal to at least 70% of the number of persons registered to vote in the election or in the precinct, keeping the balance in reserve in such a manner that is secured yet accessible if needed. If a runoff election is necessary, the responsible board of elections shall prepare and fully distribute, without a reservation, ballots in a number equal to at least twice the number of ballots issued for that particular race in the first election.

(c) In Other Elections:

(1) All voting system ballots for use in any county shall be printed and furnished by the chairman of the county board of elections.

(2) The chairman shall print or cause to be printed on the official ballots for use in the county, the questions, issues, or propositions which are to be voted on in that county, as contained on the list of statewide items received from the State Board of Elections, or from petitions or action of local governmental entities.

(3) Any review of any special election ballot containing questions, issues, or propositions by the State Board of Elections office or a county board of elections shall not be considered a certification or opinion that the items on the ballot are lawfully upon the ballot and lawfully authorized to be voted upon at the time and place so indicated. It shall be the responsibility of the political entities authorizing the placing of the questions, issues, or propositions for a vote to determine the legality of items to be presented. Upon the request of a county board of elections, the State Board of Elections may present any issue as to the legality of any ballot item in a special election to the North Carolina Attorney General for a legal opinion.

(4) The responsible board of elections shall prepare ballots in a number equal to 100% of the number of registered voters in the election and shall furnish each precinct voting place with each kind of ballot to be voted in the election in a number equal to at least 70% of the number of persons registered to vote in the election or in the precinct, keeping the balance in reserve in such a manner that is secured yet accessible if needed. If a runoff election is necessary, the responsible board of elections shall prepare and fully distribute, without a reservation, ballots in a number equal to at least twice the number of ballots issued for that particular race in the first election.

(d) The State Board shall review for accuracy the ballot content, arrangement and instructions to voters and certify all ballots to be used in each official election. The primary responsibility for proofing the ballot lies with the county board of elections. Ballots are to be submitted to the State Board as soon as practicable but not later than five days following the certification of ballot items. When related litigation is pending and delays certification of ballot information, the State Board shall certify ballot information in as timely a manner as possible.

History Note: Authority G.S. 163-22; 163-165.6;
Temporary Adoption Eff. April 15, 2002;
Eff. August 4, 2004.

08 NCAC 04 .0306 DUTIES OF CUSTODIANS OF VOTING SYSTEMS

(a) The chairman of the county board of elections shall be responsible for the safekeeping, storage, maintenance and care of the voting system. The voting system shall be properly stored in a safe, appropriate and secure location so that the system cannot be tampered with when not in use on election day. The county board of elections may appoint as many persons as determined necessary for the maintenance, storage and care of the voting system and for the proper preparation and testing of the voting system and delivery to the voting precincts preceding a primary or an election. Persons employed for this purpose shall be compensated for their services as authorized by the county board of elections.

(b) On election day when the system is used for voting purposes and until the county board chairman collects the system, the voting system shall be under the direct supervision and control of the chief judge unless provision for its custody is otherwise authorized.

History Note: Authority G.S. 163-23; 163-165.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 04 .0307 TESTING OF VOTING SYSTEM BEFORE USE IN AN ELECTION

The county board of elections shall test or cause to be tested each voting system or unit that will be used in the election to ensure that the system is operating properly and has been programmed to count votes accurately. There shall be a record maintained along with the voted and unvoted ballots at the county board of elections office that shall include at a minimum the dates, times and method of testing used, the results of the test, and the persons conducting the test. Any interested person may observe the testing of the voting system but shall not interfere or impede the process. For the purpose of testing a voting system prior to the purchase or lease of the system, testing at a one-stop absentee voting site shall fulfill the requirement to test the voting system in a precinct within the county.

History Note: Authority G.S. 163-22; 163-165.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 06B .0101 GENERAL BALLOT GUIDELINES

(a) All ballots cast in elections, primaries, and referenda shall be printed and distributed at the public expense of the county or local jurisdiction for which the election is conducted.

(b) Ballots shall be arranged in the order certified to the county board of elections by the State Board of Elections.

(c) Ballots shall be printed in plain clear type, of such size and arrangement as to fit the construction of the voting system or size of the ballot.

(d) The ballot shall be printed with contrasting type and background so that it can be easily viewed by the voter and material of different colors to identify different ballots may be used. In primary elections, ballots of different colors may be used to distinguish a political party's ballot if practicable. Composition and color of ballots shall be subject to approval by the Executive Director of the State Board of Elections.

(e) The State Board of Elections shall review for accuracy the ballot content, arrangement and instructions to voters and approve all ballots to be used in each official election. The primary responsibility for proofing the ballot lies with the county board of elections. Ballots are to be submitted to the State Board of Elections as soon as practicable but not later than five days following the certification of ballot items. When related litigation is pending that delays certification of ballot information, the State Board of Elections shall certify ballot information in as timely a manner as possible.

(f) The responsible board of elections shall prepare ballots in a number equal to 100% of the number of registered voters in the primary or election and shall furnish each precinct voting place with each kind of ballot to be voted in the primary or election in a number equal to at least 70% of the number of persons registered to vote in the primary or election in the precinct, keeping the balance in reserve in such a manner that is secured yet easily accessible if needed. If a second primary or runoff election is necessary, the responsible board of elections shall prepare and fully distribute, without a reservation, ballots in a number equal to at least twice the number of ballots issued for that particular race in the first primary or election but in no case more than a number equal to 100% of the number of registered voters in the primary or election.

History Note: Authority G.S. 163-22; 163-165.3; 163-165.4;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 06B .0102 USE OF PAPER BALLOTS WHERE VOTING SYSTEMS ARE USED

The county board of elections shall have authority to furnish paper ballots of each kind to precincts using voting systems for use by:

(1) Persons who have been challenged and the challenge has been overruled or sustained;
(2) Persons who vote using the curbside voting provisions;
(3) Persons who vote a provisional ballot; and
(4) In extraordinary circumstances if written approval is issued by the State Board of Elections. Such circumstances shall include an inability to use another system, unavailability of another system, economic

factors, existence of contested races, size of potential electorate, and integrity needs.

History Note: Authority G.S. 163-22; 163-165.3; 163-165.4;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 06B .0103 ARRANGEMENT OF OFFICIAL BALLOTS

(a) As soon as practicable after the close of the filing period, the State Board of Elections shall certify to the county boards of elections the order of the offices and candidate names to be voted on the official ballot. The State Board of Elections shall provide the text and arrangement of referenda to be voted on the official ballot.

(b) Generally, the order of precedence for candidate ballot items shall be as follows:

(1) Federal Offices;
(2) State Offices in the order certified by the State Board of Elections;
(3) District and local offices;
(4) Non-partisan offices; and
(5) Referenda, unless the voting system design requires referenda to be before candidate ballot items.

Ballot items for full terms of an office shall be listed before ballot items for partial terms of the same office. The term of the unexpired office only shall be listed as part of the title of the office.

(c) Names of candidates shall be printed in the exact form either certified by the State Board of Elections for those candidates who are required to file the Notice of Candidacy with the State Board of Elections, by convention or by petition. Candidates for all offices shall provide their name exactly as it is to appear on the ballot. Candidates may request in writing a change in the manner that their name is to appear on the ballot during the time the filing period is open.

History Note: Authority G.S. 163-22; 163-165.6;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 06B .0104 LATE CHANGES IN BALLOTS

After the official ballots for a general or special election have been printed and the absentee voting period has begun, the death, resignation, or disqualification of a candidate whose name appears on the official ballots shall not require that the ballots be reprinted. If the vacancy occurs before the absentee voting period begins, the responsible board of elections may determine whether it is practical to have the ballots reprinted with the name of the replacement nominee as authorized by G.S. 163-114. If the ballots are not reprinted, a vote cast for the candidate whose name is printed on the ballot shall be counted as a vote for the replacement nominee.

History Note: Authority G.S. 163-22; 163-165.3;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 06B .0105 COUNTING OF OFFICIAL BALLOTS

(a) Following the close of the polls the official ballots shall be counted. Precinct officials shall follow the procedures specified by the voting system manufacturer and in compliance with G.S. 163-182.1 and 163-182.2. The counting of the ballots shall be completed in the presence of the precinct election officials, observers, and any persons desiring to observe the count. All official ballots shall be counted at the precinct unless authorized by legislative local act and approved by the State Board of Elections.

(b) The counting of the ballots at the precinct shall be continuous until completed. From the time the counting of the ballots is begun until the votes are counted and the requisite documentation is signed, certified as required, and delivered to the chief judge or judge chosen to deliver the documentation to the county board of elections, the precinct chief judge and judges shall not separate, nor shall any of them leave the voting place except for unavoidable necessity.

(c) In the cases where the precinct officials must interpret the voter's choice, the following shall apply:

(1) When it is impossible to determine a voter's choice for an office, the ballot shall not be counted for that office but shall be counted for all other offices;
(2) If a ballot is marked for more names than there are positions to be filled, it shall not be counted for that office but shall be counted for all other offices;
(3) If a ballot has been defaced or torn by a voter so that it is impossible to determine that voter’s choice for one or more offices, it shall not be counted for such offices but shall be counted for all offices for which the voter’s choice can be determined; and
(4) If a voter has done anything to a ballot other than mark it properly, it shall be counted unless such action by the voter makes it impossible to determine the voter's choice.

(d) When the counting is completed the chief judge or his or her designee shall announce the results at the precinct. The announcement of the results shall clearly state the results are unofficial. The unofficial results shall be transmitted to the county board of elections in the manner determined by the county board of elections and the voting system. This report shall be unofficial and shall have no binding effect upon the official county canvass to follow. As soon as the precinct reports are received, the chairman, secretary or designee shall publish the unofficial reports to the news media.

(e) Provisional official ballots shall be counted by the county board of elections before the canvass. If the county board finds that an individual voting a provisional official ballot is not eligible to vote in one or more ballot items on the official ballot, the board shall not count the official ballot in those ballot items, but shall count the official ballot in any ballot items for which the individual is eligible to vote.

History Note: Authority G.S. 163-22; 163-182.1; 163-182.2;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 07B .0101 SUBMITTING VOTER REGISTRATION AND CHANGES OF PARTY AFFILIATION

(a) An applicant may submit any form outlined in G.S. 163-82.3 by fax to the county board of elections fax number. There are no other numbers to which faxed voter registration applications may be sent. Note that faxed voter registration applications must be received by the county board of elections by 5:00 p.m. on the 25th day before the election. Applicants are encouraged to retain the fax transmission sheet in case the timeliness of their faxed application is called into question.

(b) The applicant, after transmitting an original application for voter registration or a change of party affiliation by fax, must mail or have placed in delivery the original and signed voter registration application to the county board of elections office in the county in which the applicant is applying no later than 20 days before the election.

(c) Changes of name or address submitted by registered voters by fax may be made in form of any written notice signed by the registrant that includes the registrant's full name, date of birth, former residence address, new residence address, and date of moving from the old to the new address. Changes of name or address submitted by fax must be received by 5:00 p.m. on the 25th day before the election. Original documents that show changes of name or address do not have to be delivered to the board of elections.

History Note: Authority G.S. 163-22; 163-82.6; 163-82.15; Temporary Adoption Eff. April 15, 2002; Eff. August 1, 2004.

08 NCAC 07B .0102 ACCEPTING VOTER REGISTRATION APPLICATIONS

(a) County boards of elections must ensure that fax machines are in good working order. County boards shall also ensure that their fax numbers are made available throughout the county and to the State Board of Elections.

(b) The State Board of Elections shall maintain all current fax numbers for county boards of elections on its Website at www.sboe.state.nc.us and shall provide telephone assistance to those seeking the proper fax number.

(c) The county board of elections shall, as much as possible, ensure the quality and security of its fax machine. A log of any problems or times in which the fax machine was not operational shall be maintained.

(d) The county board shall develop a plan for checking the fax machine for voter registration documents and shall ensure their delivery to a secure location to await processing.

(e) The following shall apply to new registrations and changes of information submitted by fax:

(1) New registrations and changes of party affiliation submitted by fax must be completed on a form outlined in G.S. 163-82.3 and must be followed by the original application with the original signature of the voter; and

(2) Changes of name or address submitted by registered voters by fax may be made in form of any written notice signed by the registrant that includes the registrant's full name, date of birth, former residence address, new residence address, and date of moving from the old to the new address. Changes of name or address submitted by fax must be received by 5:00 p.m. on the 25th day before the election. Original documents do not have to be delivered to the board of elections prior to processing for changes of address or names.

(f) When a faxed voter registration document is received by a county board of elections office, staff must determine whether or not the document is a new registration within the county or a change of information within the county. New registrations and changes of party affiliation shall be separated from changes of name or address received by fax.

(g) Faxed original applications and changes of party affiliation may be held in queue until the original application is received by mail or other delivery. Upon receipt of the original application, the application may be processed as timely if transmitted by the 20-day deadline.

(h) Faxed changes of name or address may be processed immediately.

(i) New applications and changes of information submitted by fax shall be maintained in the same manner as all other registration/change of information documents.

History Note: Authority G.S. 163-22; 163-82.6; 163-82.15; Temporary Adoption Eff. April 15, 2002; Eff. August 1, 2004.

08 NCAC 09 .0106 GENERAL GUIDELINES

(a) Prior to each recount, the board of elections shall confer with affected parties and candidates and describe to them the process of conducting recounts.

(b) In the case of tie votes, the winner shall be determined by lot only in the case set out in G.S. 163-182.8(2). Where there are 5,000 or fewer votes cast, there shall be only one determination by lot for each tied election. There shall be no determination by lot until the time has expired for the affected candidate(s) to request a recount, unless all of the affected candidate(s) waive their right in writing to request a recount.

(c) During the conduct of recounts, in the cases where the board of elections must interpret the voter's choice, the following shall apply:

(1) When it is impossible to determine a voter's choice for an office, the ballot shall not be counted for that office but shall be counted for all other offices;

(2) If a ballot is marked for more names than there are positions to be filled, it shall not be counted for that office but shall be counted for all other offices;

(3) If a ballot has been defaced or torn by a voter so that it is impossible to determine that voter's choice for one or more offices, it shall not be counted for such offices but shall be counted for all offices for which the voter's choice can be determined; and

(4) If a voter has done anything to a ballot other than mark it properly with pen or pencil, it shall be counted unless such action by the

voter makes it impossible to determine the voter's choice.

(d) The following shall apply in counting punch card ballots:

(1) All of the candidates for whom the voter has indicated a preference shall be counted if the corresponding chad is completely punched out or hanging by one corner (showing that three of the four corners have been punched out); and

(2) If the chad has not been punched out or is not hanging by one corner, then the determination must be made if the voter has shown consistency in marking the ballot. If the voter has shown consistency in marking choices on the ballot - all of the candidates for whom the voter has indicated a preference shall be counted.

(e) In conducting recounts of lever, direct record electronic, and any other types of voting machines that require a county board member or designated official to reprint tapes and to read the totals and another board member to record the totals for each candidate such recount shall be conducted by a bi-partisan team of four: two officials (one from each of the two parties having the largest number of registered voters in the state) reading and confirming the totals per machine and two officials (one from each of the two parties having the largest number of registered voters in the state) recording the results simultaneously.

(f) In conducting hand to eye recounts or recounts of paper ballots, a bi-partisan team of four shall be used: two officials (one from each of the two parties in the State with the largest number of registered voters) to relay the results of each ballot with one person reading the ballot and the other official observing the ballot and the person reading the results of the ballot, and two officials (one from each of the two parties in the State with the largest number of registered voters) recording the tally of votes for each candidate on paper while stating aloud after each choice is read on the fifth tally for a particular candidate, the word "tally."

(g) The county board of elections shall conduct recounts in two circumstances. In the first circumstance, the recount is mandatory under G.S. 163-182.7(b). In the second circumstance, the recount is not mandatory but the county board of elections or the State Board of Elections determines, using its authority in G.S. 163-182.7(a), that in order to complete the canvass a recount is necessary.

(h) A candidate shall have the right to call for a hand-eye recount, as to elections conducted by optical scan marksense or punchcard systems, within 24 hours after a mandatory or discretionary recount or by noon on the next business day of the county board office, whichever is later, if the apparent winner is the apparent loser after the first recount, unless human error resulted in the vote count change.

(i) Any candidate shall have the right to file an election protest within 24 hours after a recount or by noon of the next business day of the county board office, whichever is later.

History Note: Authority G.S. 163-22; 163-182.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 09 .0107 RECOUNT OF OPITICAL SCAN/MARKSENSE/PUNCHCARD BALLOTS

(a) How to conduct the first recount. In the first recount, all ballots that were originally counted by the optical scan equipment are to be counted again by the optical scan equipment producing another machine count. A "machine count" total is a ballot count produced by a voting system that uses machines. All ballots that were rejected for tabulation purposes by the machines - commonly called "outstacked" or center bin ballots - are to be recounted by hand and eye using the team of four guidelines outlined in 08 NCAC 09 .0106.

(b) The steps after the first recount. When the first recount, including absentee and provisional ballot recount totals, has been completed, the board of elections shall follow these steps:

(1) The county board must determine whether the first recount produces a change in the winner;

(2) If the apparent winner after the initial balloting is the apparent loser after the first recount, that candidate shall be entitled to demand a second recount, by hand and eye, of all ballots;

(3) If the apparent winner after the initial balloting remains the apparent winner after the first recount, Subparagraph (4) of this Rule must be considered;

(4) The county board must determine whether there is a discrepancy in the machine totals between the initial balloting and the first recount;

(5) If the machine totals from the initial balloting and the first recount are the same, no second recount is necessary;

(6) If the machine totals from the initial balloting and the first recount are not the same, Subparagraph (7) of this Rule must be considered;

(7) The county board must determine whether the discrepancy in the machine total can be reconciled;

(8) The county board shall determine if the discrepancy in the machine total between the initial balloting and the first recount can be explained. The county board shall examine the outstack/center bin ballots from the first recount, determine how they should be counted, and reconcile the count with the machine count on the initial balloting. If this reconciliation produces the same machine total for the first recount as the machine total in the initial balloting, no second recount is necessary; and

(9) If the reconciliation produces a different machine total for the first recount than the machine total in the initial balloting, the losing candidate is entitled to demand a second recount, by hand and eye, of all ballots.

History Note: Authority G.S. 163-22; 163-182.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 09 .0108 DIRECT RECORD ELECTRONIC AND LEVER (DIRECT RECORD MECHANICAL) VOTING MACHINES

(a) In the first recount, all votes cast on each unit shall be retabulated and results provided. The results provided shall be re-read using the team of four rules outlined in Section I of these Rules.

(b) When the first recount has been completed, the board of elections shall follow these steps:

(1) The county board must determine whether the first recount produces a change in the winner;
(2) If the apparent winner after the initial balloting is the apparent loser after the first recount, that candidate shall be entitled to demand a second recount;
(3) If the apparent winner after the initial balloting remains the apparent winner after the first recount, Subparagraph (4) of this Rule must be considered;
(4) The county board must determine whether there is a discrepancy in the machine totals between the initial balloting and the first recount;
(5) If the unit totals from the initial balloting and the first recount are the same, no second recount is necessary;
(6) If the unit totals from the initial balloting and the first recount are not the same, Subparagraph (7) of this Rule must be considered;
(7) The county board must determine whether the discrepancy in the machine total can be reconciled;
(8) The county board shall determine if the discrepancy in the unit totals between the initial balloting and the first recount can be explained. (Possible acceptable explanations may include problems with the setup of the ballot, problems with the software or other unit malfunction); and
(9) If the reconciliation produces a different unit total for the first recount than the unit total in the initial balloting, the losing candidate is entitled to demand a second recount provided by the county board of elections.

(c) A manual recount, by hand and eye, of ballots is not possible whenever a lever machine or direct record electronic voting machine error occurs.

(d) The State Board of Elections shall hear any appeals of recount protests.

History Note: Authority G.S. 163-22; 163-182.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 09 .0109 MANUAL HAND TO EYE RECOUNTS

Mandatory recounts, as set out in G.S. 163-182.7, by hand-eye optical scan/marksense/punchcard voting equipment shall be conducted as follows if a sample of the precincts of the voting units in question were recounted by hand-eye and produced results with that of the mandatory recount in those precincts such that one could reliably assume that any problems with scanning equipment was confined to those precincts in which there was a difference that could not be reconciled in the totals between the original count and the mandatory recount, then:

(1) The mandatory recount by hand-eye initially shall occur in only 10 percent of the voting jurisdiction's precincts.
(2) Those precincts shall include all those precincts in which a different total was produced by the machine-read count of ballots for the first count, including the outstacked/center bin, and the mandatory recount, as well as a sufficient number of additional precincts to constitute a total of at least 10 percent of the precincts of the voting jurisdiction.
(3) However, in any event, at least five percent of the voting jurisdiction's precincts included in the sample shall have experienced the same count for machine-read ballots, including the outstacked/center bin, in the original count, and in the mandatory recount.
(4) The precincts included in the sample which had the same machine-read count in the original and mandatory recount shall be chosen by random draw by lot from a container held by the Chair of the county board of elections, with all precincts which did not experience a difference in count by number being placed into the container, with the candidate whom appears to have been the loser after the mandatory recount drawing said lots.
(5) If the hand-eye recount of those precincts which did not experience a difference in count from the original count and the mandatory recount results in a different total from that produced on the previous counts, in any precinct, then upon request of the apparent losing candidate, all precincts for that race shall be recounted by hand-eye.
(6) After two machine count of votes (including the initial election or primary night count), any recount conducted in cases involving optical scan marksense and punchcard voting equipment shall be a manual hand-eye recount.

History Note: Authority G.S. 163-22; 163-182.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 10B .0102 SETTING UP POLLING PLACE PRIOR TO VOTING

(a) The Chief Judge, Judges, and Assistants shall arrive at the voting place no later than 6:00 a.m. on the day of the election.

(b) The Chief Judge shall administer the oath to Judges and Assistants who have not taken the oath.

(c) The Chief Judge shall assign tasks regarding the set up of the polling place to ensure the participation of judges and assistants of each represented party. The tasks and duties assigned shall adhere to the rules and orders promulgated by the State Board of Elections. At least one official shall be directed by the Chief Judge to manage curbside voting and facilitate the process for voters with special needs.
(d) The Chief Judge or designated official shall ensure that the telephone or other approved communications device is working.
(e) The members of the County Board of Elections shall ensure that each voting system is delivered to the voting place and placed in the custody of the Chief Judge or designated official within three days before the election with the ballot labels or other necessary identifiers already in place on each unit. Keys and other security devices necessary for the operation of the voting system shall be delivered to the Chief Judge in a sealed container. Together, a board member or agent of the County Board of Elections and the Chief Judge or designated official shall inspect the contents of the sealed container to ensure that all necessary mechanisms are provided to the Chief Judge. All numbers stamped on the keys and security devices should correspond to the number of the voting units. Together they shall also ensure that the ballots are correctly in position and that no votes have been cast or recorded on any unit, and that the units are in good working order. Voting tabulating units should be locked and sealed (or otherwise secured in the manner recommended by the manufacturer) and should remain that way until the polls are closed.
(f) The Chief Judge, with the cooperation of at least one official of the other major political party shall verify the delivery of all election supplies, records and equipment necessary for the conduct of the election.
(g) The Chief Judge shall ensure that all applicable instructions, signs, and sample ballots are posted around the polling place, including signs designating the voting place, the buffer zone, temporary and/or permanent accessible parking, and the curbside voting area.
(h) The Chief Judge shall ensure that the polling place is arranged to provide private spaces so voters may cast votes unobserved. The Chief Judge shall also ensure that there is continual adequate space and furniture for separate areas for voter registration records, ballot distribution, and private discussions with voters concerning irregular situations. The voting enclosure must be set up so that all equipment and furniture can be generally seen. The exterior of the voting units and every part of the voting enclosure shall be in plain view of the Chief Judge and Judges.
(i) The door to the voting place/enclosure should be sufficiently wide to accommodate voters in wheelchairs. The door width, hardware, and thresholds shall comply with the Americans with Disabilities Act Accessibility Guidelines (ADAAG) or shall be made to comply on election day. The County Board of Elections must approve any plan that would cause a deviation in the set up and arrangement of the voting enclosure. For example, generally the door into the voting place/enclosure should be the same door used to exit the voting place/enclosure. However, if by doing so the flow of voters is disturbed, a separate door may be used to exit the voting place/enclosure. If a separate door is used, it should be in plain view of the Chief Judge, Judges, and Assistants so that no unauthorized persons may enter the voting enclosure through the exit door.
(j) The Chief Judge shall assign a Judge or Assistant to provide demonstrations to voters, upon request, in the proper use of the voting system.
(k) At the Chief Judge's request at 6:30 a.m. (according to the official timepiece used by the Chief Judge), one of the Judges shall announce that the polls are open and shall state the hour at which they will be closed.

History Note: Authority G.S. 163-22; 163-165.5;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 10B .0103 VOTING PROCEDURES

(a) From the time the polls are opened until the precinct count has been completed, the returns signed, and the results declared, no person shall take or remove from the voting enclosure election supplies and materials, including official ballots, containers of official ballots, provisional official ballots, spoiled ballots, the pollbook or voter authorization slip(s), the registration record(s) or any voting units or devices that are part of the voting system, except as authorized by law to accommodate curbside voters. Provisions for secure removal of election supplies and materials at any time would be permissible under the emergency management plan of a county board of elections in the cases of natural or man-made emergencies.
(b) A person seeking to vote shall enter the voting enclosure at the voting place through the designated entrance and shall clearly communicate the person's name and place of residence to one of the judges of election. In some cases, the precinct judge may prompt the voter to provide this information. In a primary election, the voter shall also state the political party with which the voter affiliates and in whose primary the voter desires to vote, or if the voter is an unaffiliated voter permitted to vote in the primary of a particular party, the voter shall state the name of the authorizing political party in whose primary the voter wishes to vote. This information, including the political party's primary in which the voter elected to participate, provided by the voter shall be recorded in the precinct pollbook or on the voter authorization slip. The judge or assistant to whom the voter gives this information shall announce the name and residence of the voter so that the information may be heard by the necessary officials and observers. After examining the precinct registration records, the judge or assistant shall state whether the person seeking to vote is registered. The precinct judge or assistant shall not presume the identity/name, address, or party affiliation of any person seeking to vote.
(c) If the person is found to be registered and is not challenged, or if the challenge is overruled, the responsible judge of election shall provide the voter with each official ballot the voter is entitled to vote. In a primary election the voter shall be allowed to vote the political party ballot(s) the voter is entitled to vote and no others, except non-partisan ballots. Unaffiliated voters may choose to participate in only one party's primary and no others on the same day. In the case of a second primary, unaffiliated voters who participated in a party's primary in the first primary may only vote that party's ballot in the second primary. However, if an unaffiliated voter did not participate in the first primary, the voter may choose which party's primary to

participate in during the second primary. Note that unaffiliated voter participation in party primaries is subject to authorization by the respective state party executive committees. Unaffiliated voters who are otherwise qualified may always participate in non-partisan primaries.

(d) If the person is found to not be registered to vote in the precinct, the responsible judge of election shall inform the person of the fail-safe voting process. First, based on information provided by the person the responsible judge shall determine whether or not the person may be eligible to vote an official provisional ballot. The person is eligible to vote an official provisional ballot if the person resides in the precinct and either:

(1) is a registered voter in the county and has moved into the precinct 30 days or more prior to the election and has not reported the change to the board of elections; or

(2) claims to have applied for voter registration in the county but there is no record of the person's name on the registration records; or

(3) was removed from the list, but the person maintains continuous eligibility within the county; or

(4) disputes the voting districts (and ballots) to which the person has been assigned.

(e) If the person is found to not be registered to vote in the precinct and the responsible judge of election learns from the person that the person resides in a different precinct, the responsible judge shall provide the person with adequate information in order to direct the person to the proper voting place.

(f) It is the duty of the chief judge and judges to gather any voter information regarding changes of name and address in order to assist the county board of elections in updating voter records. If the county board of elections has identified a voter's record pursuant to law to gather additional information, the responsible judge shall require the voter to update the information.

(g) It is the duty of the chief judge and judges to give any voter any technical information the voter desires in regard to ballot items. In response to questions asked by the voter, the chief judge and judges shall communicate to the voter only technical information necessary to enable the voter to vote the ballot.

(h) The Chief Judge shall assign two precinct officials, one from each political party if possible, to keep the pollbook or other voting record and to keep the registration list. The names of all persons voting shall be checked on the registration record and entered on the pollbook or other voting record. In an election where observers may be appointed each voter's party affiliation shall be entered in the proper column of the pollbook or other approved record opposite the voter's name. The designated official shall make each entry at the time the ballots are handed to the voter. The information about the voter's political party registration shall be obtained from the registration record and not from the voter.

(i) The chief judge, judges, and assistants must ensure that registration records are kept secure and do not leave the voting enclosure for any purpose. Properly designated observers are entitled to obtain a list of the persons who have voted in the precinct so far in that election day at least at the following times: 10 a.m., 2 p.m. and 4 p.m. Counties using authorization to vote documents as opposed to traditional pollbooks may comply with the requirement by permitting each observer to inspect election records so that the observer may create a list of persons who have voted in the precinct. A party may designate more than two observers for each precinct, but only two may serve in the voting place at the same time. Observers may serve in shifts, as long as the shifts are at least four hours long and the persons serving in the shifts have been properly appointed as observers.

History Note: Authority G.S. 163-22; 163-166.7; 163-119;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 10B .0104 LEAVING THE VOTING ENCLOSURE, SPOILED OR INCOMPLETE BALLOTS

(a) When the voter has been presented with the official ballots by the judge, the voter shall be deemed to have begun the act of voting, and the voter shall not leave the voting enclosure until the voter has finalized the act of voting by performing whatever action is necessary to cause the act of voting to be finalized. On receiving the ballots, the voter shall immediately retire alone to one of the voting booths unless the voter is entitled to assistance and without any undue delay, the voter shall mark the ballots. The voter shall return any unvoted ballot(s) to the precinct officials.

(b) If a voter spoils or damages a ballot, the voter may obtain another upon returning the spoiled or damaged ballot to the chief judge or other designated official. A voter shall not be given a replacement ballot until the voter has returned the spoiled or damaged ballot. The voter shall not be permitted to receive more than three replacement ballots. The chief judge shall deposit each spoiled or damaged ballot in the container provided for that purpose.

(c) When the voter has marked the ballot the voter shall ensure the ballot(s) are cast. If the voter has been challenged and the challenge has been overruled, before casting the ballot(s), the voter shall write the voter's name on each of the ballot so they may be identified in the event the voter's right to vote is again questioned. After casting the ballots in the proper manner, the voter shall immediately leave the voting enclosure unless the voter is one of the persons authorized by law to remain within the enclosure for purposes other than voting.

(d) No voter shall be permitted to occupy a voting booth already occupied by another voter, provided, however, husbands and wives may occupy the same voting booth if both wish to do so. Excluded from this prohibition are persons lawfully providing assistance.

(e) When the voter leaves the voting enclosure, whether or not the voter has finalized voting, the voter shall not be permitted to enter the voting enclosure again for the purpose of voting.

(f) If a voter leaves the voting enclosure and is found not to have finalized the act of voting by pressing the appropriate button or touching the screen in the appropriate space in the case of Direct Record Electronic Voting Machines, by feeding their ballot into the appropriate tabulator in the case of Optical Scan/Marksense and Punchcard Voting Equipment, by pulling the appropriate lever in the case of Lever Voting Machines, or by depositing the paper ballot into the ballot box, the chief judge or judges of election may find, by unanimous vote, that the votes

marked by the voter had not been disturbed by any other person and may execute the ballot for the voter who has vacated the voting enclosure. If the Chief Judge and Judges of election cannot unanimously confirm that the ballot marked by the voter has not been disturbed, the ballot must be marked as spoiled and placed with other spoiled ballots (or in the case of direct record electronic and lever machines, the ballot must be cleared according to the voting system specifications). The fact that a ballot is only partially and not fully marked shall have no bearing on the decision of the Chief Judge and Judges. In each instance where this type of incident occurs, the Chief Judge and Judges must document the circumstances and make the information known to the county board of elections.

History Note: Authority G.S. 163-22; 163-166.7;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 10B .0105 PROCEDURES AT THE CLOSE OF VOTING

(a) Before each primary and election, the chairman of the county board of elections shall furnish each chief judge written instructions on how ballots shall be marked and counted. Before starting the counting of ballots in the precinct, the chief judge shall instruct all of the judges, assistants, and ballot counters in how differently marked ballots shall be counted and tallied.
(b) The Chief Judge shall announce or have it announced that the polls are closed at 7:30 p.m. unless the time has been extended until 8:30 p.m. Time shall be determined by the same timepiece used to determine the opening of the polls.
(c) Any person who is in line at the close of polls shall be afforded an opportunity to vote. A list shall be made, starting at the end of the line and moving forward, of everyone standing in line at the close of polls and anyone whose name is on that list shall be permitted to vote. No person entering the voting enclosure after the close of polls has been announced, other than those whose names are on the list, shall be permitted to vote under any circumstance.
(d) The Chief Judge and Judges must subscribe their names to each pollbook.
(e) Only official ballots shall be voted and counted. No official ballot shall be rejected because of technical errors in marking it, unless it is impossible to determine the voter's choice under the rules for counting ballots. Such determination shall be made by the county board of elections if the chief judge and judges are unable to determine the voter's choice, or whether a particular ballot should be counted.
(f) No person shall purposely deface or tear an official ballot in any manner, and no person, other than the voter, shall purposely erase any name or mark written on a ballot by a voter.
(g) The Chief Judge, along with a Judge of another political party, shall "close the polls" on each voting unit. The results sheet from each unit shall be placed in an "Official Precinct Returns Envelope." As soon as the polls are closed the chief judge and judges shall, without adjournment or postponement, count the ballots. The counting of ballots at the precinct shall be continuous until completed. More than one voting unit may be counted at the same time by the precinct officials, assistants, and ballot counters, but the chief judge and judges shall supervise the counting of all units and shall be responsible for them. From the time the first unit is read or opened and the count of votes begun until the votes are counted and the statement of returns made out, signed, certified and provided to the chief judge or judge responsible for delivering them to the county board office, the precinct chief judge and judges shall not separate, nor shall any one of them leave the voting place except in case of unavoidable necessity as determined by the Chief Judge.
(h) The counting of the ballots shall be made in the presence of the precinct election officials and witnesses and observers who are present and desire to observe the count. Observers shall not interfere with the orderly counting of the ballots. As soon as the votes have been counted and the precinct returns certified, the chief judge, or one of the judges selected by the chief judge, shall report the total precinct vote for each ballot item to the witnesses and observers who are present and also by telephone or other electronic means to the county board of elections. This report shall be unofficial and shall have no binding effect upon the official county canvass to follow.
(i) The Chief Judge and Judges shall sign the consolidation and accounting sheets and statement of returns and shall place them in the "official precinct returns" envelope or container.
The Chief Judge shall place or cause to be placed by an authorized person under the Chief Judges direction and control: voter registration documents and information, provisional ballot envelope, payroll information, county board communication devices, unit keys and security devices and the official returns envelope. The container should be sealed with non-transparent tape of sufficient size to contain signatures. It shall be signed by the Chief Judge and two Judges.
(k) Consolidation sheets, including the statement of returns for all voted official ballots, shall be completed by adding curbside votes to the totals. In any precinct using direct record electronic voting equipment, the county board of elections, with the approval of the State Board of Elections, may provide for any paper ballots to be transported upon closing of the polls to the office of the county board of elections for counting. An accounting form shall be completed that accounts for every used and unused ballot—providing the number of blank ballots received from the board of elections, the number of regular voted ballots, provisional voted ballots, and spoiled ballots.
(l) Voted provisional ballots must be placed in a sealed envelope or container and the seal must be signed by the Chief Judge and Judges.
(m) The Chief Judge shall bring (or have delivered by secure means) the results cartridge (or reading) from each unit to the board of elections office.
(n) All supplies must be collected for return to the board of elections office. Any items brought into the polling place facility shall be removed upon vacating the polling place. Precinct Judges shall ensure that the facility is left in the same condition in which it was received for voting purposes.
(o) Under no circumstance shall voting items be left in the polling place facility out of the custody of the Chief Judge or other designee.

History Note: Authority G.S. 163-22; 163-166.10;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 10B .0106 ELECTION SUPPLIES RETURN

(a) After an election or primary, all election supplies shall be immediately taken to the county board of elections office. (b) Election materials and supplies, used or unused, shall not remain in the custody of the Chief Judge, Judges, or any other person in unsecured locations overnight. However, if it is not possible for a county board of elections to have all precincts return materials and supplies on the night of the election, the county board of elections must submit a security plan to the Executive Director of the State Board of Elections 30 days prior to the election. The Executive Director will provide either approval or required modifications to the plan in writing no later than 15 days prior to the election. The board of elections shall have an emergency backup plan that will enable board of elections employees or other authorized persons to retrieve the items from the custody of the Chief Judge and Judges and transport them to the board of elections office. A county board must have an alternative security plan approved by the Executive Director in order to use it.

(c) All materials shall be transported with a "chain of custody" form that includes the signatures and times in which the supplies are in the custody of each official. All supplies, once received at the board of elections, will be verified and signed for by a board of elections representative.

History Note: Authority G.S. 163-22; 163-166.10;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 10B .0107 ASSISTANCE TO VOTERS IN PRIMARIES AND GENERAL ELECTIONS

(a) In any primary or election, including one-stop absentee voting, a registered voter qualified to vote in the primary or election shall be entitled to assistance in getting to and from the voting booth, entering and exiting the voting booth, and in preparing their ballots in accordance with the following:

(1) Any assistance rendered must be performed in person, and shall not be allowed by electronic, paper, or mechanical means of communication with a person outside the voting booth, except in circumstances of disabled voters with special needs. The use of electronic, paper, or mechanical devices by the voter, while alone in the voting booth and not in contact with another person outside the voting booth, shall not be considered voting assistance;

(2) Any voter shall be entitled to assistance from a near relative, as defined in G.S. 163-166.8 (a)(1), of his choice. Under no circumstances shall any other relative, friend, guardian, person holding a power of attorney, or any other person be allowed to render assistance except as allowed under G.S. 163-166.8 (a)(2) and in Paragraph (b) of this Rule; and

(3) The person rendering assistance shall not in any manner seek to persuade or induce any voter to cast any vote in any particular way.

(b) Any voter in any of the following four categories shall be entitled to assistance from any person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union:

(1) One who, on account of physical disability, is unable to enter the voting booth without assistance;

(2) One who, on account of physical disability, is unable to mark his or her ballot without assistance;

(3) One who, on account of illiteracy, is unable to mark his or her ballot without assistance;

(4) One who, on account of visual impairment, is unable to enter the voting booth or mark the ballot without assistance.

No precinct official may refuse the voter's choice of the person to assist him, unless the person so named is legally excluded, does not appear at the voting place to assist the voter prior to the close of the polls, or refuses to assist the voter. If the voter's choice of the assisting person cannot be met on the ground(s) set out herein, the voter shall be allowed to make an additional choice until a willing assisting person is available to assist the voter. There shall be no limitation on the number of voters a person can assist, as long as the assisting person is properly chosen by each voter to assist.

(c) A person seeking assistance in any election shall, upon arriving at the voting place, first request the chief judge to permit him to have assistance, communicating the reasons. If the chief judge determines that the voter is entitled to assistance, the chief judge shall ask the voter to identify the person the voter desires to provide assistance. If that person is not present, the voter is entitled to contact the person and to wait for the person at the voting place, but outside the voting enclosure. When that person is available to assist or is already present to assist, the voter, along with that person, shall present themselves to the chief judge. The chief judge shall thereupon request the person indicated to render the requested aid. In the case of assistance requested at a one-stop voting site, the assistance may be requested and received from any election official available at such site.

(d) Any chief judge, judge, or assistant shall provide assistance to a voter if so requested, except for good cause, unless the election official is prohibited from doing so by his status as the voter's employer, official of the voter's union, or agent of the voter's employer or union. Under no circumstances shall any precinct official or person be assigned to assist a voter who was not specified by the voter.

(e) Conduct of Persons Rendering Assistance. - Anyone rendering assistance to a voter shall be admitted to the voting booth with the person being assisted and shall be governed by G.S. 163-166.8(c). The assisting person shall not do the following:

(1) Give, present, or display within the vision of the voter, any list of preferred candidates, a marked sample ballot, or any other type of document, item, or display that conveys a choice of candidate(s). unless it was brought to the voting booth by the voter. An assisting person may respond to an inquiry of a hearing impaired voter in writing if needed, as long as a ballot choice is not communicated to the voter;

(2) Speak or play within the hearing or vision of the voter, any conversation, communication, or

recording that conveys a choice of candidate(s);

(3) Operate a phone, radio, computer, or any other means of communication while in the voting booth with the voter;

(4) Communicate to others how the voter voted, unless ordered by a court, or make a memorandum of anything that occurred in the voting booth; and

(5) Violate any election law set out in G.S. 163 or violate any election rule set out in Title 8 of the NC Administrative Code.

(f) It shall be presumed that the operation by a voter of any means of communication capable of being received by a voter in the voting booth shall constitute an attempt to receive unlawful voting assistance, except in cases of a disabled voter with special needs. Upon having reasonable grounds to suspect such communication or operation by the voter, a precinct official may make inquiry and investigate the alleged operation of the communication equipment. The voter shall be informed of this presumption of unlawful assistance, and the prohibitions contained within G.S. 163-166.8 as to voter assistance. Regardless, any voter suspected of such conduct shall be allowed to vote and cast his or her ballot.

History Note: Authority G.S. 163-22; G.S. 163-166.8;
Temporary Adoption Eff. April 15. 2002;
Eff. August 1, 2004.

08 NCAC 10B .0108 CURBSIDE VOTING

In any primary or election any qualified voter who is able to travel to the voting place, but because of age, or physical disability and physical barriers encountered at the voting place is unable to enter the voting place or enclosure to vote in person without physical assistance, shall be allowed to vote either in the vehicle conveying such person to the voting place or in the immediate proximity of the voting place under the following restrictions.

(1) The county board of elections shall have printed and numbered a sufficient supply of affidavits to be distributed to each precinct chief judge which shall be in the following form:

Affidavit of Person Voting Outside Voting Place or Enclosure

State of North Carolina
County of___________

I do solemnly swear (or affirm) that I am a registered voter in____________________________ precinct. That because of age or physical disability I am unable to enter the voting place to vote in person without physical assistance. That I desire to vote outside the voting place and enclosure. I understand that a false statement as to my condition will be in violation of North Carolina law.

____
Date Signature of Voter
____
Address
____
Signature of precinct election official who administered oath;

(2) The chief judge or a judge may designate one of the assistants to attend the voter, or assist the voter himself or herself. Upon arrival outside the voting place, the voter shall execute the affidavit after being sworn by a precinct election official. The ballot(s) shall then be delivered to the voter who shall mark the ballot(s) and hand them to the assisting precinct election official. The ballot(s) shall then be delivered to one of the judges of elections who shall deposit the ballot(s) in the proper boxes. The affidavit shall be delivered to a different judge of election;

(3) The voter and any assisting person shall be entitled to the same assistance and subject to the same restrictions in marking the ballot as is authorized by G.S. 163-166.8 and 08 NCAC 10B .0107; and

(4) The affidavit executed by the voter shall be retained by the county board of elections for a period of six months. In those precincts using voting machines, the county board of elections shall furnish paper ballots of each kind for use by persons authorized to vote outside the voting place by this section. In any precinct using direct record electronic voting equipment, the county board of elections, with the approval of the State Board of Elections, may provide for all such paper ballots to be transported upon closing of the polls to the office of the county board of elections for counting. Those ballots may be transported only by the chief judge, judge, or assistant. Upon receipt by the county board of elections, these ballots shall be counted and canvassed in the same manner as one-stop ballots cast under G.S. 163-227.2, except that the count shall commence when the board has received from each precinct either that precinct's ballots or notification that no such ballots were cast. The total for ballots counted by the county board of elections under this subdivision shall be canvassed as if it were a separate precinct.

History Note: Authority G.S. 163-22;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0101 DEFINITIONS

In this Chapter:

(1) "director" means the county director of elections;

(2) "board" means the county board of elections;

(3) "facsimile (fax) transmission" means transmission by a telefacsimile machine

(FAX) or any other form of facsimile (fax) transmission device which transports an authentic copy of a document from one user of the device to the other;

(4) "electronic mail (email)" means transmission via the World Wide Web using a software application such as Microsoft Outlook, Outlook Express, Pegasus, and others to enable transmission from one email address to another email address;

(5) "transmission statement" means the printout from the sender's fax machine or device that indicates the status of the transmission by fax. The transmission statement shall either confirm that the fax transmitted successfully or indicate that it was not received; and

(6) Any reference to deadlines should be assumed to represent Eastern Standard Time.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0102 ELECTRONIC MAIL (E-MAIL)

The following requests may be transmitted via e-mail:

(1) Requests for absentee ballot applications;
(2) Requests for voter registration forms;
(3) Voter registration mailing address changes; and
(4) Ballot mailing address changes.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0103 APPLICATIONS/REQUESTS

(a) Voters under G.S. 163, Article 21, which deals with military and overseas citizens absentee voting, may use the Federal Post Card Application (FPCA) to register to vote and to apply for an absentee ballot. The applicant may send the application by air mail or have it placed in delivery or send it by fax to the State Board of Elections secure fax line and may request that the ballot be sent by air mail, placed in delivery or transmitted by fax.

(b) Upon receipt of an application for an absentee ballot under G.S. 163, Article 21, it shall be determined at the county level whether the applicant is qualified to vote. A list shall be made of those applications approved and disapproved (which list shall be open to inspection by election officials and the public) and an absentee ballot shall be forwarded to each person whose application is approved.

(c) When the county board receives an application request by fax or other delivery from a voter under G.S. 163, Article 21, and that voter requests to have the ballot sent to him/her by fax, the county board shall verify the voter's eligibility to vote. If the voter is eligible to vote, the county board shall send the ballot to the voter as soon as practicable by fax using the telephone number supplied by the voter for that purpose or the number specified by the Department of Defense's Federal Voting Assistance Program. If the voter is not eligible to vote in the State or county, notice of non-eligibility shall be provided to the voter by fax as soon as practicable after the receipt of the request. All transmission statements shall be retained with the corresponding voter's records.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0104 INSTRUCTIONS AND NOTICE; DELIVERY

(a) Each county board shall send by airmail or have placed in delivery, for each absentee voter under G.S. 163, Article 21, appropriate printed instructions for its completion and return, together with a container-return envelope.

(b) Each county board shall send to each absentee voter under G.S. 163, Article 21 who requests that a ballot be sent to him/her by fax all appropriate printed instructions for its completion and return. The printed instructions sent to each such voter shall include the same information provided for other absentee voters.

(c) An absentee ballot that is completed and returned by the voter by facsimile transmission must:

(1) Contain the following statement: "I understand that by using facsimile transmission to return my marked ballot, I am voluntarily waiving a portion of the secrecy of my ballot to the extent necessary to process my ballot, but expect that my vote will be held as confidential as possible. At the same time, I pledge to place the original voted ballot in a secure envelope, together with any other required materials and send the documents immediately by air mail or place them in delivery to the appropriate county board of elections." This must be followed by the voter's signature and date of signature; and

(2) Be witnessed by two other persons who are at least 18 years of age, and who are not disqualified by G.S. 163-226.3(a)(4) or 163-237(b1).

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0105 GENERAL GUIDELINES

(a) A qualified voter under G.S. 163-245 may apply by mail or by facsimile (fax) transmission to the board of elections office for an absentee ballot. The application must include the address or, if the applicant requests delivery of an absentee ballot by facsimile (fax) transmission, the telephone facsimile (fax) transmission number, to which the absentee ballot is to be returned, the applicant's full North Carolina residence address, date of birth, and the applicant's signature.

(b) For the purposes of these rules, requests should be made on the Federal Post Card Application (FPCA). Note that an absentee ballot application submitted under this section must permit the person to register to vote and to request an absentee ballot for each state election held within that calendar year for which the voter is eligible to vote.

(c) An application requesting delivery of an absentee ballot by mail may be made to the board at any time. Also, an application for an absentee ballot for a state election from a qualified voter requesting delivery of an absentee ballot by facsimile (fax) transmission may made to the county board of elections at any time before the election for which the absentee ballot is sought.
(d) After receipt of an application, the county board of elections shall send the absentee ballot and other absentee voting material to the applicant by the most expeditious delivery service. However, if the applicant requests that an absentee ballot be sent by facsimile (fax) transmission, the board of elections office shall send the absentee ballot and other absentee voting material to the applicant by facsimile (fax) transmission utilizing the methods recommended by the Federal Voting Assistance Program (FVAP).

History Note: Authority G.S. 163-22; 163-247(1); 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0106 PROCESSES BY MAIL
(a) The absentee ballot number and other absentee voting information shall be entered into the register of absentee requests, applications, and ballots issued. Upon receiving the request to receive voting materials by mail, the board shall cause to be mailed to the voter in a single package:

(1) the official ballots the voter is entitled to vote;
(2) a container-return envelope for the ballots, printed in accordance with G.S. 163-229; and
(3) An instruction sheet.

(b) If the absentee ballot and other absentee voting materials are mailed to the applicant, the container return envelope sent with the ballot and other materials shall be addressed to the election director of the county in which the voter is domiciled and registered.
(c) Upon receipt of an absentee ballot by mail, the voter, in the presence of two other persons who are at least 18 years of age, and who are not disqualified, shall:

(1) Mark the ballots, or cause them to be marked by one of such persons in the voter's presence according to the voter's instruction;
(2) Fold each ballot separately, or cause each of them to be folded in the voter's presence;
(3) Place the folded ballots in the container-return envelope and securely seal it, or have this done in the voter's presence; and
(4) Make the certificate printed on the container-return envelope according to the provisions of G.S. 163-248(c).

(d) The sealed container-return envelope in which executed absentee ballots have been placed shall be transmitted to the board who issued them as follows: All ballots issued under the provisions of G.S. 163, Articles 20 and 21 shall be delivered not later than 5:00 p.m. on the day before the primary, special or general election.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0107 PROCESSES BY FAX
(a) Faxed ballots must be received by 5:00 p.m. on the day before the primary, special or general election and that the original voted ballots for faxed ballots must be mailed or placed in delivery to serve as a fail-safe mechanism and serve as part of the election audit trail.
(b) The board shall maintain a record of the name of each voter to whom an absentee ballot is sent under G.S. 163, Articles 20 and 21 which deal with absentee voting. The record must list the date on which the ballot is mailed or provided by facsimile (fax) transmission and the date on which the ballot is received by the board of elections office and the dates on which the ballot was executed and postmarked.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0108 ABSENTEE VOTING BY FACSIMILE (FAX) TRANSMISSION
(a) An application for an absentee ballot shall indicate that the absentee ballot returned by facsimile (fax) transmission will be accepted if received by the board no later than 5:00 p.m. the day before an election. The application shall also indicate that the original ballot must be mailed or placed in delivery. The application must include the voter's name, North Carolina residence address, ballot mailing address or telephone number of the facsimile machine to which the ballot is to be sent, date of birth and signature.
(b) An application for an absentee ballot received by facsimile (fax) transmission shall indicate that the absentee ballot returned by mail will be accepted by the board subject to the provisions of G.S. 163, Article 21.
(c) An application for an absentee ballot received by facsimile (fax) transmission will be treated in the same manner as an application for an absentee ballot received by mail, except that a notation will be made on the absentee ballot application log when an application is received by facsimile (fax) transmission.
(d) If an absentee ballot is sent to a voter by facsimile (fax) transmission, the ballot will include:

(1) a transmittal form that fulfills all transmission information requirements;
(2) instructions to the voter with procedures for returning the completed ballot by facsimile (fax) transmission or by mail, including a telephone number for the State Board of Elections dedicated fax line to which all ballots returned by facsimile (fax) transmission are to be transmitted, and the address of the appropriate office to which the ballot must be mailed; and
(3) the statements required with places for the voter and witnesses to sign.

(e) The instructions sent to the voter will include a description of the procedures that a voter returning the ballot must follow. The instructions will also inform the voter that if the voter follows these instructions, the ballot will be counted, unless it is sent in violation of G.S. 163, Articles 20 or 21 or is otherwise ineligible. The instructions will also inform the voter that the

voter assumes the risk that faulty facsimile (fax) transmission may occur.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0109 RECEIVING FACSIMILE (FAX) TRANSMISSIONS

(a) When a completed absentee ballot is received by facsimile (fax) transmission, the board of elections will note the date of receipt on the absentee ballot application log and, if the ballot is received on the day before election day, the time of receipt. The board of elections will then remove the ballot portion of the transmission from the portion that identifies the voter; place the ballot portion in a container-return envelope of the type used for absentee ballots returned by mail; seal the envelope; and maintain the voted ballot and envelope in a secure location for county board of elections consideration.

(b) A county board of elections may not accept multiple transmissions of a voted ballot or any other voting material submitted by the voter. The earliest date and timed version of a voted ballot or any other voting material received by the board of elections will be accepted. All other versions of a voted ballot or any other voting material will be rejected, except in the following circumstances: an incomplete fax transmission occurs and calls for a new complete fax transmission, and/or the original voted ballot which will be retained for audit purposes or used as a fail-safe mechanism.

(c) An absentee ballot that is returned by facsimile (fax) transmission must be received by the board of elections no later than 5:00 p.m., Eastern Standard Time, on the day before election day in order to be counted. Faxed ballots will not be accepted after that time, except votes for President and Vice-President of the United States may be received by fax or other delivery by the close of polls on election day. The original voted ballots shall be transmitted or delievered to the county board of elections. However, failure to receive the original voted ballot does not disqualify the faxed ballot. All approved absentee ballots returned by facsimile (fax) transmission will be hand-counted.

(d) Procedures for handling mail-in ballots that were sent to the voter electronically shall be the same as for other mail-in absentee ballots.

(1) An absentee ballot that was sent to a voter by facsimile (fax) transmission and was returned by mail will not be counted if the envelope in which the ballot is returned contains the ballot of more than one voter.

(2) Immediately after a copy of the voted ballot has been faxed to the county board, the voter shall place the original voted ballot in a secure envelope, together with a certificate as provided for in these Rules, and send the documents by air mail or place them in delivery to the county board office.

(3) All copies of voted ballots received by fax shall be approved, disapproved, processed, and counted, and disputes in connection therewith shall be handled in the same manner as applicable to other absentee ballots. Transmission problems that result in failure of the faxed ballot to be received by the board will result in the original voted ballot (hard copy) serving as a fail-safe ballot, treated as a regular absentee ballot, that must be received by the deadlines for counting absentee ballots under G.S. 163, Article 21 to be counted. Original voted ballots will be used as part of the audit process and as part of the election record in any election protest(s).

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0110 BALLOT VERIFICATION AND SECURITY

(a) The county board shall take all necessary precautions to preserve the security of the ballot materials and specifically shall ensure that the vote cast by a voter using a faxed ballot is not revealed, except to the extent necessary by law or judicial determination. Upon the completion of all inspections of a faxed ballot required by law, the board or any employee thereof acting under its direction shall promptly separate the waiver from the faxed ballot. Any person handling a faxed ballot shall not identify the votes cast by any voter, except upon judicial determination.

(b) Prior to certification of the results of the election, the county board shall:

(1) Compare the information on the faxed copy of each voted ballot with the same on the original voted ballot sent by air mail or placed in delivery by the voter who faxed to the county board a copy of the voted ballot, and the signature on the statement received by fax with the signature on the certificate received by air mail or delivery; and

(2) Ascertain whether an original voted ballot has been received for each faxed copy of a voted ballot received and counted. Note that failure to receive an original voted ballot by the deadline shall not result in the faxed ballot being disqualified.

(c) Whenever the particulars of the faxed copy of a voted ballot of a voter do not conform exactly with the particulars of the original voted ballot sent by air mail or delivery to the county board afterwards by that voter and whenever an original voted ballot has not been received which corresponds to a faxed copy of a voted ballot which has been received, those ballots and all other pertinent documents and information relative to those ballots shall be turned over to the investigative staff of the State Board of Elections for further investigation.

(d) Within 30 days after the election, the county board shall gather and keep together the faxed copy of the voted ballot, the certified statement and the original voted ballot sent by air mail or delivery of each voter who transmitted a copy of a voted ballot by fax. Those ballots needed for an investigation conducted by the investigative staff of the State Board of Elections or by law enforcement officials may be obtained by

such investigators but shall be returned to the county board as soon as practicable after the conclusion of the investigation. All ballots and documents relative to a faxed copy of a voted ballot received by the county board shall be retained by it for the period required by law for retention of other materials relevant to the election.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

08 NCAC 12 .0111 OTHER PROVISIONS

(a) The State Board of Elections agrees, unless the State Board of Election directs otherwise, to participate in any pilot projects sponsored by the Department of Defense to assist in improving processes for faxing or emailing voting information and materials. Should the State Board of Elections participate in a project, a full report shall be written by the staff regarding the pilot project for State Board consideration.

(b) Transmission details including preferred transmission times to county boards will be ascertained according to local needs. General procedures will be developed to accommodate for this part of the process.

(c) All county boards of elections plans for sending and receiving voting information and materials via electronic transmission must be submitted and approved by the State Board of Elections. Plans must include information regarding the type of equipment being used—type of fax machine, serial number, location of equipment, and security measures employed.

History Note: Authority G.S. 163-22; 163-257;
Temporary Adoption Eff. April 15, 2002;
Eff. August 1, 2004.

TITLE 10A - DEPARTMENT OF HEALTH & HUMAN SERVICES

10A NCAC 21A .0201 DEFINITIONS

For purposes of this Chapter, the following definitions apply:

(1) "M-AA" means a program of medical assistance to persons 65 years of age and older, and also means the assistance itself.

(2) "M-AB" means a program of medical assistance to blind persons, and also means the assistance itself.

(3) "M-AD" means a program of medical assistance to disabled persons less than 65 years of age, and also means the assistance itself.

(4) "M-AF" means a program of medical assistance for families and children, and also means the assistance itself.

(5) "M-IC" means a program of medical assistance for infants and children, and also means the assistance itself.

(6) "M-PW" means a program of medical assistance for pregnant women, and also means the assistance itself.

(7) "M-QB" means a program of medical assistance for qualified medicare beneficiaries described at 42 U.S.C. 1396d(p), and also means the assistance itself.

(8) "AFDC" means a program of assistance for families with dependent children, and also means the assistance itself.

(9) "AFDC-MA" has the same meaning as "M-AF".

(10) "Adequate Notice" means a written notice to inform the client of intended action. The client must receive this notice no later than the effective date of the action.

(11) "Advance Notice" means a written notice to inform the client at least 10 work days prior to terminating assistance, beginning or increasing a deductible, or beginning or increasing patient monthly liability.

(12) "Agency" means the Division of Medical Assistance and the county departments of social services, unless separately identified.

(13) "Appeal" means an oral or written request from a client for a hearing to review the action of a county department of social services or the disability decision when the client is dissatisfied with the decision in his case.

(14) "Application" means a written request for assistance on a form prescribed by the state that is signed under penalty of perjury by a client or an individual authorized by the client to be his representative for establishing his eligibility for medical assistance.

(15) "Authorization Period" means the period for which all conditions of eligibility have been established and for which the client is authorized to receive a Medicaid card and benefits.

(16) "Award Letter" means a statement to an individual from a governmental or private agency indicating benefits for which he is eligible.

(17) "BENDEX" means Beneficiary Data Exchange with the Social Security Administration for social security status and amount of benefits.

(18) "Budget Unit" means all persons whose income and needs are considered in the determination of eligibility for Medicaid.

(19) "Caretaker Relative" means a parent or a person in one of the following groups with whom a child lives:

(a) any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great;

(b) stepfather, stepmother, stepbrother, and stepsister;

(c) persons who legally adopt a child, their parents as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with state law;

(d) spouses of any persons named in the groups in (19) (a) - (c) of this Rule even after the marriage is terminated by death or divorce.

(20) "Certification Period" means the months for which eligibility is being established.

(21) "Client" means any applicant for or recipient of Medicaid, or someone who makes inquiries, is interviewed, or has been otherwise served or someone acting for the client.

(22) "Client Information" or "Client Record" means any information, including information stored in computer data banks or computer files relating to a client that was received in connection with the performance of any function of the agency.

(23) "Collateral" means a person or agency who can substantiate or verify information necessary to establish eligibility.

(24) "Contiguous Property" means real property with boundaries joining the homesite of the client.

(25) "Court Order" means any written order from a judge or a written document from a judicial official that explicitly directs the release of client information.

(26) "Deductible" means the amount that the client or budget unit member must personally spend or incur for medical expenses before he can be authorized to receive a Medicaid card and services that may be billed to the Medicaid program.

(27) "Delegated Representative" means a staff member designated by the director to carry out the responsibilities established by the rules in this Subchapter. Designation is implied when the assigned duties of an employee require access to confidential information.

(28) "Deprivation" means the lack of support or care from one or both parents (including adoptive parents) of a dependent child, as a result of the absence, incapacity, unemployment, or death of either parent.

(29) "Director" means the head of the Division of Medical Assistance or the county department of social services.

(30) "Disregard of Earned Income" means the procedure for exempting portions of earned income as a resource when determining the amount of payment.

(31) "Documentary Evidence" means information or records that can be relied on to prove the client's statements of fact.

(32) "Effective Date" means the date on which an action will take effect.

(33) "Equity" means the tax value of a resource less the amount of debts, liens, or other encumbrances.

(34) "Excluded Income" means money received by a member of the budget unit that is not counted in determining eligibility for assistance.

(35) "Foster Care Resource" means any private home or facility licensed to provide full time care to children.

(36) "Fraud" means an act in which a client makes false statements or withholds information willfully and knowingly with the intent to deceive, or both, and as a result obtains assistance for which he is not eligible.

(37) "Full-Time Student" means a student so designated by the school in which he is enrolled.

(38) "Good Cause" includes death, incapacity, hospitalization of the applicant/recipient (a/r), failure to receive written notice, or failure of a representative acting on the a/r's behalf to meet required time frames.

(39) "Grandfathered Status" means Medicaid eligibility based on the individual's status as a blind or disabled client or as an essential spouse of aged, blind, or disabled client in December, 1973.

(40) "Greater Weight of Evidence" means evidence of such quality as to persuade an ordinary and prudent person of the truth or falsity of a statement.

(41) "Guardian" means an individual, corporation, or disinterested public agent appointed by the clerk of superior court to replace an individual's authority to make decisions about his person, family, or property when the individual does not have adequate capacity to make such decisions and has been adjudicated incompetent. A guardian may be a guardian of the person, a guardian of the estate, or a general guardian which is guardian of both the person and the estate.

(42) "HCT (Healthy Children and Teens)" means a program which provides health screenings and treatment for clients from birth through age 20.

(43) "Incapacity" has the same meaning as in the North Carolina State plan approved under Part A of Title IV of the Social Security Act as in effect on July 16, 1996, as is required by 42 U.S.C. 1396u-1.

(44) "Income" means money that is available to members of the budget unit for their needs.

(45) "Income, Earned" means money received as a result of employment.

(46) "Income, Gross" means total income before allowable deductions.

(47) "Income, Net" means income after all allowable deductions.

(48) "Income, Unearned" means money received from any source other than employment.

(49) "Incompetent Adult" means an adult who lacks sufficient capacity to manage his own affairs or to make or communicate decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, senility, disease, injury, or similar cause or condition.

(50) "Inmate of a Public Institution" means a person who lives in an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control and that provides treatment or services, food and shelter.

(51) "Institutionalized Spouse" means an individual who:
- (a) is in a medical institution or nursing facility or who is described under 42 U.S.C. 1396a (a) (10) (A) (ii) (VI); and
- (b) is married to an individual who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of Subparagraph (a) for at least 30 consecutive days.

(52) "Life Estate Interest" means the right to use property and receive income from the property for the remainder of one's life.

(53) "Long Term Care" means care in:
- (a) a general or specialty hospital in excess of 30 continuous days;
- (b) a state mental hospital;
- (c) a skilled nursing facility; or
- (d) an intermediate care facility.

(54) "Patient Monthly Liability" means the amount of a long term care patient's income that must be paid towards his cost of care.

(55) "Remainder Interest" means ownership interest in property that will be inherited in full or jointly with other remainder interest holders at a life interest holder's death.

(56) "Representative" means a person who is authorized by the client to act on behalf of the client.

(57) "Reserve" means assets owned by members of the budget unit and that have a market value.

(58) "Residence" means the county where a client lives with intent to remain for an indefinite time as governed by Rule .0303 of Subchapter 21B. Also, an individual under age 21 has the residence of the person with whom he resides unless he is in the custody of a social services agency, in which case he is a resident of the county of the custodial agency.

(59) "Revocable Trust" means funds held in trust that are available for the client's use.

(60) "RSDI (Retirement, Survivors, Disability Insurance)" means social security benefits.

(61) "SDX" means State Data Exchange with the Social Security Administration for the purpose of providing a listing of all persons receiving supplemental security income, their current payment status and amount of SSI and other sources of income.

(62) "SSI" means Supplemental Security Income, a federal assistance payment for aged, blind and disabled persons administered by the Social Security Administration.

(63) "Stepparent" means that a person is not the parent of a child but the person is married to the parent of the child who wants to receive Medicaid.

(64) "Timely Notice" means the same as "Advance Notice".

(65) "Time Standard" means the requirement to process an application within 45 or 90 days from the date of application in accordance with 42 C.F.R. 435.911.

(66) "Verification" means the confirmation of facts and information used in determining eligibility.

History Note: Authority G.S. 108A-25(b); 108A-54; P.L. 99-509; P.L. 100-360; P.L. 100-485; 42 C.F.R. 431.211; 42 C.F.R. 431.214; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;
Eff. September 1, 1984;
Amended Eff. August 1, 1990;
Temporary Amendment Eff. March 1, 2003;
Amended Eff. August 1, 2004.

10A NCAC 21A .0602 CORRECTIVE ACTIONS

(a) Corrections in an applicant's or recipient's case shall be made by the county department of social services when:
- (1) An individual was discouraged from filing an application; or
- (2) An appeal or court decision overturns an earlier adverse decision; or
- (3) The certification periods of financially responsible persons need to be adjusted to coincide; or
- (4) Information received from any source is verified and is found to change the amount of the recipient's deductible, patient liability, authorized period or otherwise affect the recipient's eligibility status; or
- (5) Additional medical bills or verified medical expenses establish an earlier Medicaid effective date; or
- (6) The agency made an administrative error due to:
  - (A) Assistance was terminated or denied in error; or

(B) Failure to act properly on information received; or
(C) Incorrect determination of the authorization period, Medicaid effective date, or erroneous data entry; or
(7) Monitoring under application processing requirements determines an application was denied, withdrawn or a person was discouraged from applying for assistance without following the requirements in Alexander v. Burton U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002.
(8) The Medicaid Eligibility Section determines the county failed to follow federal or state regulations to authorize eligibility or follow requirements in 10A NCAC 21A.

(b) Corrections in an applicant's or recipient's case shall be made by the Division of Medical Assistance when:
(1) Information is received from county departments of social services, medical providers, public, clients or Division of Medical Assistance staff showing that a terminated case has errors in the Medicaid eligibility segments, Buy-In effective date, eligible case members, CAP or HMO indicators and effective dates or other data that is causing valid claims to be denied; or
(2) The county department of social services refuses to take required corrective actions; or
(3) An audit report from State auditors hired by the county departments of social services shows verified errors in the Medicaid eligibility history or recipient identification number.

History Note: Authority G.S. 108A-54; 42 C.F.R. 431.246; 42 C.F.R. 435.904; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;
Eff. June 1, 1990;
Temporary Amendment Eff. March 1, 2003;
Amended Eff. August 1, 2004.

10A NCAC 21A .0603 TIME LIMITS FOR CORRECTIONS

(a) The county department of social services and Division of Medical Assistance shall make corrections required by Rule .0602 of Subchapter 21A within 30 days after discovery of the need for action unless good cause exists for failure to act timely.

(b) Good cause is limited to:
(1) The need to verify other conditions of eligibility before authorizing eligibility; or
(2) The county department of social services is unable to locate the applicant or recipient; or
(3) The county department of social services disagrees with a decision requiring corrective action and has requested administrative review by the Medicaid Eligibility Section;

(c) To receive state and federal financial participation in any benefits authorized retroactively by corrective actions, the effective date of the correction must correspond with the date assistance would have been effective but may be no earlier than the following dates:
(1) Retroactive to the date ordered by the appeal or court decision if all eligibility conditions are met, including any legal retroactive coverage period associated with the adverse action; or
(2) Retroactive to the date that all requirements of eligibility are met but no earlier than the 12th month immediately preceding the month the change is reported or the administrative error was discovered; or
(3) Retroactive to the date required for corrective action due to errors cited from monitoring under application processing standards in Rule .0605 in Subchapter 21A of this Chapter.

(d) If the change is adverse to the recipient, it shall be effective with the first calendar month following expiration of the 10 work day advance notice period.

History Note: Authority G.S. 108A-54; 42 C.F.R. 431.246; 42 C.F.R. 431.250; 42 C.F.R. 435.904; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;
Eff. June 1, 1990;
Temporary Amendment Eff. March 1, 2003;
Amended Eff. August 1, 2004.

SECTION .0600 – CORRECTIVE ACTIONS IN MEDICAID CASES

10A NCAC 21A .0606 TIMELINESS

(a) Every month, each county department of social services and the Disability Determination Section (DDS) of the Division of Vocational Rehabilitation shall process applications as follows:
(1) The average processing time (APT) for the county department of social services shall be 90 days for M-AD and 45 days for all other aid program categories.
(2) APT for DDS shall be 70 days.
(3) The percentage processed timely (PPT) standard for county departments of social services: Level I counties must process 85% of applications within the 45/90 day time standard. Level II and III counties must process 90% of applications within the 45/90 day time standard. Counties are classified as Levels I through III based on population of the county with Level I counties as the smallest in population while Level III counties are the largest in population size.

(4) PPT standard for DDS: DDS must render a decision within 70 days on 85% of cases for Level I counties and 90% of cases for Level II and III counties. For county levels refer to the table below.

COUNTY LEVELS			
ALAMANCE (II)	CUMBERLAND (III)	JOHNSTON (II)	RANDOLPH (II)
ALEXANDER (I)	CURRITUCK (I)	JONES (I)	RICHMOND (I)
ALLEGHANY (I)	DARE (I)	LEE (I)	ROBESON (II)
ANSON (I)	DAVIDSON (II)	LENOIR (II)	ROCKINGHAM (II)
ASHE (I)	DAVIE (I)	LINCOLN (I)	ROWAN (II)
AVERY (I)	DUPLIN (II)	MACON (I)	RUTHERFORD (II)
BEAUFORT (II)	DURHAM (III)	MADISON (I)	SAMPSON (II)
BERTIE (I)	EDGECOMBE (II)	MARTIN (I)	SCOTLAND (II)
BLADEN (I)	FORSYTH (III)	MCDOWELL (I)	STANLY (I)
BRUNSWICK (II)	FRANKLIN (I)	MECKLENBURG (III)	STOKES (I)
BUNCOMBE (III)	GASTON (III)	MITCHELL (I)	SURRY (II)
BURKE (II)	GATES (I)	MONTGOMERY (I)	SWAIN (I)
CABARRUS (II)	GRAHAM (I)	MOORE (II)	TRANSYLVANIA (I)
CALDWELL (II)	GRANVILLE (I)	NASH (II)	TYRRELL (I)
CAMDEN (I)	GREENE (I)	NEW HANOVER (III)	UNION (II)
CARTERET (II)	GUILFORD (III)	NORTHAMPTON (I)	VANCE (II)
CASWELL (I)	HALIFAX (II)	ONSLOW (II)	WAKE (III)
CATAWBA (III)	HARNETT(II)	ORANGE (II)	WARREN (I)
CHATHAM (I)	HAYWOOD (II)	PAMLICO (I)	WASHINGTON (I)
CHEROKEE (I)	HENDERSON (II)	PASQUOTANK (I)	WATAUGA (I)
CHOWAN (I)	HERTFORD (I)	PENDER (I)	WAYNE (II)
CLAY (I)	HOKE (I)	PERQUIMANS (I)	WILKES (II)
CLEVELAND (II)	HYDE (I)	PERSON (I)	WILSON (II)
COLUMBUS (II)	IREDELL (II)	PITT (II)	YADKIN (I)
CRAVEN (II)	JACKSON (I)	POLK (I)	YANCEY (I)

(b) If a county department of social services fails to meet the standards in Paragraph (a) of this Rule, the county shall analyze the reason for failure, document findings and work with the Medicaid Program Representative (MPR) to achieve corrective action. The MPR is a Division of Medical Assistance employee.

(c) Failure to meet the time standards in paragraph (a), monthly shall result in corrective action to alleviate problems as outlined in Rules 21A .0607 and .0608. Once eligibility is determined except for the following requirements:

(1) sufficient medical expenses to meet a deductible; or
(2) the determination of need for institutionalization; or
(3) the plan of care for the home and community based waivers; or
(4) the disability decision made by the Disability Determination Section; or
(5) medical records needed to determine emergency dates for non-qualified aliens;

days shall be excluded from the time standard of 45 or 90 days. Days in the time standard are again included when the items in (1) through (5) are received until the application is completed with a written notice to the applicant. When the 45/90th day falls on a weekend or holiday, the next workday in the month is considered the 45/90th day.

History Note: Authority G.S. 108A-54; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;
Temporary Adoption Eff. March 1, 2003;
Adoption Eff. August 1, 2004.

10A NCAC 21A .0607 LOCAL CORRECTIVE ACTION EAM

(a) The Assistant Director for Recipient and Provider Services (R&PS) in the Division of Medical Assistance shall determine that a Local Corrective Action Team is needed when the county department of social services (DSS) is out of compliance with the monitoring or APT or PPT processing thresholds in any category for three consecutive months, or, five months out of any 12 consecutive months. The Local Corrective Action Team

shall include the Medicaid Program Representative and any additional state staff identified by the Assistant Director for R&PS, the county department of social services director and any county staff the county director designates, the county manager or the chair of the county board of commissioners as selected by the county director, a member of the general public as selected by the county director, the social services board chairman or other board member for the county as selected by the county director, and an independent management consultant at the option and expense of the county.

(b) A Local Corrective Action Team shall not convene when:

(1) All failures are attributable to DDS.

(2) It is determined by DMA Assistant Director for Recipient and Provider Services that the reasons for non-compliance have been or are being corrected.

(3) Budgetary constraints decided by DMA Assistant Director for R&PS do not allow travel for the purpose of convening a corrective action team. Conference calls shall be held by the DMA Assistant Director for R&PS when travel is not allowed as determined by State officials due to fiscal constraints.

(c) The Local Corrective Action Team may design any remedy reasonable and necessary to bring the DSS into compliance with application processing requirements as in 10A NCAC 21B .0201-.0209.

(d) The Team shall establish a corrective action plan within 40 calendar days of notice from the Assistant Director of Recipient and Provider Services to the county director of social services that a local corrective action team was required, and a date for compliance with the plan shall be set. The corrective action plan must be submitted to the Assistant Director for R&PS. The county must meet the thresholds in 10A NCAC 21A .0606(a) within three months after the date the compliance plan was required to be established.

(e) Failure of a county to take corrective action, or meet compliance thresholds shall result in a referral by the Division of Medical Assistance to a State Corrective Action Team, unless the State Corrective Action Team grants an extension, not to exceed three months, for the county to meet the thresholds. In determining if an extension shall be granted, the State Corrective Action Team shall receive a recommendation from the Division of Medical Assistance to grant an extension based on the Division's assessment that the county is taking action to comply with the corrective action plan. The State Corrective Action Team shall be formed by the Secretary for the Department of Health and Human Services based on a request from the Division of Medical Assistance. The State Corrective Action Team shall consist of a representative from the Department of Health and Human Services appointed by the Secretary, a representative of the NC Association of County Commissioners, two representatives from county departments of social services, excluding the county in question, appointed by the presidents of the following associations: NC Social Services Association, NC Association of County Directors of Social Services, and the NC Association of County Boards of Social Services, the chairman of the Board of Legal Services of North Carolina or his designee, a recipient of Medicaid appointed by the Secretary, and a representative of the Institute of Government.

History Note: Authority G.S. 108A-54; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;
Temporary Adoption Eff. March 1, 2003;
Adoption Eff. August 1, 2004.

10A NCAC 21A .0608 STATE CORRECTIVE ACTION TEAM

(a) A State Corrective Action Team shall be convened by the Chairperson within 10 days when:

(1) The county department of social services (DSS) has failed to meet the compliance thresholds by the date established by the local corrective action team.

(2) A local corrective action team requests an extension of time, not to exceed three months, to meet the compliance thresholds.

(3) DDS fails to meet its compliance thresholds for three consecutive months or five out of twelve consecutive months.

(b) The State Corrective Action Team may design any remedy reasonable and necessary to bring the DSS or DDS into compliance with application processing requirements in 10A NCAC 21B 0201-.0209. This includes employing additional staff, altering office procedures (such procedures must be consistent with federal and state regulations, laws and Departmental rules), purchasing office equipment, retaining private consultants, reopening of cases, ordering retroactive relief to applicants harmed by violation of application processing requirements, and ordering the State to assist in the operation of a county department.

(c) The State Corrective Action Team shall establish a corrective action plan for the DSS or DDS within 45 calendar days of convening. A date for compliance shall be established. The county or DDS must meet the thresholds in 10A NCAC 21A .0606(a) within three months after the date the team was convened.

(d) Failure to achieve compliance shall result in a request from the Division of Medical Assistance to the Local Government Commission to assess and determine the capacity of the county to expend resources to bring the county into compliance.

History Note: Authority G.S. 108A-54; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;
Temporary Adoption Eff. March 1, 2003;
Adoption Eff. August 1, 2004.

10A NCAC 21B .0410 ALIEN SPONSOR DEEMING

(a) For purposes of this Rule, a sponsored alien is an alien lawfully admitted for permanent residence sponsored by an individual who has signed an Affidavit of Support required by the Bureau of Citizenship and Immigration Services.

(b) For purposes of this Rule, a sponsor is a person who signed an Affidavit of Support on behalf of an alien as a condition of the alien's entry or admission to the United States. The sponsor is financially responsible for the alien so the sponsor's income

must be counted in determining an alien's eligibility for medical assistance.
(c) An indigent alien is exempt from Paragraph (b) of this Rule if the sum of Subparagraphs(1), (2), and (3) of this Paragraph does not exceed 130 percent of the poverty income guidelines.
(1) The sum of the sponsored alien's own income;
(2) The cash contributions of the sponsor and others; and
(3) The value of any in-kind assistance the sponsor and others provide the alien.
(d) The countable income of a sponsor is determined in accordance with Rules .0312 and .0404 of this Subchapter. Rule .0402 of this Subchapter applies for situations in which the sponsor is the spouse or a parent.
(e) The countable resources of a sponsor are determined in accordance with Rules .0311 and .0403 of this Subchapter.
(f) Third party verification of the following is required for:
(1) sponsorship;
(2) a sponsor's income; and
(3) a sponsor's resources.
The application shall be denied if verification is not received by the processing deadline.

History Note: Authority G.S. 108A-25(b); 108A-54; 108A-55; P.L. 104-208; P.L. 105-33;
Temporary Adoption Eff. July 3, 2003;
Eff. March 1, 2004.

DEPARTMENT OF INSURANCE

11 NCAC 04 .0427 DISCLOSURE REQUIREMENTS
Every insurer that writes motor vehicle insurance in this state and that intends to require or specify the use of after market parts must disclose to its policyholders in writing, either in the policy or on a sticker attached thereto, the following information in no smaller print than ten point type:

IN THE REPAIR OF YOUR COVERED AUTO UNDER THE PHYSICAL DAMAGE COVERAGE PROVISIONS OF THIS POLICY, WE MAY REQUIRE OR SPECIFY THE USE OF AUTOMOBILE PARTS NOT MADE BY THE ORIGINAL MANUFACTURER. THESE PARTS ARE REQUIRED TO BE AT LEAST EQUAL IN TERMS OF FIT, QUALITY, PERFORMANCE AND WARRANTY TO THE ORIGINAL MANUFACTURER PARTS THEY REPLACE.

All after market parts installed on a motor vehicle shall be identified on the estimate and invoice for such repair.

History Note: Authority G.S. 58-2-40;
Eff. April 1, 1989;
Amended Eff. March 1, 2004.

TITLE 12 - DEPARTMENT OF JUSTICE

12 NCAC 09G .0405 CERTIFICATION OF SCHOOL DIRECTORS
(a) Any person designated to act as, or who performs the duties of, a School Director in the delivery or presentation of a Commission-certified corrections training course shall be and continuously remain certified by the Commission as a School Director.
(b) To qualify for certification as a corrections School Director, at a minimum, an applicant shall:
(1) present documentary evidence showing that the applicant:
(A) is a high school graduate or has passed the General Education Development Test (GED) indicating high school equivalency and has acquired five years of practical experience as a criminal justice officer, corrections officer, or as an administrator or specialist in a field directly related to the corrections system. At least one year of the required five years experience must have been while actively participating in corrections training as a Commission-certified instructor; or
(B) has been awarded an associate degree and has acquired four years of practical experience as a criminal justice officer, corrections officer, or as an administrator or specialist in a field directly related to the corrections system. At least one year of the required four years experience must have been while directly participating in corrections training as a Commission-certified instructor; or
(C) has been awarded a baccalaureate degree from a regionally accredited institution of higher learning;
(2) attend or have attended the most current offering of the School Director's orientation as developed and presented by the Commission staff, otherwise an individual orientation with a staff member shall be required; and
(3) submit a written request to the Commission for the issuance of such certification. This request shall be executed by the executive officer of the North Carolina Department of Correction.
(c) To qualify for certification as a School Director in the presentation of the "Criminal Justice Instructor Training Course" an applicant shall:
(1) document that he/she has been awarded a baccalaureate degree from a regionally accredited institution of higher learning;
(2) present evidence showing successful completion of a Commission-certified instructor training course or an equivalent instructor training program as determined by the Commission;

(3) be currently certified as a criminal justice instructor by the Commission; and
(4) document successful participation in a special program presented by the Justice Academy for purposes of familiarization and supplementation relevant to delivery of the instructor training course and trainee evaluation.

History Note: Authority G.S. 17C-6;
Temporary Adoption Eff. January 1, 2001;
Temporary Adoption Expired December 20, 2001;
Temporary Adoption Eff. April 15, 2003;
Eff. April 1, 2004.

12 NCAC 11 .0505 RECORDING AND REPORTING CONTINUING EDUCATION CREDITS

(a) Each licensee shall record and report continuing education credits to the Board at the time of license or registration renewal, and for each course taken such report shall include a certificate of course completion that is signed by at least one course instructor, indicates the name of the licensee or registrant who completed the course, indicates the date of course completion, and indicates the number of hours taken by the licensee or registrant. Credit shall not be given if a certificate of course completion is dated more than two years from the license or registration permit renewal date. Each course instructor shall maintain a course roster. Said roster shall be delivered to the Board's office within two weeks of the completion date of the course.
(b) All applications for renewal of a license or registration permit shall have a CE Certificate(s) attached verifying completion of the required number of credit hours. If an applicant is filing an application designated as "new" and the applicant has been licensed or registered for any period of time within the previous two years, the applicant shall attach a CE Certificate(s) verifying completion of the required number of credit hours. An applicant shall not be required to submit a CE Certificate if the applicant is filing an application designated as a "transfer" or "duplicate" and if the applicant has a current registration card issued by the Board.

History Note: Authority G.S. 74D-2; 74D-5;
Eff. May 1, 1999;
Amended Eff. March 1, 2004; July 18, 2002.

TITLE 15A - DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

15A NCAC 01R .0101 FEE SCHEDULE

(a) The following schedule of fees shall be applicable to govern admission to the North Carolina Aquariums:
(1) Roanoke Island:

Adults, 18 and over	$7.00
Senior Citizens, 62 and over	$6.00
Active Military	$6.00
Ages 6-17	$5.00

(2) Fort Fisher:

Adults, 18 and over	$7.00
Senior Citizens, 62 and over	$6.00
Active Military	$6.00
Ages 6-17	$5.00

(3) Pine Knoll Shores:

Adults, 18 and over	$7.00
Senior Citizens, 62 and over	$6.00
Active Military	$6.00
Ages 6-17	$5.00

(b) Free admission is offered to the following groups:
(1) Aquarium Society Members;
(2) North Carolina School groups;
(3) American Zoo and Aquarium Association reciprocals; and
(4) Children under the age of six.

Free admission will be offered on the following holidays: Martin Luther King, Jr. Day, Valentine's Day, Veteran's Day, and Christmas Eve.

History Note: Authority G.S. 143B-289.41(b); 143B-289.44;
Eff. March 1, 2004.

15A NCAC 18A .2508 DEFINITIONS

The following definitions shall apply throughout this Section:
(1) Equipment replacement means replacement of individual components of the hydraulic and disinfection systems such as pumps, filters, and automatic chemical feeders.
(2) Public swimming pool means public swimming pool as defined in G.S. 130A-280. Public swimming pools are divided into four types:
(a) Swimming pools are public swimming pools used primarily for swimming.
(b) Spas are public swimming pools designed for recreational and therapeutic use that are not drained, cleaned, or refilled after each individual use. Spas may include units designed for hydrojet circulation, hot water, cold water mineral bath, air induction bubbles, or any combination thereof. Common terminology for spas includes "therapeutic pool", "hydrotherapy pool", "whirlpool", "hot spa", and "hot tub".
(c) Wading pools are public swimming pools designed for use by children, including wading pools for toddlers and children's activity pools designed for casual water play ranging from splashing activity to the use of interactive water features placed in the pool.
(d) Specialized water recreation attractions are pools designed for special purposes that differentiate them from swimming pools, wading

pools and spas. They include, but are not limited to:

(i) water slide plunge pools and run out lanes;

(ii) wave pools;

(iii) rapid rides;

(iv) lazy rivers;

(v) interactive play attractions that incorporate devices using sprayed, jetted, or other water sources contacting the users and that do not incorporate standing or captured water as part of the user activity area, and

(vi) training pools deeper than a 24 inch deep wading pool and shallower than a 36 inch deep swimming pool.

(3) Remodeled means renovations requiring disruption of the majority of the pool shell or deck, changes in the pool profile, or redesign of the pool hydraulic system. Remodeled does not include equipment replacement, repair, or addition of outlets for the purpose of reducing suction hazards.

(4) Repair means repair of existing equipment, replastering or repainting of the pool interior, replacement of tiles or coping and similar maintenance activities. This term includes replacement of pool decks where the Department has determined that no changes are needed to underlying pipes or other pool structures.

(5) Safety vacuum release system means a system or device capable of providing vacuum release at a suction outlet caused by a high vacuum occurrence due to suction outlet flow blockage.

(6) Splash zone means the area of an interactive play attraction that sheds water to a surge tank or container to be recirculated.

History Note: Authority G.S. 130A-282;
Eff. May 1, 1991;
Temporary Amendment Eff. June 1, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Amended Eff. March 1, 2004, April 1, 1999; January 1, 1996; October 1, 1994.

15A NCAC 18A .2511 INSPECTIONS

(a) Each public swimming pool shall be inspected by the Department to determine compliance with the rules of this Section. Pools that open on or after April 1 and close on or before October 31 shall be inspected at least once during the period of operation. All other pools shall be inspected at least twice a year.

(b) Inspections of public swimming pools shall be conducted by Environmental Health Specialists authorized by the Department to enforce the rules of this Section. Inspections shall be documented on Inspection of Swimming Pool Form DENR 3960. Items on the grade sheet shall be divided into two, four and six-demerit items. Six-demerit items are failures to maintain minimum water quality or safety standards and warrant immediate suspension of an operation permits under G.S. 130A-23(d). Four-demerit items are rule violations which warrant denial of an operation permit or notification of an intent to suspend an operation permit. Two-demerit items are rule violations that do not warrant permit action unless such violation causes an imminent hazard, failure to meet water quality or safety standard, or a suction hazard. Demerits shall be assessed for each item found not to be in compliance with the rules of this Section. Demerits shall be assessed as follows:

(1) Violation of Rule 18A .2535(2) of this Section regarding water clarity shall be assessed six demerits.

(2) Violation of Rule 18A .2531(a)(11) .2531(b)(3), .2535(3), (4), (5), (7), (8), or (9), or .2543(d)(7) or (e)(2) of this Section regarding disinfectant residuals shall be assessed six demerits.

(3) Violation of Rule 18A .2535(1) of this Section regarding pool water pH shall be assessed six demerits.

(4) Violation of Rule 18A .2535(12) of this Section or regarding control of water temperature in heated pools shall be assessed six demerits.

(5) Violation of Rule 18A .2535(10), (11), or (13), .2537(c), or .2540 of this Section regarding pool operator training, water quality records and test kits shall be assessed four demerits.

(6) Violation of Rule 18A .2518(k), .2537(b)(7) or (16), or .2539 of this Section regarding pool drains and suction hazards shall be assessed six demerits.

(7) Violation of Rule 18A .2537(b)(3), (8), (9) or (14) of this Section regarding maintenance of pool walls and floor shall be assessed four demerits.

(8) Violation of Rule 18A .2518(l) or (m), .2531(5), .2532(4)(b) or .2537(b)(14) of this Section regarding water surface skimmers shall be assessed four demerits.

(9) Violation of Rule 18A .2523 or .2537(b)(6) of this Section regarding depth markers and no diving markers shall be assessed four demerits.

(10) Violation of Rule 18A .2515(d) or (f), .2523(d) or .2537(b)(12) of this Section regarding floating safety ropes and contrasting color bands at breakpoints shall be assessed two demerits.

(11) Violation of Rule 18A .2517, .2521, .2527, .2537(b)(10), .2527, or .2542 of this Section regarding diving equipment, slides, ladders, steps, handrails and in-pool exercise equipment shall be assessed two demerits.

(12) Violation of Rule 18A .2518(j) or .2537(b)(8) of this Section regarding inlets and other fittings shall be assessed four demerits.
(13) Violation of Rule 18A .2516(b), .2521(b)(4), .2532(13) or .2537(b)(12) of this Section regarding contrasting color bands on seats or benches shall be assessed four demerits.
(14) Violation of Rule 18A .2532(7) or .2537(b)(11) of this Section regarding spa timers shall be assessed four demerits.
(15) Violation of Rule 18A .2530(a), or (b), or .2537(b)(1) of this Section regarding lifesaving equipment shall be assessed six demerits.
(16) Violation of Rule 18A .2528, .2531(a)(8) or .2537(b)(5) of this Section regarding fences, barriers and gates shall be assessed four demerits.
(17) Violation of Rule 18A .2522 or .2537(b)(2) of this Section regarding decks shall be assessed four demerits.
(18) Violation of Rule 18A .2530(c) of this Section regarding No Lifeguard warning signs shall be assessed four demerits.
(19) Violation of Rule 18A .2530(d) or .2543(d)(13) of this Section regarding pet and glass container signs shall be assessed four demerits.
(20) Violation of Rule 18A .2532(15) through (17), or .2537(b)(13) of this Section regarding caution signs at hot water spas shall be assessed four demerits.
(21) Violation of Rule 18A .2524, or .2537(b)(4) of this Section regarding pool and deck lighting and ventilation shall be assessed four demerits.
(22) Violation of Rule 18A .2530(f) of this Section regarding emergency telephones shall be assessed six demerits.
(23) Violation of Rule 18A .2535(6) of this Section regarding automatic chlorine or bromine feeders shall be assessed four demerits.
(24) Violation of Rule 18A .2518 .2519, .2525, .2531(a)(1) through (3), .2532(1) through (6), or .2543(b), (d)(1) through (6) or (e)(1) of this Section regarding pool filter and circulation systems shall be assessed four demerits.
(25) Violation of Rule 18A .2533, .2534 or .2537(b)(15) of this Section regarding equipment rooms and chemical storage rooms shall be assessed two demerits.
(26) Violation of Rule 18A .2518(e) of this Section regarding identification of valves and pipes shall be assessed two demerits.
(27) Violation of Rule 18A .2513(b) of this Section regarding air gaps for filter backwash shall be assessed two demerits
(28) Violation of Rule 18A .2526 or 2543(d)(11) of this Section regarding accessible dressing and sanitary facilities shall be assessed two demerits.
(29) Violation of Rule 18A .2526 of this Section regarding maintenance and cleaning of dressing and sanitary facilities and fixtures shall be assessed two demerits.
(30) Violation of Rule 18A .2512 of this Section regarding water supplies shall be assessed two demerits.
(31) Violation of Rule 18A .2513(a) of this Section regarding sewage disposal shall be assessed two demerits.
(32) Violation of Rule 18A .2526(c) of this Section regarding floors in dressing and sanitary facilities shall be assessed two demerits.
(33) Violation of Rule 18A .2526(c), or (d) of this Section regarding hose bibs and floor drains in dressing and sanitary facilities shall be assessed two demerits.

History Note: Authority G.S. 130A-282;
Eff. May 1, 1991;
Amended Eff. March 1, 2004; January 1, 1996.

15A NCAC 18A .2543 WATER RECREATION ATTRACTIONS

(a) Water recreation attractions including water slides, wave pools, rapid rides, lazy rivers and other similar features can deviate from the requirements of this Section with respect to pool profile, depth, freeboard, flow dynamics and surface skimming systems. The designing engineer or equipment manufacturer shall provide the Department with information to justify such deviation as necessary for the proper function of the attraction. Water recreation attractions shall meet all other requirements of this Section.
(b) Water slide landing pools with a capacity of less than 60,000 gallons shall have a circulation and filtration system capable of turning over the entire pool capacity every two hours. Where automatic chemical controllers are used the turnover time shall be no more than three hours. Landing pool dimensions shall be consistent with the slide manufacturer's recommendation.
(c) When waterfalls are incorporated in water recreation attractions, they shall be constructed with no handholds or footholds to a height of four feet to discourage climbing.
(d) Interactive play attractions shall be constructed and operated in accordance with the rules of this section and shall comply with the following:
(1) The recirculation system shall contain a water capacity equal to at least three minutes of maximum flow of all feature pumps and filter circulation pumps combined and shall not be less than 1,000 gallons. Where the water capacity exceeds 10,000 gallons, the minimum capacity shall be based on the lesser of three minutes of maximum feature flow or 7.5 gallons per square foot of splash zone watershed drained to the surge container.
(2) Access shall be provided to the surge water container.
(3) A filter circulation system shall be provided and shall be separate from the feature pump system except that both systems can draw

water from a common drain pipe if the drain and pipe are sized to handle the flow of all pumps without exceeding the flow velocities specified in Rule .2518 of this Section.

(4) The filter circulation system shall draw water from the surge container through a variable height surface skimmer and a bottom drain located no more than 6 inches from the bottom of the container. Custom skimming systems that do not comply with ANSI/NSF Standard 50 shall be approved where the operational requirements make it necessary to deviate from that standard.

(5) The filter circulation system shall filter and return the entire water capacity in no more than 30 minutes and shall operate 24 hours a day.

(6) Automatic chemical controllers shall be provided to monitor and adjust the disinfectant residual and pH of the water contained in the system.

(7) The disinfectant residual in interactive play attractions shall be maintained at a level of at least two parts per million of free chlorine. Chlorine feeders shall be capable of producing 12 parts per million of free chlorine in the filter circulation piping.

(8) Valves shall be provided to control water flow to the features in accordance with the manufacturers' specifications.

(9) Splash zones shall be sloped to drains sized and located to remove all feature water to the surge tank without water accumulating on the surface.

(10) Deck or walkway space is not required outside the splash zone.

(11) Dressing and sanitary facilities shall be provided.

(12) Interactive play features shall not be required to have a fence except the wading pool fence requirements shall apply to interactive play features located inside a swimming pool enclosure.

(13) The safety provisions of Rule .2530 of this Section shall not apply except a sign shall be posted prohibiting pets and glass containers.

(14) Interactive play attractions built prior to April 1, 2004, that do not comply with these design and construction requirements shall be permitted to operate as built if no water quality or safety violations occur.

(e) Training pools shall meet the requirements for swimming pools with the following exceptions:

(1) Training pools shall be equipped with a filter circulation system that filters and returns the entire pool capacity in no more than two hours.

(2) The free chlorine residual in training pools shall be maintained at no less than two parts per million.

History Note: Authority G.S. 130A-282;
Eff. April 1, 1999;
Amended Eff. March 1, 2004.

TITLE 19A - TRANSPORTATION

19A NCAC 02D .0532 TOLL OPERATIONS

The Cedar Island-Ocracoke, Currituck-Corolla, Swan Quarter-Ocracoke and Southport-Ft. Fisher ferry operations are toll operations. Fares and rates applicable to each operation are as listed in this Rule:

(1) Cedar Island-Ocracoke and Swan Quarter-Ocracoke

(a) pedestrian $ 1.00

(b) bicycle and rider $ 3.00

(c) motorcycle and rider $10.00

(d) single vehicle or combination 20 feet or less in length $15.00 (minimum fare for licensed vehicle)

(e) vehicle or combination over 20 feet up to and including 40 feet $30.00

(f) vehicle or combination over 40 feet to 65 feet (maximum length) $45.00

(g) vehicle or combination over 65 feet Special Permit @ $1.00 Per Foot

(2) Currituck-Corolla (pedestrian only) $ 2.00 (no toll charge for Currituck County school children and staff)

(3) Southport-Ft. Fisher

(a) pedestrian $ 1.00

(b) bicycle and rider $ 2.00

(c) motorcycle and rider $ 3.00

(d) single vehicle or combination 20 feet or less in length $ 5.00 (minimum fare for licensed vehicle)

(e) vehicle or combination over 20 feet up to and including 40 feet $10.00

(f) vehicle or combination over 40 feet to 65 feet $15.00

(g) vehicle or combination over 65 feet Special Permit @ $1.00 Per Foot

(4) Commuter Passes are valid for one year from date of purchases. Passes are available to anyone.

Type	System-Wide Pass	Site Specific Pass
Vehicles up to 20 feet	$150.00	$100.00
Vehicles over 20 feet to 40 feet	$200.00	$125.00
Vehicles over 40 feet to 65 feet	$250.00	$150.00

History Note: Authority G.S. 136-82; 143B-10(j);
Eff. July 1, 1978;
Amended Eff. March 1, 2004; April 1, 2003; August 1, 2002;

November 1, 1991; May 1, 1983.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

CHAPTER 29 - LOCKSMITH LICENSING BOARD

21 NCAC 29 .0604 REQUEST FOR HEARING

(a) Any time an individual believes his rights, duties, or privileges have been affected by the Board's administrative action, but has not received notice of a right to an administrative hearing pursuant to G.S. 150B-38(b), that individual may file a request for a hearing.

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

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

(1) Name and address of the Petitioner;

(2) A concise statement of the action taken by the Board that is challenged;

(3) A concise statement of the way in which the Petitioner has been aggrieved; and

(4) A specific statement of request for a hearing.

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

History Note: Authority G.S. 74F-6; 150B-38;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2004.

21 NCAC 29 .0605 GRANTING OR DENYING HEARING REQUEST

(a) The Board shall decide whether to grant a request for a hearing.

(b) The Board shall issue the denial of request for a hearing immediately upon decision, and in no case later than 60 days after the submission of the request. Such denial shall contain a statement of the reasons leading the Board to deny the request.

(c) The Board shall signify the approval of a request for a hearing by the issuing of a notice as required by G.S. 150B-38(b) and explained in Rule .0606 of this Section.

History Note: Authority G.S. 74F-6; 150B-38;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2004.

21 NCAC 29 .0609 PETITION FOR INTERVENTION

(a) A request to intervene shall bear the notation: PETITION TO INTERVENE IN THE CASE OF (Name of case).

(b) If the Board determines to allow intervention, notice of that decision shall be issued promptly to all parties, and to the petitioner. In cases of permissive intervention, such notification shall include a statement of any limitations of time, subject matter, evidence or whatever else is deemed necessary, that are imposed on the intervenor.

(c) If the Board's decision is to deny intervention, the petitioner shall be notified promptly. Such notice shall be in writing, identifying the reasons for the denial, and shall be issued to the petitioner and all parties.

History Note: Authority G.S. 74F-6; 150B-38;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2003.

21 NCAC 29 .0610 TYPES OF INTERVENTION

(a) Intervention of Right. A petition to intervene as of right, as provided in the North Carolina Rules of Civil Procedure, Rule 24, shall be granted if the petitioner meets the criteria of that rule and the petition is timely.

(b) Permissive Intervention. A petition to intervene permissibly as provided in the North Carolina Rules of Civil Procedure, Rule 24, shall be granted if the petitioner meets the criteria of that rule and the Board determines that:

(1) There is legal or factual similarity between the petitioner's claimed rights, privileges, or duties and those of the parties to the hearing; and

(2) Permitting intervention by the petitioner as a party would aid the purpose of the hearing.

(c) The Board may allow permissive intervention, with whatever limits and restrictions are deemed appropriate.

History Note: Authority G.S. 74F-6; 150B-38;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2004.

21 NCAC 29 .0611 DISQUALIFICATION OF BOARD MEMBERS

(a) Self-disqualification. If for any reason a board member determines that personal bias or other factors render that member unable to hear a contested case and perform all duties in an impartial manner, that board member shall voluntarily decline to participate in the hearing or decision.

(b) Petition for Disqualification. If for any reason any party in a contested case believes that a board member is personally biased or otherwise unable to hear a contested case and perform all duties in an impartial manner, the party may file a sworn, notarized affidavit with the Board. The title of such affidavit shall bear the notation: AFFIDAVIT OF DISQUALIFICATION OF BOARD MEMBER IN THE CASE OF (Name of case).

(c) Contents of Affidavit. The affidavit must state all facts the party deems to be relevant to the disqualification of the Board member.

(d) Timeliness of Affidavit. An affidavit of disqualification shall be considered timely if filed ten days before commencement of the hearing. Any other affidavit shall be considered timely provided it is filed at the first opportunity after the party becomes aware of facts that give rise to a reasonable belief that a board member may be disqualified under this Rule.

(e) Where a petition for disqualification is filed less than 10 days before or during the course of a hearing, the hearing shall continue with the challenged board member sitting. The petitioner shall have the opportunity to present evidence

supporting his petition, and the petition and any evidence relative thereto presented at the hearing shall be made a part of the record. The Board, before rendering its decision, shall decide whether the evidence justifies disqualification. In the event of disqualification, the disqualified member shall not participate in further deliberation or decision of the case.
(f) Procedure for Determining Disqualification:
(1) The Board shall appoint a board member to investigate the allegations of the affidavit.
(2) The investigator shall report their findings and recommendations to the Board.
(3) The Board shall decide whether to disqualify the challenged individual.
(4) The person whose disqualification is to be determined shall not participate in the decision but may be called upon to furnish information to the other members of the Board.
(5) When a board member is disqualified prior to the commencement of the hearing or after the hearing has begun, such hearing shall continue with the remaining members sitting provided that the remaining members still constitute a majority of the Board.
(6) If five or more members of the Board are disqualified pursuant to this Rule, the Board shall petition the Office of Administrative Hearings to appoint an administrative law judge to hear the contested case pursuant to G.S. 150B-40(e).

History Note: Authority G.S. 74F-6; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2004.

21 NCAC 29 .0614 WITNESSES
Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation and shall be recorded. At the request of a party or upon the Board's own motion, the presiding officer shall exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

History Note: Authority G.S. 74F-6; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2004.

21 NCAC 29 .0615 FINAL DECISION
In all cases heard by the Board, the Board shall issue its decision within 60 days after its next regularly scheduled meeting following the close of the hearing. This decision shall be the prerequisite "final agency decision" for the right to judicial review.

History Note: Authority G.S.74F-6; 150B-38; 150B-42;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2004.

21 NCAC 29 .0616 PROPOSALS FOR DECISIONS
(a) When an administrative law judge conducts a hearing pursuant to G.S. 150B-40(e), a "proposal for decision" shall be rendered within 45 days of the hearing pursuant to the Rules of the Office of Administrative Hearings, 26 NCAC 03 .0127. Any party may file written exceptions to this "proposal for decision" and submit their own proposed findings of fact and conclusions of law. The exceptions and alternative proposals must be received within ten days after the party has received the "proposal for decision" as drafted by the administrative law judge.
(b) Any exceptions to the procedure during the hearing, the handling of the hearing by the administrative law judge, rulings on evidence, or any other matter, must be written and refer specifically to pages of the record or otherwise precisely identify the occurrence to which exception is taken. The exceptions must be filed with the Board within ten days of the receipt of the proposal for decision. The written exceptions shall bear the notation: EXCEPTIONS TO THE PROCEEDINGS IN THE CASE OF (Name of case).
(c) Any party may present oral argument to the Board upon request. The request must be included with the written exceptions.
(d) Upon receipt of request for further oral argument, notice shall be issued promptly to all parties designating time and place for such oral argument.
(e) Giving due consideration to the proposal for decision and the exceptions and arguments of the parties, the Board may adopt the proposal for decision or may modify it as the Board deems necessary. The decision rendered shall be a part of the record and a copy thereof given to all parties. The decision as adopted or modified becomes the "final agency decision" for the right to judicial review. Said decision shall be rendered by the Board within 60 days of the next regularly scheduled meeting following the oral arguments, if any. If there are no oral arguments presented, the decision shall be rendered within 60 days of the next regularly scheduled board meeting following receipt of the written exceptions.

History Note: Authority G.S. 74F-6; 150B-38; 150B-40;
Temporary Adoption Eff. May 28, 2003;
Eff. March 1, 2004.

CHAPTER 34 - BOARD OF FUNERAL SERVICE

21 NCAC 34A .0201 FEES AND OTHER PAYMENTS
(a) Fees for funeral service shall be as follows:

Establishment permit		
	Application	$250.00
	Annual renewal	$150.00
	Late renewal fee	$100.00
Establishment/embalming facility reinspection fee		$100.00
Courtesy card		
	Application	$ 75.00
	Annual renewal	$ 50.00
Out-of-state licensee		
	Application	$200.00
Embalmer, funeral director, funeral service		
	Application, NC resident	$150.00
	Application, non-resident	$200.00
Annual renewal		
	Embalmer	$ 40.00
	Funeral Director	$ 40.00

	Total fee, embalmer and funeral director, when both are held by same person	$ 60.00
	Funeral service	$ 60.00
	Inactive status	$ 30.00
	Reinstatement fee	$ 50.00
Resident trainee permit		
	Application	$ 50.00
	Voluntary change in supervisor	$ 50.00
	Annual renewal	$ 35.00
	Late renewal	$ 25.00
Duplicate License certificate		$ 25.00
Chapel registration		
	Application	$150.00
	Annual renewal	$100.00
	Late renewal	$ 75.00

(b) Fees for crematories shall be as follows:

License		
	Application	$400.00
	Annual renewal	$150.00
	Late renewal fee	$ 75.00
Crematory reinspection fee		$100.00
Per-cremation fee		$ 10.00
Late filing or payment fee for each cremation		$ 10.00
Late filing fee for cremation report, per month		$ 75.00
Crematory Manager Permit		
	Application	$150.00
	Annual renewal	$ 40.00

(c) Fees for preneed funeral contract regulation shall be as follows:

Preneed funeral establishment license		
	Application	$150.00
	Annual renewal	$150.00
	Late renewal fee	$100.00
	Reinspection fee	$100.00
Preneed sales license		
	Application	$ 20.00
	Annual renewal	$ 20.00
	Late renewal fee	$ 25.00
Preneed contract filings		
	Filing fee for each contract	$ 20.00
	Late filing or payment fee for each contract	$ 25.00
	Late filing fee for each certificate of performance	$ 25.00
	Late filing fee for annual report	$150.00

(d) Fees for Transportation Permits

	Application	$125.00
	Annual renewal	$ 40.00
	Late fee	$ 50.00

History Note: Authority G.S. 90-210.23(a); 90-210.25(c); 90-210.28; 90-210.67(b),(c),(d),(d1); 90-210.68(a);
Eff. September 1, 1979;
Amended Eff. January 1, 1991; July 1, 1988; January 1, 1988; October 1, 1983;
Recodified from 21 NCAC 34. 0123 Eff. February 7, 1991;
Amended Eff. December 1, 1993; August 2, 1993; May 1, 1993, July 1, 1991;
Temporary Amendment Eff. October 1, 1997;
Amended Eff. March 1, 2004; August 1, 1998.

CHAPTER 46 - BOARD OF PHARMACY

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 pharmacy technician certification board exam, or its equivalent, that has been approved by the Board according to these Rules.

(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.

(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.

(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.

(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.

(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.

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

(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.

(14) HMES. Home medical equipment supplier.

(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.

(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.

(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.

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

(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.

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

(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.

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

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

(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.

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

(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.

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

(29) President. The President of the Board.

(30) Rehabilitation environmental control equipment. Equipment or devices which

permit a person with disabilities to control his or her immediate surroundings.

(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.

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

(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.

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

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

History Note: 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;
Eff. May 1, 1989;
Amended Eff. March 1, 2004; April 1, 1999; May 1, 1997; September 1, 1995; September 1, 1993; October 1, 1990; January 1, 1990.

21 NCAC 46 .1813 TRANSMISSION OF PRESCRIPTION ORDERS

(a) Prescription orders may be transmitted by using a facsimile machine ("FAX") or by other electronic transmission from a prescriber to a pharmacy. "Electronic transmission" means transmission of the digital representation of information by way of electronic equipment.

(b) All prescription drug orders transmitted by FAX or by electronic transmission shall:

(1) be transmitted directly to a pharmacist or certified technician in a pharmacy of the patient's choice with no intervening person altering the content of 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 an electronic signature unique to the practitioner;

(4) be deemed the original prescription drug order, provided it meets all requirements of federal and state laws and 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 transmit by FAX or by electronic transmission a prescription drug order to a pharmacist or certified 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 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 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.

History Note: Authority G.S. 90-85.6; 90-85.32;
Eff. August 1, 1998;
Amended Eff. March 1, 2004.

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 or even if the substitution of a generic drug is not authorized.

History Note: Authority G.S. 90-85.6; 90-85.32;
Eff. January 1, 2006.

21 NCAC 46 .2509 AVAILABILITY OF PHARMACY RECORDS

A pharmacist may disclose pharmacy records to investigators of occupational licensing boards whose licensees have prescribing authority during the course of an investigation of such licensee as permitted by state or federal law.

History Note: Authority G.S. 90-85.6; 90-85.36;
Eff. March 1, 2004.

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 shall be responsible for the dispensing and delivery of devices and medical equipment.

History Note: Authority G.S. 90-85.3(e), (l1), (r); 90-85.6; 90-85.22;
Eff. October 1, 1990;
Amended Eff. March 1, 2004; October 1, 1995.

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 components 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 Subpart (b)(1)(B)(i) of this 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.

History Note Authority G.S. 90-6; 90-18; 90-18.4; 90-85.3; 90-85.18; 90-85.26A;
Eff. April 1, 2001;
Amended Eff. March 1, 2004; October 1, 2001.

CHAPTER 58 - REAL ESTATE COMMISSION

21 NCAC 58A .0104 AGENCY AGREEMENTS AND DISCLOSURE

(a) Every agreement for brokerage services in a real estate transaction and every agreement for services connected with the management of a property owners association shall be in writing. Every agreement for brokerage services between a broker and an owner of the property to be the subject of a transaction must be in writing from the time of its formation. Every agreement for brokerage services between a broker and a buyer or tenant shall be express and shall be reduced to writing not later than the time one of the parties makes an offer to purchase, sell, rent, lease, or exchange real estate to another. However, every agreement between a broker and a buyer or tenant which seeks to bind the buyer or tenant for a period of time or to restrict the buyer's or tenant's right to work with other agents or without an agent shall be in writing from its formation. A broker or salesperson shall not continue to represent a buyer or tenant without a written agreement when such agreement is required by this rule. Every written agreement for brokerage services of any kind in a real estate transaction shall provide for its existence for a definite period of time and shall provide for its termination without prior notice at the expiration of that period, except that an agency agreement between a landlord and broker to procure tenants or receive rents for the landlord's property may allow for automatic renewal so long as the landlord may terminate with notice at the end of any contract period and any subsequent renewals.

(b) Every listing agreement, written buyer agency agreement or other written agreement for brokerage services in a real estate sales transaction shall contain the following provision: The broker shall conduct all his brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap or familial status of any buyer, prospective buyer, seller or prospective seller. The provision shall be set forth in a clear and conspicuous manner which shall distinguish it from other provisions of the agreement. For the purposes of this Rule, the term, familial status, shall be defined as it is in G.S. 41A-3(1b).

(c) In every real estate sales transaction, a broker or salesperson shall, at first substantial contact directly with a prospective buyer or seller, provide the prospective buyer or seller with a copy of the publication "Working with Real Estate Agents," review it with him or her, and determine whether the agent will act as the agent of the buyer or seller in the transaction. If the first substantial contact with a prospective buyer or seller occurs by telephone or other electronic means of communication where it is not practical to provide the "Working with Real Estate Agents" publication, the broker or salesperson shall at the earliest opportunity thereafter, but in no event later than three days from the date of first substantial contact, mail or otherwise transmit a copy of the publication to the prospective buyer or seller and review it with him or her at the earliest practicable opportunity thereafter.

(d) A real estate broker or salesperson representing one party in a transaction shall not undertake to represent another party in the transaction without the written authority of each party. Such written authority must be obtained upon the formation of the relationship except when a buyer or tenant is represented by a broker without a written agreement in conformity with the requirements of Paragraph (a) of this Rule. Under such circumstances, the written authority for dual agency must be reduced to writing not later than the time that one of the parties represented by the broker or salesperson makes an offer to purchase, sell, rent, lease, or exchange real estate to another party.

(e) In every real estate sales transaction, a broker or salesperson working directly with a prospective buyer as a seller's agent or subagent shall disclose in writing to the prospective buyer at the first substantial contact with the prospective buyer that the broker or salesperson represents the interests of the seller. If the first substantial contact occurs by telephone or by means of other electronic communication where it is not practical to provide written disclosure, the broker or salesperson shall immediately disclose by similar means whom he represents and shall immediately mail or otherwise transmit a copy of the written disclosure to the buyer. In no event shall the broker or salesperson mail or transmit a copy of the written disclosure to the buyer later than three days from the date of first substantial contact with the buyer.

(f) In every real estate sales transaction, a broker or salesperson representing a buyer shall, at the initial contact with the seller or seller's agent, disclose to the seller or seller's agent that the broker or salesperson represents the buyer's interests. In addition, in every real estate sales transaction other than auctions, the broker or salesperson shall, no later than the time of delivery of an offer to the seller or seller's agent, provide the seller or seller's agent with a written confirmation disclosing that he represents the interests of the buyer. The written confirmation may be made in the buyer's offer to purchase.

(g) The provisions of Paragraphs (c), (d) and (e) of this Rule shall not apply to real estate licensees representing sellers in auction sales transactions.

(h) A broker or salesperson representing a buyer in an auction sale transaction shall, no later than the time of execution of a written agreement memorializing the buyer's contract to purchase, provide the seller or seller's agent with a written confirmation disclosing that he represents the interests of the buyer. The written confirmation may be made in the written agreement.

(i) A firm which represents more than one party in the same real estate transaction is a dual agent and, through the brokers and salespersons associated with the firm, shall disclose its dual agency to the parties.

(j) When a firm represents both the buyer and seller in the same real estate transaction, the firm may, with the prior express approval of its buyer and seller clients, designate one or more individual agents associated with the firm to represent only the interests of the seller and one or more other individual brokers and salespersons associated with the firm to represent only the interests of the buyer in the transaction. The authority for designated agency must be reduced to writing not later than the time that the parties are required to reduce their dual agency agreement to writing in accordance with Paragraph (d) of this Rule. An individual broker or salesperson shall not be so designated and shall not undertake to represent only the interests of one party if the broker or salesperson has actually received confidential information concerning the other party in connection with the transaction. A broker-in-charge shall not act as a designated agent for a party in a real estate sales transaction when a salesperson under his or her supervision will act as a designated agent for another party with a competing interest.

(k) When a firm acting as a dual agent designates an individual broker or salesperson to represent the seller, the broker or salesperson so designated shall represent only the interest of the seller and shall not, without the seller's permission, disclose to the buyer or a broker or salesperson designated to represent the buyer:

(1) that the seller may agree to a price, terms, or any conditions of sale other than those established by the seller;

(2) the seller's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and

(3) any information about the seller which the seller has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(l) When a firm acting as a dual agent designates an individual broker or salesperson to represent the buyer, the broker or salesperson so designated shall represent only the interest of the buyer and shall not, without the buyer's permission, disclose to the seller or a broker or salesperson designated to represent the seller:

(1) that the buyer may agree to a price, terms, or any conditions of sale other than those established by the seller;

(2) the buyer's motivation for engaging in the transaction unless disclosure is otherwise required by statute or rule; and

(3) any information about the buyer which the buyer has identified as confidential unless disclosure of the information is otherwise required by statute or rule.

(m) A broker or salesperson designated to represent a buyer or seller in accordance with Paragraph (j) of this Rule shall disclose the identity of all of the brokers and salespersons so designated

to both the buyer and the seller. The disclosure shall take place no later than the presentation of the first offer to purchase or sell.

(n) When an individual broker or salesperson represents both the buyer and seller in the same real estate sales transaction pursuant to a written agreement authorizing dual agency, the parties may provide in the written agreement that the broker or salesperson shall not disclose the following information about one party to the other without permission from the party about whom the information pertains:

(1) that a party may agree to a price, terms or any conditions of sale other than those offered;

(2) the motivation of a party for engaging in the transaction, unless disclosure is otherwise required by statute or rule; and

(3) any information about a party which that party has identified as confidential, unless disclosure is otherwise required by statute or rule.

History Note: Authority G.S. 41A-3(1b); 93A-3(c); 41A-4(a); Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1, 1998; July 1, 1997; August 1, 1996; July 1, 1995.

21 NCAC 58A .0110 BROKER-IN-CHARGE

(a) Every real estate firm shall designate a broker to serve as the broker-in-charge at its principal office and a broker to serve as broker-in-charge at any branch office. No broker shall be broker-in-charge of more than one office at a time. If a firm shares office space with one or more other firms, one broker may serve as broker-in-charge of each firm at that location. No office or branch office of a firm shall have more than one designated broker-in-charge. A broker who is a sole proprietor shall designate himself or herself as a broker-in-charge if the broker engages in any transaction where the broker is required to deposit and maintain monies belonging to others in a trust account, engages in advertising or promoting his or her services as a broker in any manner, or has one or more brokers or salespersons affiliated with him or her in the real estate business. Each broker-in-charge shall make written notification of his or her status as broker-in-charge to the Commission on a form prescribed by the Commission within 10 days following the broker's designation as broker-in-charge. The broker-in-charge shall assume the responsibility at his or her office for:

(1) the retention and display of current license renewal pocket cards by all brokers and salespersons employed at the office for which he or she is broker-in-charge; the proper display of licenses at such office in accordance with Rule .0101 of this Section; and assuring that each licensee employed at the office has complied with Rules .0503, .0504, and .0506 of this Subchapter;

(2) the proper notification to the Commission of any change of business address or trade name of the firm and the registration of any assumed business name adopted by the firm for its use;

(3) the proper conduct of advertising by or in the name of the firm at such office;

(4) the proper maintenance at such office of the trust or escrow account of the firm and the records pertaining thereto;

(5) the proper retention and maintenance of records relating to transactions conducted by or on behalf of the firm at such office, including those required to be retained pursuant to Rule .0108 of this Section;

(6) the proper supervision of salespersons associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule .0506 of this Subchapter;

(7) the verification to the Commission of the experience of any salesperson at such office who may be applying for licensure as a broker; and

(8) the proper supervision of all brokers and salespersons employed at the office for which he or she is broker-in-charge with respect to adherence to agency agreement and disclosure requirements.

(b) When used in this Rule, the term:

(1) "Branch Office" means any office in addition to the principal office of a broker which is operated in connection with the broker's real estate business; and

(2) "Office" means any place of business where acts are performed for which a real estate license is required.

(c) A broker-in-charge must continually maintain his or her license on active status.

(d) Each broker-in-charge shall notify the Commission in writing of any change in his or her status as broker-in-charge within 10 days following the change. Upon written request of a salesperson within five years after termination of his or her association with a broker-in-charge, the broker-in-charge shall provide the salesperson, in a form prescribed by the Commission, an accurate written statement regarding the number and type of properties listed, sold, bought, leased, or rented for others by the salesperson while under the supervision of the broker-in-charge.

(e) A licensed real estate firm shall not be required to designate a broker-in-charge if it:

(1) has been organized for the sole purpose of receiving compensation for brokerage services furnished by its principal broker through another firm or broker;

(2) is designated a Subchapter S corporation by the United States Internal Revenue Service;

(3) has no branch office; and

(4) has no person associated with it other than its principal broker.

(f) Except as provided herein every broker-in-charge designated before October 1, 2000 shall complete the Commission's broker-in-charge course not later than October 1, 2005 in order to remain broker-in-charge on that date and thereafter. Except as provided herein, every broker-in-charge designated after October 1, 2000 shall complete the broker-in-charge course within 120 days following designation in order to remain broker-in-charge thereafter. Every broker who has completed the broker-in-

charge course shall take the course on a recurring basis at intervals not to exceed five years between courses in order to remain eligible to be designated broker-in-charge of the principal or branch office of any real estate firm. If a broker who is designated broker-in-charge fails to complete the broker-in-charge course within the prescribed time period, the broker-in-charge status of that broker shall be immediately terminated, and the broker must complete the broker-in-charge course before he or she may again be designated as broker-in-charge. A broker-in-charge residing outside of North Carolina who is the broker-in-charge of a principal or branch office not located in North Carolina shall not be required to complete the broker-in-charge course.

History Note: Authority G.S. 93A-2; 93A-3(c); 93A-4;
Eff. September 1, 1983;
Amended Eff. April 1, 2004; September 1, 2002; July 1, 2001; October 1, 2000; August 1, 1998; April 1, 1997; July 1, 1995; July 1, 1994.

21 NCAC 58A .0302 FILING AND FEES

(a) Applications for a real estate license shall be complete and, except as provided by Rule .0403 of this Subchapter, shall be submitted to the Commission's office accompanied by the application fee. Examination scheduling of applicants who are required to pass the real estate licensing examination shall be accomplished in accordance with Rule .0401 of this Subchapter. An applicant for a real estate salesperson license shall not make application for a broker license while the salesperson application is pending unless the applicant first withdraws the salesperson application.

(b) The license application fee shall be thirty dollars ($30.00). In addition to the license application fee, applicants for licensure who are required to take the license examination must pay the examination fee charged by the Commission's authorized testing service in the form and manner acceptable to the testing service.

(c) An applicant shall update information provided in connection with an application or submit a newly completed application form without request by the Commission to assure that the information provided in the application is current and accurate. Failure to submit updated information prior to the issuance of a license may result in disciplinary action against a licensee in accordance with G.S. 93A-6(b)(1). In the event that the Commission requests an applicant to submit updated information or to provide additional information necessary to complete the application and the applicant fails to submit such information within 90 days following the Commission's request, the Commission shall cancel the applicant's application. The license application of an individual found by the Commission to be qualified for the licensing examination shall be immediately canceled if the applicant fails to pass a scheduled licensing examination, fails to appear for and take any examination for which the applicant has been scheduled without having the applicant's examination postponed or absence excused in accordance with Rule .0401(b) and (c) of Section .0400, or fails to take and pass the examination within 180 days of filing a complete application as described in Rule .0301 of this Section and having the application entered into the Commission's examination applicant file. Except as permitted otherwise in Rule .0403 of this Subchapter, an applicant whose license application has been canceled and who wishes to obtain a real estate license must start the licensing process over by filing a complete application to the Commission and paying all required fees.

History Note: Authority G.S. 93A-4;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. April 1, 2004; July 1, 2003; October 1, 2000; August 1, 1998; July 1, 1998; July 1, 1996; February 1, 1989.

21 NCAC 58A .0303 PAYMENT OF APPLICATION FEES

Payment of application fees shall be made to the Commission by bank check, certified check, money order, debit card, or credit card. Once an application has been filed and processed, the application fee may not be refunded.

History Note: Authority G.S. 93A-3(c); 93A-4(a),(d);
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. April 1, 2004; July 1, 2000; December 1, 1985.

21 NCAC 58A .0401 SCHEDULING EXAMINATIONS

(a) An applicant who is required and qualified to take the licensing examination shall be provided a notice of examination eligibility that shall be valid for a period of 180 days and for a single administration of the licensing examination. Upon receipt of the notice of examination eligibility, the applicant shall contact the Commission's authorized testing service to pay for and schedule the examination in accordance with procedures established by the testing service. The testing service will schedule applicants for examination by computer at their choice of one of the testing locations and will notify applicants of the time and place of their examinations.

(b) An applicant may postpone a scheduled examination provided the applicant makes the request for postponement directly to the Commission's authorized testing service in accordance with procedures established by the testing service. An applicant's examination shall not be postponed beyond the 180 day period allowed for taking the examination without first refiling another complete application with the Commission. A request to postpone a scheduled licensing examination without complying with the procedures for re-applying for examination described in Rule .0403 of this Section shall be granted only once unless the applicant satisfies the requirements for obtaining an excused absence stated in Paragraph (c) of this Rule.

(c) An applicant may be granted an excused absence from a scheduled examination if the applicant provides evidence that the absence was the direct result of an emergency situation or condition which was beyond the applicant's control and which could not have been reasonably foreseen by the applicant. A request for an excused absence must be promptly made in writing and must be supported by documentation verifying the reason for the absence. The request must be submitted directly to the testing service in accordance with procedures established by the testing service. A request for an excused absence from an examination shall be denied if the applicant cannot be rescheduled and examined prior to expiration of the 180 day

period allowed for taking the examination without first refiling another complete application with the Commission.

History Note: Authority G.S. 93A-4(b),(d);
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. April 1, 2004; October 1, 2000; July 1, 1996; July 1, 1989; February 1, 1989.

21 NCAC 58A .0403 RE-APPLYING FOR EXAMINATION

(a) An individual whose license application has been canceled and whose 180 day examination eligibility period has expired who wishes to be rescheduled for the real estate license examination must re-apply to the Commission by filing a complete license application as described in Rule .0301 of this Subchapter and paying the prescribed application fee. Subsequent examinations shall then be scheduled in accordance with Rule .0401 of this Section.

(b) An individual whose license application has been canceled who wishes to be rescheduled for the license examination before the expiration of his or her 180 day examination eligibility period may utilize an abbreviated electronic license application and examination rescheduling procedure by directly contacting the Commission's authorized testing service, paying both the license application fee and the examination fee to the testing service, and following the testing service's established procedures.

(c) An applicant who fails the license examination shall not be allowed to retake the examination for at least 10 calendar days.

History Note: Authority G.S. 93A-4(b),(d);
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. February 1, 1988; December 1, 1985; April 11, 1980;
Temporary Amendment Eff. April 24, 1995 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Amended Eff. April 1, 2004; October 1, 2000; August 1, 1995.

21 NCAC 58A .0502 BUSINESS ENTITIES

(a) Every business entity other than a sole proprietorship shall apply for and obtain from the Commission a firm license prior to engaging in business as a real estate broker. An entity that changes its business form shall be required to submit a new application immediately upon making the change and to obtain a new license. Incomplete applications shall not be acted upon by the Commission. Application forms for partnerships, corporations, limited liability companies, associations and other business entities required to be licensed as brokers shall be available upon request to the Commission and shall require the applicant to set forth:

(1) the name of the entity;
(2) the name under which the entity will do business;
(3) the type of business entity;
(4) the address of its principal office;
(5) the entity's NC Secretary of State Identification Number if required to be registered with the Office of the NC Secretary of State;
(6) the name, real estate license number and signature of the proposed principal broker for the proposed firm;
(7) the address of and name of the proposed broker-in-charge for each office where brokerage activities will be conducted, along with a completed broker-in-charge declaration form for each proposed broker-in-charge;
(8) any past criminal conviction of and any pending criminal charge against any principal in the company or any proposed broker-in-charge;
(9) any past revocation, suspension or denial of a business or professional license of any principal in the company or any proposed broker-in-charge;
(10) if a general partnership, a full description of the applicant entity, including a copy of its written partnership agreement or if no written agreement exists, a written description of the rights and duties of the several partners;
(11) if a business entity other than a corporation, limited liability company or partnership, a full description of the organization of the applicant entity, including a copy of its organizational documents evidencing its authority to engage in real estate brokerage;
(12) if a foreign business entity, a certificate of authority to transact business in North Carolina and an executed consent to service of process and pleadings; and
(13) any other information required by this Rule.

The Commission also may require the applicant to declare in the license application that the applicant's organizational documents authorize the firm to engage in the real estate business and to submit organizational documents, addresses of affiliated persons and similar information. For purposes of this Paragraph, the term principal shall mean any person or entity owning 10 percent or more of the business entity, or who is an officer, director, manager, member, partner or who holds any other comparable position.

(b) After filing a written application with the Commission and upon a showing that at least one principal of said business entity holds a broker license on active status and in good standing and will serve as principal broker of the entity, the entity shall be licensed provided it appears that the applicant entity employs and is directed by personnel possessed of the requisite truthfulness, honesty, and integrity. The principal broker of a partnership of any kind must be a general partner of the partnership; the principal broker of a limited liability company must be a manager of the company; and the principal broker of a corporation must be an officer of the corporation. A licensed business entity may serve as the principal broker of another licensed business entity if the principal broker-entity has as its principal broker a natural person who is himself licensed as a broker. The natural person who is principal broker shall assure the performance of the principal broker's duties with regard to both entities.

(c) The licensing of a business entity shall not be construed to extend to the licensing of its partners, managers, members, directors, officers, employees or other persons acting for the entity in their individual capacities regardless of whether they are engaged in furthering the business of the licensed entity.

(d) The principal broker of a business entity shall assume responsibility for:

(1) designating and assuring that there is at all times a broker-in-charge for each office and branch office of the entity at which real estate brokerage activities are conducted;

(2) renewing the real estate broker license of the entity;

(3) retaining the firm's renewal pocket card at the firm and producing it as proof of firm licensure upon request and maintaining a photocopy of the firm license certificate and pocket card at each branch office thereof;

(4) notifying the Commission of any change of business address or trade name of the entity and the registration of any assumed business name adopted by the entity for its use;

(5) notifying the Commission in writing of any change of his or her status as principal broker within ten days following the change;

(6) securing and preserving the transaction and trust account records of the firm whenever there is a change of broker-in-charge at the firm or any office thereof and notifying the Commission if the trust account records are out-of-balance or have not been reconciled as required by Rule .0107 of this Chapter;

(7) retaining and preserving the transaction and trust account records of the firm upon termination of his or her status as principal broker until a new principal broker has been designated with the Commission or, if no new principal broker is designated, for the period of time for which said records are required to be retained by Rule .0108 of this Chapter; and

(8) notifying the Commission if, upon the termination of his status as principal broker, the firm's transaction and trust account records cannot be retained or preserved or if the trust account records are out-of-balance or have not been reconciled as required by Rule .0107(e) of this Chapter.

(e) Every licensed business entity and every entity applying for licensure shall conform to all the requirements imposed upon it by the North Carolina General Statutes for its continued existence and authority to do business in North Carolina. Failure to conform to such requirements shall be grounds for disciplinary action or denial of the entity's application for licensure. Upon receipt of notice from an entity or agency of this state that a licensed entity has ceased to exist or that its authority to engage in business in this state has been terminated by operation of law, the Commission shall cancel the license of the entity.

History Note: Authority G.S. 93A-3(c); 93A-4(a),(b),(d);
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. April 1, 2004; July 1, 2003; October 1, 2000; August 1, 1998; January 1, 1997; July 1, 1994; May 1, 1990.

21 NCAC 58A .0503 LICENSE RENEWAL; PENALTY FOR OPERATING WHILE LICENSE EXPIRED

(a) (Effective January 1, 2006) All real estate licenses issued by the Commission under G.S. 93A, Article 1 shall expire on the 30th day of June following issuance. Any licensee desiring renewal of a license shall apply for renewal within 45 days prior to license expiration by submitting a renewal application on a form provided by the Commission and submitting with the application the required renewal fee of forty-five dollars ($45.00).

(b) Any person desiring to renew his or her license on active status shall, upon the second renewal of such license following initial licensure, and upon each subsequent renewal, have obtained all continuing education required by G.S. 93A-4A and Rule .1702 of this Subchapter.

(c) A person renewing a license on inactive status shall not be required to have obtained any continuing education in order to renew such license; however, in order to subsequently change his or her license from inactive status to active status, the licensee must satisfy the continuing education requirement prescribed in Rule .1703 of this Subchapter.

(d) Any person or firm which engages in the business of a real estate broker or salesperson while his, her, or its license is expired is subject to the penalties prescribed in G.S. 93A.

History Note: Authority G.S. 93A-3(c); 93A-4(c),(d); 93A-4A; 93A-6;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. July 1, 1994; February 1, 1991; February 1, 1989;
Temporary Amendment Eff. April 24, 1995 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Amended Eff. January 1, 2006; December 4, 2002; April 1, 1997; July 1, 1996; August 1, 1995.

21 NCAC 58A .0505 REINSTATEMENT OF EXPIRED LICENSE, REVOKED, SURRENDERED OR SUSPENDED LICENSE

(a) Licenses expired for not more than six months may be reinstated upon the submission of a complete and accurate application and payment of a fifty-five dollar ($55.00) reinstatement fee. In order to reinstate such license on active status, the applicant shall also present clear and convincing evidence of having obtained such continuing education as is required by Rule .1703 of this Subchapter to change an inactive license to active status. A person reinstating such a license on inactive status shall not be required to have obtained any continuing education in order to reinstate such license; however, in order to subsequently change his or her reinstated license from inactive status to active status, the licensee must satisfy the continuing education requirement prescribed in Rule .1703 of this Subchapter, and be supervised by a broker-in-charge in compliance with the requirements of Rule .0506 of this Section.

(b) Reinstatement of licenses expired for more than six months may be considered upon the submission of a complete and accurate application and payment of a fifty-five dollar ($55.00) reinstatement fee. Applicants must satisfy the Commission that they possess the current knowledge, skills and competence, as well as the truthfulness, honesty and integrity, necessary to function in the real estate business in a manner that protects and serves the public interest. To demonstrate current knowledge, skills and competence, the Commission may require such applicants to complete real estate education or pass the license examination or both.
(c) Reinstatement of a revoked license may be considered upon the submission of a complete and accurate application and payment of a thirty dollar ($30.00) fee. Applicants must satisfy the same requirements as those prescribed in Paragraph (b) of this Rule for reinstatement of licenses expired for more than six months.
(d) Reinstatement of a license surrendered under the provisions of G.S. 93A-6(e) may be considered upon termination of the period of surrender specified in the order approving the surrender and upon the submission of a complete and accurate application and payment of a thirty dollar ($30.00) fee. Applicants must satisfy the same requirements as those prescribed in Paragraph (b) of this Rule for reinstatement of licenses expired for more than six months.
(e) When a license is suspended by the Commission, the suspended license shall be restored at the end of the period of active suspension provided that any applicable license renewal fees that accrued during the time of the suspension are paid by the licensee. In order for the license to be restored on active status, the licensee shall be required to demonstrate that the licensee has satisfied the continuing education requirement for license activation prescribed by Rule .1703 of this Subchapter and that the licensee is supervised by a broker-in-charge in compliance with the requirements of Rule .0506 of this Section, if applicable.

History Note: Authority G.S. 93A-3(c); 93A-4(c),(d); 93A-4A;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Temporary Amendment Eff. April 24, 1995 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Amended Eff. April 1, 2004; July 1, 2000; August 1, 1998; July 1, 1996; August 1, 1995; July 1, 1995.

21 NCAC 58C .0311 INSTRUCTIONAL DELIVERY METHODS

The principal instructional delivery method utilized in real estate pre-licensing courses must provide for the instructor to interact with students either in person in a traditional classroom setting or through an interactive television system or comparable system which permits continuous mutual audio and visual communication between the instructor and all students and which provides for appropriate monitoring and technical support at each site where the instructor or students are located. The use of media-based instructional delivery systems such as videotape or digital video disc (DVD), remote non-interactive television, computer-based instructional programs or similar systems not involving continuous mutual audio and visual communication between instructor and students may be employed only to enhance or supplement personal teaching by the instructor. Such delivery systems may not be used to substitute for personal teaching by the instructor. No portion of a course may consist of correspondence instruction.

History Note: Authority G.S. 93A-3(c); 93A-4(a); 93A-34;
Eff. July 1, 1996;
Amended Eff. April 1, 2004.

21 NCAC 58C .0603 APPLICATION AND CRITERIA FOR ORIGINAL APPROVAL

(a) An individual seeking original approval as a pre-licensing course instructor shall make application on a form provided by the Commission. An applicant who is not a resident of North Carolina shall also file with the application a consent to service of process and pleadings. No application fee shall be required. All required information regarding the applicant's qualifications shall be submitted.
(b) An instructor applicant shall demonstrate that he or she possesses good moral character and the following qualifications or other qualifications found by the Commission to be equivalent to the following qualifications: A current North Carolina real estate broker license; a current continuing education record; three years active full-time experience in general real estate brokerage, including substantial experience in real estate sales, within the previous seven years; 120 classroom hours of real estate education excluding company or franchise in-service sales training; and 60 semester hours of college-level education at an institution accredited by a nationally recognized college accrediting body.
(c) In addition to the qualification requirements stated in Paragraph (b) of this Rule, an applicant shall also demonstrate completion of the Commission's new instructor seminar and shall submit a one-hour video recording which depicts the applicant teaching a real estate pre-licensing course topic and which demonstrates that the applicant possesses the basic teaching skills described in Rule .0604 of this Section. The video recording shall comply with the requirements specified in Rule .0605(c) of this Section. An applicant who is a Commission-approved continuing education update course instructor under Subchapter E, Section .0200 of this Chapter or who holds the Distinguished Real Estate Instructor (DREI) designation granted by the Real Estate Educators Association or an equivalent real estate instructor certification shall be exempt from the requirement to demonstrate satisfactory teaching skills by submission of a digital video disc (DVD) or videotape. An applicant who is qualified under Paragraph (b) of this Rule but who has not satisfied these additional requirements at the time of application shall be approved and granted a six-month grace period to complete these requirements. The approval of any instructor who is granted such six-month period to complete the requirements shall automatically expire on the last day of the period if the instructor has failed to fully satisfy his or her qualification deficiencies and the period has not been extended by the Commission. The Commission may extend the six-month period for up to three additional months when the Commission requires more than 30 days to review and act on a submitted video recording, when the expiration date of the period occurs

during a course being taught by the instructor, or when the Commission determines that such extension is otherwise warranted by exceptional circumstances which are outside the instructor's control or when failure to extend the grace period could result in harm or substantial inconvenience to students, licensees, or other innocent persons. An individual applying for instructor approval shall be allowed the authorized six-month period to satisfy the requirements stated in this Paragraph only once.

History Note: Authority G.S. 93A-4(a),(d); 93A-33; 93A-34;
Eff. October 1, 2000;
Amended Eff. April 1, 2004; September 1, 2002.

21 NCAC 58E .0203 APPLICATION AND CRITERIA FOR ORIGINAL APPROVAL

(a) A person seeking original approval as an update course instructor must make application on a form provided by the Commission. An applicant who is not a resident of North Carolina shall also file with the application a consent to service of process and pleadings. No application fee is required. All required information regarding the applicant's qualifications must be submitted.

(b) The applicant must be truthful, honest and of high integrity.

(c) The applicant must be qualified under one of the following standards:

(1) Possession of a current North Carolina real estate broker license, a current continuing education record, three years active full-time experience in general real estate brokerage, including substantial experience in real estate sales, within the previous seven years, and 30 classroom hours of real estate education, excluding prelicensing education, within the past three years, such education covering topics which are acceptable under Commission rules for continuing education credit.

(2) Possession of qualifications found by the Commission to be equivalent to the standard stated in Subparagraph (c)(1) of this Rule.

(d) The applicant must possess good teaching skills as demonstrated on a video recording portraying the instructor teaching a live audience. The applicant must submit the video recording for Commission review on either a digital video disc (DVD) or a VHS formatted videocassette. The video recording must be 45-60 minutes in length and must depict a continuous block of instruction on a single real estate or directly related topic. The video recording must be unedited, must show at least a portion of the audience, and must have visual and sound quality sufficient to enable reviewers to clearly see and hear the instructor. The video recording must have been recorded within the previous one year. The video recording must demonstrate that the instructor possesses the teaching skills described in Rule .0509 of this Subchapter.

(e) An applicant shall be exempt from qualifying under Paragraphs (c) and (d) of this Rule if he or she is a Commission-approved real estate prelicensing instructor who has satisfied all requirements for an unconditional approval or possesses a current North Carolina real estate broker license, a current continuing education record, and a current designation as a Distinguished Real Estate Instructor (DREI) granted by the Real Estate Educators Association.

History Note: Authority G.S. 93A-3(c); 93A-4A;
Eff. July 1, 1994;
Amended Eff. April 1, 2004; July 1, 2003; September 1, 2002; July 1, 1996; July 1, 1995.

21 NCAC 58E .0510 MONITORING ATTENDANCE

(a) Sponsors and instructors must monitor attendance for the duration of each class session to assure that all students reported as satisfactorily completing a course according to the criteria in 21 NCAC 58A .1705 have attended at least 90 percent of the scheduled classroom hours. Students shall not be admitted to a class session after 10 percent of the scheduled classroom hours have been conducted. Students shall not be allowed to sign a course completion card, shall not be issued a course completion certificate, and shall not be reported to the Commission as having completed a course unless the student fully satisfies the attendance requirement. Sponsors and instructors may not make any exceptions to the attendance requirement for any reason.

(b) Sponsors must assure that adequate personnel, in addition to the instructor, are present during all class sessions to assist the instructor in monitoring attendance and performing the necessary administrative tasks associated with conducting a course. A minimum of one person, including the instructor, for every 50 students registered for a class session shall be utilized for this purpose.

History Note: Authority G.S. 93A-3(c); 93A-4A;
Eff. July 1, 1994;
Amended Eff. April 1, 2004.

CHAPTER 61 - THE NORTH CAROLINA RESPIRATORY CARE BOARD

21 NCAC 61 .0201 APPLICATION PROCESS

Each applicant for a respiratory care practitioner license shall complete an application form provided by the Board. This form shall be submitted to the Board and shall be accompanied by:

(1) one recent head and shoulders passport type photograph of the applicant of acceptable quality for identification, two inches by two inches in size;

(2) the fee established in Rule .0204 of this Chapter;

(3) evidence, verified by oath, that the applicant has successfully completed the minimum requirements of a respiratory care education program approved by the Commission for Accreditation of Allied Health Educational Programs or the Canadian Council on Accreditation for Respiratory Therapy Education;

(4) evidence, verified by oath, that the applicant has successfully completed the requirements for certification in Basic Life Support which includes Adult, Child and Infant Cardiopulmonary Resuscitation (CPR), the Heimlich Maneuver, and Automatic External

Defibrillator (AED) use by the American Heart Association, the American Red Cross or the American Safety and Health Institute; and

(5) evidence from the National Board for Respiratory Care (NBRC) of successful completion of the Certified Respiratory Therapist (CRT) examination administered by it.

History Note: Authority G.S. 90-652(1) and (2); 90-653(a);
Temporary Adoption Eff. October 15, 2001;
Eff. August 1, 2002;
Amended Eff. March 1, 2004.

21 NCAC 61 .0204 FEES

(a) Fees are as follows:

(1) For an initial application, a fee of twenty-five dollars ($25.00);
(2) For issuance of an active license, a fee of one hundred dollars ($100.00);
(3) For the renewal of an active license, a fee of fifty dollars ($50.00);
(4) For the late renewal of any license, an additional late fee of fifty dollars ($50.00);
(5) For a license with a provisional or temporary endorsement, a fee of thirty-five dollars ($35.00);
(6) For official verification of license status, a fee of ten dollars ($10.00);
(7) For copies of rules adopted pursuant to this Article and licensure standards, charges not exceeding the actual cost of printing and mailing.

(b) Fees shall be nonrefundable and shall be paid in the form of a cashier's check, certified check or money order made payable to the North Carolina Respiratory Care Board. However, personal checks shall be accepted for payment of renewal fees.

History Note: Authority G.S. 90-652(2);(9); 90-660;
Temporary Adoption Eff. October 15, 2001;
Eff. August 1, 2002;
Amended Eff. March 1, 2004.

21 NCAC 61 .0303 LICENSE WITH PROVISIONAL ENDORSEMENT

An applicant for a provisional license must have completed the educational requirements set out in G.S. 90-563(a)(3) and must have made application to take the certification exam administered by the NBRC and must have filed his application with the Board in accordance with G.S. 90-656 and the rules in this Chapter. The supervising licensed respiratory care practitioner shall be in the same facility and readily available for supervision of and consultation with the provisional licensee at all times the provisional licensee is engaging in the practice of respiratory care.

History Note: Authority G.S 90-652(2),(4); 90-656;
Temporary Adoption Eff. October 15, 2001;
Eff. August 1, 2002;
Amended Eff. March 1, 2004.

21 NCAC 61 .0310 CIVIL PENALTY PROCEDURES

(a) Citations. The Board, through its duly authorized representatives, shall issue a citation with respect to any violation for which a civil penalty may be assessed. Each citation shall be in writing and shall describe the nature of the violation, including a reference to the specific provision alleged to have been violated. The civil penalty, if any, shall attach at the time the citation is written. The citation shall include an order to correct any condition or violation which lends itself to corrections, as determined by the Board.

(b) Correction of Violation. Any licensee who has been issued a warning citation must present written proof satisfactory to the Board, or its executive director, that the violation has been corrected. This provision applies only to a licensee's first violation in any one year period for a violation with a first offense warning penalty. Proof of correction shall be presented to the Board, through its executive director, within 30 days of the date the warning citation was issued. The Board may extend for a reasonable period, the time within which to correct the warning citation in case of an illness or hospitalization or other exigent circumstances. Notices of correction filed after the prescribed date shall not be acceptable and the civil penalty shall be paid.

(c) Contested Case. Persons to whom a notice of violation or a citation is issued and a civil penalty assessed, may contest the civil penalty by filing written notice with the Board within 60 days of the receipt of the notice of violation or citation. The Board shall institute a contested case by sending a notice of hearing pursuant to G.S. 150B, Article 3A. The Board shall conduct a contested case hearing pursuant to G.S. 150B, Article 3A. The licensee's filing written notice with the Board shall stay the civil penalty until the Board renders a final agency decision in the contested case.

(d) Final Agency Decision. The Board, after the hearing has been concluded, may affirm, reduce, or dismiss the charges filed in the notice of hearing or any penalties assessed. In no event shall the civil penalty be increased.

(e) Cost of disciplinary action(s).The Board shall assess the costs of disciplinary actions against a person found to be in violation of the Respiratory Care Practice Act or rules adopted by the Board.

(f) Failure to File. If no written notice contesting the civil penalty is filed as set forth in Paragraph (c) of this Rule, the civil penalty becomes a final agency decision.

History Note: Authority G.S. 90-666;
Eff. March 1, 2004.

This Section contains information for the meeting of the Rules Review Commission on Thursday, April 15, 2004, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Friday, April 9, 2004 to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate	Appointed by House
Jim R. Funderburke - 1st Vice Chair	Jennie J. Hayman - Chairman
David Twiddy - 2nd Vice Chair	Graham Bell
Thomas Hilliard, III	Dana E. Simpson
Robert Saunders	Dr. John Tart
Jeffrey P. Gray	

RULES REVIEW COMMISSION MEETING DATES

April 15, 2004 May 20, 2004
June 17, 2004 July 15, 2004
August 19, 2004 September 16, 2004
October 21, 2004 November 18, 2004
December 16, 2004

RULES REVIEW COMMISSION
MARCH 18, 2004
MINUTES

The Rules Review Commission met on Thursday, March 18, 2004, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Jennie Hayman, Graham Bell, Jim Funderburk, Jeffrey Gray, Thomas Hilliard, Robert Saunders, Dana Simpson, John Tart and David Twiddy .

Staff members present were: Joseph DeLuca, Staff Director; Bobby Bryan, Rules Review Specialist; and Lisa Johnson, Administrative Assistant.

The following people attended:

Robert Newton	State Treasurer
Marshall Barnes	State Treasurer
Tom West	Poyner & Spruill, LLP
Rod Presnell	Medco Health Solutions
Blen Gee	Attorney/Eckerd Drug
Jane Carter	NC Respiratory Care Board
Andy Ellen	NC Retail Merchants
Tancred Miller	Coastal Management
Sheila Green	Coastal Management
Thomas Allen	DENR/DAQ
Robert Curran	Attorney General's Office
Janice Fain	DHHS/DCD
Anna Carter	DHHS/DCD
Dedra Alston	DENR
Jon Carr	Attorney/NC Board of Dietetics/Nutrition
Kim Dove	NC Board of Dietetics/Nutrition
Denise Stanford	Attorney/Pharmacy Board/Contractors Board
Amy Pickle	Southern Environmental Law Center
Ruby Creech	OAH
Debra Gray	OAH
Molly Masich	OAH
Dana Sholes	OAH

Julie Brincefield OAH

APPROVAL OF MINUTES

The meeting was called to order at 10:08 a.m. with Commissioner Hayman presiding. Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the February 19, 2004, meeting. The minutes were approved as written.

The Chairman reminded the Commissioners of their obligations as set out in Governor Easley's Executive Order No. 1.

FOLLOW-UP MATTERS

21 NCAC 29 .0602; .0603; .0607; .0612; .0613: Locksmith Licensing Board – The agency has not submitted rewritten rules. No action was taken.

Chairman Hayman asked Vice Chairman Funderburk to preside over the meeting for the Pharmacy Board rules. Chairman Hayman recused herself and based on a familial relationship did not participate in the discussion or vote on the Pharmacy Board rules.

21 NCAC 46 .1505; .1804; .2605: Pharmacy Board – The Commission approved the rewritten rules submitted by the agency.

21 NCAC 46 .1604: Pharmacy Board – The Commission objected to the rewritten rule based on ambiguity and lack of necessity. While the revision to the rule appears to satisfy the objection the Commission made last month, it now appears that the rule remains ambiguous for other reasons not previously noticed. The terms "surrendered, terminated, or transferred," in the last sentence of the rule, on their face appear to be terms commonly and easily understood and therefore clear and unambiguous. However it now appears that there is uncertainty about their meaning and the meaning of this paragraph of the rule. The terms do not seem to be used anywhere else in the rules or the Pharmacy Act. These terms are not defined anywhere in the act or the rules. There does not appear to be any mechanism or role for "transferring" a permit. In the previous rule, .1603, on the transfer or change in ownership of a pharmacy or a pharmacy's owner, there is a requirement that the transferee obtain a new permit and there is no mention of the old permit being "surrendered, terminated, or transferred." It would appear that the new owner is not only allowed, but required, to obtain a new permit, regardless of the status of the old permit. If this rule is meant to address the ability of the board to continue disciplinary proceedings against a permit holder, that is not clear. In this entire context it is unclear what this paragraph (b) requires or forbids or whether this paragraph has any necessity whatsoever.

21 NCAC 46 .1806: Pharmacy Board – The Commission objected to the rewritten rule based on lack of authority and ambiguity. While the revision to the rule appears to satisfy the objection the Commission made last month, it appears that the rule remains ambiguous for other reasons not previously noticed. Paragraph (a) appears to prohibit one pharmacy owned by a single entity from filling or dispensing prescription medication based on a prescription that is originally filed and filled at another pharmacy owned by the same entity unless the prescription were transferred according to set rules. The Pharmacy would easily be able to fill the prescription based on having a copy of it on file in a computerized database open to all the pharmacies owned by a single entity. And (e) recognizes this sort of common database. [Think about going to one pharmacy in a chain when another one is closed and you need a refill or you are on vacation and need a refill or forgot prescription medication.] It is unclear if the intent of this rule is to prohibit that sort of "transfer." It appears to have been permitted under the previous (a)(1) prior to this amendment. If it is the intent to now prohibit it, that would arguably exceed the board's authority. It would exceed the board's authority because G.S. 90-85.32 allows the board to make rules governing the "filling, refilling, and transfer of prescription orders not inconsistent with other provisions of law …" (emphasis added). However, G.S. 90-85.36(a)(1), (8), and (14) would all appear to allow this type of "transfer" to be allowed. That is because "any person having custody or access to the prescription orders," and presumably that would include any pharmacy having access to the database, can and might be required to provide that prescription to the patient (1), anyone with authorization (8), and the person owning the pharmacy or his agent (14). Any of those could then turn around and hand it back to the other or new pharmacy. If those statutory provisions do allow this type of transfer, then the rule would exceed the board's authority because it would then be "inconsistent with other provisions of law," i.e., the provisions found in G.S. 90-85.36.

21 NCAC 46 .2502: Pharmacy Board – The Board chose to republish this rule and will not otherwise satisfy the RRC objection.

21 NCAC 46 .2504: Pharmacy Board – The Commission objected to the rewritten rule based on lack of statutory authority in violation of G.S. 150B-21.9(a)(1). The rule still requires pharmacies to take certain actions and "provide counseling services." This exceeds the board's authority over pharmacies or registrants. This rule also requires a technical change. The reference in the history note to 90-85.21A as statutory authority is a reference to the board's authority over out-of-state operations. The board has no more authority under that statute over out-of-state pharmacies than it does over in-state pharmacies, at least as far as requiring them to offer counseling services. It needs to be removed from the history note.

21 NCAC 46 .2510: Pharmacy Board – The Board stated that it needed more time to clarify the meaning of "unique projects."

21 NCAC 61 .0205; .0301; .0309; .0401: Respiratory Care Board – This Commission approved the rewritten rules submitted by the agency.

10A NCAC 13F .0509; .1211; .1501: Medical Care Commission – These temporary rules were withdrawn by the agency.

10A NCAC 13G .0509; .1211; .1301: Medical Care Commission – These temporary rules were withdrawn by the agency.

The meeting adjourned at 11:20 a.m. to allow the Commissioners to enter into executive session to discuss the lawsuits filed against the RRC.

The meeting reconvened at 11:55 a.m.

LOG OF FILINGS

Chairman Hayman presided over the review of the log and all rules were approved unanimously with the following exceptions:
10A NCAC 9 .0705: NC Child Care Commission – The Commission objected to this rule and the following rule due to the same ambiguity. In (f)(2) the rule requires an operator to complete ITS-SIDS training and then to complete that training again every three years. At the latest this training would have to be completed within four months of this rule's effective date. The rule goes on at the end of the paragraph to specify that those who have completed the training prior to this rule's becoming effective do not have to retake the course "for three years," page 2 line 3. However the rule does not specify, and is thus unclear, whether the repetition of the initial ITS-SIDS training is required from the completion of the initial training or from the effective date of this rule.

10A NCAC 9 .1705: NC Child Care Commission – The Commission objected to the rule due to ambiguity. In (b)(4) the rule requires an operator to complete ITS-SIDS training and then to complete that training again every three years. At the latest this training would have to be completed within four months of this rule's effective date. The rule goes on at the end of the paragraph to specify that those who have completed the training prior to this rule's becoming effective do not have to retake the course "for three years," page 2 line 3. However the rule does not specify, and is thus unclear, whether the repetition of the initial ITS-SIDS training is required from the completion of the initial training or from the effective date of this rule.

15A NCAC 2D .0538: DENR/Environmental Management Commission – The Commission objected to this rule based on ambiguity. It is unclear what the last two lines of (b), lines 11 and 12, apply to or require, especially the quoted words set out below. The first line of the rule specifies that the rule applies to certain emissions of ethylene oxide and then goes on to list two specific uses where those emissions might result from. But then after listing those two uses, it goes on to say "from the processes described in Paragraph (d) of this rule." That particular phrase makes no sense. If it were deleted the rule would be clear.

21 NCAC 14A .0101: State Board of Cosmetic Art Examiners – The Commission objected to the rule due to ambiguity. In (13), it is not clear what standards the Board will use in approving other providers.
21 NCAC 14B .0603: State Board of Cosmetic Art Examiners – This rule was withdrawn by the agency.
21 NCAC 14H .0122: State Board of Cosmetic Art Examiners – This rule was withdrawn by the agency.
21 NCAC 14J .0501: State Board of Cosmetic Art Examiners – The Commission objected to the rule due to lack of statutory authority and ambiguity. In (a), it is not clear when the Board will approve credit for instruction that does not meet the conditions in this rule. There is also no authority cited for the last sentence in (c). The authority cited is to approve hours of instruction, not examinations. This objection applies to existing language in this rule.
21 NCAC 14R .0101: State Board of Cosmetic Art Examiners – The Commission objected to the rule due to lack of statutory authority. There is no authority cited for paragraph (a). G.S. 88B-21(e) requires all licensed teachers to complete continuing education prior to renewal of their licenses. The Board has no authority to exempt people from what the statutes require.
21 NCAC 14R .0102: State Board of Cosmetic Art Examiners – The Commission objected to the rule due to lack of statutory authority. There is no authority cited for the processing fee set in (a)(2).
21 NCAC 14R .0103: State Board of Cosmetic Art Examiners – The Commission objected to the rule due to lack of statutory authority. In (k), there is no authority cited for the Board to approve instructors.
21 NCAC 14R .0104: State Board of Cosmetic Art Examiners – The Commission objected to the rule due to lack of statutory authority. There is no authority cited for charging an application processing fee.
21 NCAC 17 .0114: NC Board of Dietetics Nutrition - The Commission objected to the rule due to ambiguity. In (10), it is not clear what would constitute "reasonable action." This objection applies to existing language in this rule.
Commissioner Gray recused himself from the Office of Administrative Hearings rules based on having acted as a substitute Administrative Law Judge for the Office of Administrative Hearings.

COMMISSION PROCEDURES AND OTHER BUSINESS

No new business was discussed.

The meeting adjourned at 12:13 p.m.

The next meeting of the Commission is Thursday, April 15, 2004 at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

Commission Review/Administrative Rules

Log of Filings (Log #208)
February 23, 2004 through March 20, 2004

MEDICAL CARE COMMISSION

Definitions	10A NCAC 13F .0201	Amend
The License	10A NCAC 13F .0202	Amend
Applying for a License to Operate a Facility	10A NCAC 13F .0204	Amend
Application to License a Newly constructed or	10A NCAC 13F .0205	Repeal
Capacity	10A NCAC 13F .0206	Amend
Change of Licensee	10A NCAC 13F .0207	Amend
Renewal of License	10A NCAC 13F .0208	Amend
Conditions for License Renewal	10A NCAC 13F .0209	Amend
Termination of License	10A NCAC 13F .0210	Repeal
Notification About Closing of Home	10A NCAC 13F .0211	Amend
Denial or Revocation of License	10A NCAC 13F .0212	Amend
Appeal of Licensure Action	10A NCAC 13F .0213	Amend
Administrative Penalty Determination Process	10A NCAC 13F .0215	Amend
Location	10A NCAC 13F .0301	Amend
Construction	10A NCAC 13F .0302	Amend
Housekeeping and Furnishings	10A NCAC 13F .0304	Amend
Certification of Administrators	10A NCAC 13F .0401	Amend
Qualifications of Administrator-in-Charge	10A NCAC 13F .0402	Amend
Qualifications of Activities Coordinator	10A NCAC 13F .0404	Amend
Test for Tuberculosis	10A NCAC 13F .0406	Amend
Other Staff Qualifications	10A NCAC 13F .0407	Amend
Personal Care Training and Competency	10A NCAC 13F .0501	Amend
Personal Care Training Content and Instructors	10A NCAC 13F .0502	Amend
Medication Administration Competency	10A NCAC 13F .0503	Amend
Competency Validation for Licensed Health Professionals	10A NCAC 13F .0504	Adopt
Training on Care of Diabetic Residents	10A NCAC 13F .0505	Adopt
Training on Physical Restraints	10A NCAC 13F .0506	Adopt
Training on Cardio-pulmonary Resuscitation	10A NCAC 13F .0507	Adopt
Assessment Training	10A NCAC 13F .0508	Adopt
Documentation of Training and Competency	10A NCAC 13F .0512	Adopt
Management of Facilities with a Capacity	10A NCAC 13F .0601	Amend
Admission of Residents	10A NCAC 13F .0701	Amend
Discharge of Residents	10A NCAC 13F .0702	Amend
Tuberculosis Test Medical Examination and Immunization	10A NCAC 13F .0703	Adopt
Resident Assessment	10A NCAC 13F .0801	Amend
Resident Care Plan	10A NCAC 13F .0802	Amend
Health Care	10A NCAC 13F .0902	Amend
Licensed Health Professional Support	10A NCAC 13F .0903	Amend
Nutrition and Food Service	10A NCAC 13F .0904	Amend
Activities Program	10A NCAC 13F .0905	Amend
Other Resident Care and Services	10A NCAC 13F .0906	Amend
Cooperation with Case Managers	10A NCAC 13F .0908	Amend
Disposal of Resident Records	10A NCAC 13F .1202	Amend
Report of Admissions and Discharges	10A NCAC 13F .1203	Amend
Population Report	10A NCAC 13F .1204	Repeal
Advertising	10A NCAC 13F .1206	Amend
Application to License an Existing Building	10A NCAC 13G .0204	Amend
Application to License a Newly Constructed or Reno	10A NCAC 13G .0205	Amend

Change of Licensee	10A NCAC 13G .0207	Amend
Closing of Home	10A NCAC 13G .0211	Amend
Construction	10A NCAC 13G .0302	Amend
Test for Tuberculosis	10A NCAC 13G .0405	Amend
Other Staff Qualifications	10A NCAC 13G .0406	Amend
Competency Validation for Licensed Health Professionals	10A NCAC 13G .0504	Adopt
Training on Care of Diabetic Residents	10A NCAC 13G .0505	Adopt
Training on Physical Restraints	10A NCAC 13G .0506	Adopt
Training on Cardio-pulmonary Resuscitation	10A NCAC 13G .0507	Adopt
Assessment Training	10A NCAC 13G .0508	Adopt
Documentation of Training and Competency Validation	10A NCAC 13G .0512	Adopt
Tuberculosis Test and Medical Examination	10A NCAC 13G .0702	Amend
Discharge of Residents	10A NCAC 13G .0705	Amend
Resident Assessment	10A NCAC 13G .0801	Amend
Resident Care Plan	10A NCAC 13G .0802	Amend
Health Care	10A NCAC 13G .0902	Amend
Licensed Health Professional Support	10A NCAC 13G .0903	Amend
Nutrition and Food Service	10A NCAC 13G .0904	Amend
Population Report	10A NCAC 13G .1205	Repeal
Pap Smear Fees	10A NCAC 42A .0107	Adopt
SOCIAL SERVICES COMMISSION		
Revocation or Denial	10A NCAC 70E .0506	Amend
Licensing Actions	10A NCAC 70I .0101	Amend
Licensing Actions	10A NCAC 70I .0101	Amend
DEPARTMENT OF INSURANCE/NC MANUFACTUREDHOUSING BOARD		
Definitions	11 NCAC 08 .1401	Amend
Scheduling	11 NCAC 08 .1407	Amend
Notice of Scheduled Courses	11 NCAC 08 .1408	Amend
CE Requirements	11 NCAC 08 .1415	Amend
Distance Education Courses	11 NCAC 08 .1433	Adopt
DEPARTMENT OF INSURANCE		
Purpose and Scope	11 NCAC 12 .0601	Amend
Definition of Replacement	11 NCAC 12 .0602	Amend
Other Definitions	11 NCAC 12 .0603	Amend
Exemptions	11 NCAC 12 .0604	Amend
Duties of Producers	11 NCAC 12 .0605	Amend
Duties of Insurers That Use Producers	11 NCAC 12 .0607	Amend
Duties of Insurers with Respect to Direct Response	11 NCAC 12 .0608	Amend
Violations and Penalties	11 NCAC 12 .0609	Amend
Notice Regarding Replacement	11 NCAC 12 .0611	Amend
Duties of Replacing Insurers That Use Producers	11 NCAC 12 .0612	Adopt
PRIVATE PROTECTIVE SERVICES BOARD		
Training Requirements for Unarmed Security Guards	12 NCAC 07D .0707	Amend
Experience Requirements for Courier License	12 NCAC 07D .1201	Adopt
CRIMINAL JUSTICE EDUCATION & TRAININGSTANDARDS COMMISSION		
Responsibilities of the School Director	12 NCAC 09B .0202	Amend
Admission of Trainees	12 NCAC 09B .0203	Amend
Supplemental SMI Training	12 NCAC 09B .0215	Amend
Lidar Instructor Training Course	12 NCAC 09B .0237	Adopt
Certification Training for Lidar Operators	12 NCAC 09B .0238	Adopt
Re-Certification Training for Lidar Instructors	12 NCAC 09B .0239	Adopt
Re-Certification Training Course for Lidar Operato	12 NCAC 09B .0240	Adopt
General Instrucor Certification	12 NCAC 09B .0302	Amend
Trainee Attendance	12 NCAC 09B .0404	Amend
Comprehensive Written Examination Basic SMI	12 NCAC 09B .0408	Amend
Satisfaction of Training SMI Operators	12 NCAC 09B .0409	Amend
Comprehensive Written Exam Specialized Instructor	12 NCAC 09B .0414	Amend
Certification of School Directors	12 NCAC 09B .0501	Amend
Speed Measurement Instrument (SMI) Operators	12 NCAC 09C .0308	Amend
Approved Speed Measuring Instruments	12 NCAC 09C .0601	Amend

Speed Measuring Instrument Accuracy Test	12 NCAC 09C .0607	Amend
Speed Measuring Instrument Operating Procedures	12 NCAC 09C .0608	Amend
Topical Areas	12 NCAC 09F .0102	Amend
Instructor Qualifications	12 NCAC 09F .0104	Amend
Instructor Responsibilities	12 NCAC 09F .0105	Amend
Sanctions	12 NCAC 09F .0106	Amend
DENR/ENVIRONMENTAL MANAGEMENT COMMISSION		
Definitions	15A NCAC 02D .0101	Amend
Control of Visible Emission	15A NCAC 02D .0521	Amend
Particulates from Concrete Batch Plants	15A NCAC 02D .0543	Adopt
Applicability	15A NCAC 02D .0902	Amend
Petroleum Liquid Storage In External Floating	15A NCAC 02D .0933	Amend
Recordkeeping Reporting Monitoring	15A NCAC 02D .1404	Amend
Stationary Internal Combustion Engines	15A NCAC 02D .1409	Amend
Emission Allocations for Utility Companies	15A NCAC 02D .1416	Amend
Emission Allocations for Large Combustion Sources	15A NCAC 02D .1417	Amend
New Electric Generating Units, Large Boilers	15A NCAC 02D .1418	Amend
Nitrogen Oxide Budget Trading Program	15A NCAC 02D .1419	Amend
Compliance Supplement Pool Credits	15A NCAC 02D .1422	Amend
Cotton Gins	15A NCAC 02Q .0806	Amend
Concrete Batch Plants	15A NCAC 02Q .0809	Adopt
DENR/MARINE FISHERIES COMMISSION		
Snapper Grouper	15A NCAC 03M .0506	Amend
WILDLIFE RESOURCES COMMISSION		
Particular Offenses	15A NCAC 10A .1001	Amend
Migratory Game Birds	15A NCAC 10B .0105	Amend
Big Game Kill Reports	15A NCAC 10B .0113	Amend
Deer (White-Tailed)	15A NCAC 10B .0203	Amend
Wild Turkey	15A NCAC 10B .0209	Amend
Sale of Live Foxes to Controlled Fox Hunting	15A NCAC 10B .0409	Amend
Public Mountain Trout Waters	15A NCAC 10C .0205	Amend
Fish Hatcheries	15A NCAC 10C .0212	Amend
Inland Game Fishes Designated	15A NCAC 10C .0301	Amend
Open Seasons Creel and Size Limits	15A NCAC 10C .0305	Amend
Manner of Taking Nongame Fishes Purchase	15A NCAC 10C .0401	Amend
Taking Nongame Fishes for Bait	15A NCAC 10C .0402	Amend
General Regulations Regarding Use	15A NCAC 10D .0102	Amend
Hunting on Game Lands	15A NCAC 10D .0103	Adopt
Warren County	15A NCAC 10F .0318	Amend
Davidson County	15A NCAC 10F .0324	Amend
Pamlico County	15A NCAC 10F .0326	Amend
Mecklenburg and Gaston Counties	15A NCAC 10F .0333	Amend
Northampton and Warren Counties	15A NCAC 10F .0336	Amend
Chatham County	15A NCAC 10F .0343	Amend
Camden County	15A NCAC 10F .0352	Amend
Graham County	15A NCAC 10F .0360	Amend
City of Rocky Mount	15A NCAC 10F .0370	Amend
License to Operate	15A NCAC 10H .1201	Amend
Establishment and Operation	15A NCAC 10H .1202	Amend
Quality of Foxes and Coyotes	15A NCAC 10H .1203	Amend
Records Required	15A NCAC 10H .1204	Amend
COMMISSION FOR HEALTH SERVICES		
Definitions	15A NCAC 18A .1935	Amend
Soil Wetness Conditions	15A NCAC 18A .1942	Amend
Approval of Permitting of On-Site Subsurface Waste	15A NCAC 18A .1969	Amend
Definitions	15A NCAC 18A .3501	Adopt
Primitive Experience Base Camp Permit	15A NCAC 18A .3502	Adopt
Permit to Perate	15A NCAC 18A .3503	Adopt
Inspections and Re-Inspections	15A NCAC 18A .3504	Adopt
Specific Requirements for Primitive Experience	15A NCAC 18A .3505	Adopt

Sanitation	15A NCAC 18A .3506	Adopt
Sanitizing Procedures	15A NCAC 18A .3507	Adopt
Primitive Experience Base Camp Water Supply	15A NCAC 18A .3508	Adopt
Swimming Pools	15A NCAC 18A .3509	Adopt
Drinking Water Facilities	15A NCAC 18A .3510	Adopt
Food Supplies	15A NCAC 18A .3511	Adopt
Milk and Milk Products	15A NCAC 18A .3512	Adopt
Shellfish	15A NCAC 18A .3513	Adopt
Ice Handling	15A NCAC 18A .3514	Adopt
Food Service Employees	15A NCAC 18A .3515	Adopt
Vermin Control Premises	15A NCAC 18A .3516	Adopt
Miscellaneous	15A NCAC 18A .3517	Adopt
Procedure When Infection Suspected	15A NCAC 18A .3518	Adopt
Severability	15A NCAC 18A .3519	Adopt
Informal Review Process and Appeals Procedure	15A NCAC 18A .3520	Adopt
STATE BOARD OF CHIROPRACTIC EXAMINERS		
Nutritional Supplements	21 NCAC 10 .0209	Adopt
MEDICAL BOARD		
Prescriptive Authority	21 NCAC 32S .0109	Amend
Supervision of Physician Assistants	21 NCAC 32S .0110	Amend
STATE BOARD OF COMMUNITY COLLEGES		
Establishing Service Areas for Colleges	23 NCAC 02C .0107	Amend
Authority to Establish Tuition and Fees	23 NCAC 02D .0201	Amend
Tuition and Fees for Curriculum Programs	23 NCAC 02D .0202	Amend
Reporting and Student Hours In Membership for Curriculum	23 NCAC 02D .0323	Amend
Reporting of Student Hours in Membership for Cont	23 NCAC 02D .0324	Amend
Courses and Standards for Curriculum Programs	23 NCAC 02E .0204	Amend
Training for Public Safety Agencies	23 NCAC 02E .0405	Adopt
Instructional Service Agreement	23 NCAC 02E .0604	Amend
STATE PERSONNEL COMMISSION		
Voluntary Resignation	25 NCAC 01D .0518	Amend
Purpose	25 NCAC 01D .1401	Amend
Classes Eligible and Rates of Shift Premium Pay	25 NCAC 01D .1402	Amend
Policy	25 NCAC 01D .1501	Amend
Application	25 NCAC 01D .1502	Amend
Application	25 NCAC 01D .1502	Amend
Administrative or Executive Employees	25 NCAC 01D .1503	Repeal
Compensatory Time and Cash Payment Including Over	25 NCAC 01D .1504	Amend
Eligible Employees	25 NCAC 01D .2401	Repeal
Rate of Pay/Compensatory Time	25 NCAC 01D .2402	Repeal
Emergency Call-Back Pay	25 NCAC 01D .2403	Repeal
Overtime	25 NCAC 01D .2404	Repeal
Separation	25 NCAC 01I .2005	Amend

AGENDA

RULES REVIEW COMMISSION

April 15, 2004

I. Call to Order and Opening Remarks

II. Review of minutes of last meeting

III. Follow Up Matters

   A. NC Child Care Commission – 10A NCAC 9 .0705; .1705 (DeLuca)
   B. Environmental Management Commission - 15A NCAC 2D .0538 (DeLuca)
   C. State Board of Cosmetic Art Examiners – 21 NCAC 14A .0101 (Bryan)
   D. State Board of Cosmetic Art Examiners – 21 NCAC 14J .0501 (Bryan)
   E. State Board of Cosmetic Art Examiners – 21 NCAC 14R .0101-.0104 (Bryan)
   F. NC Board of Dietetics Nutrition – 21 NCAC 17 .0114 (Bryan)
   G. Locksmith Licensing Board – 21 NCAC 29 .0602; .0603; .0607; .0612; .0613 (Bryan)
   H. Pharmacy Board – 21 NCAC 46 .1604; .1806; .2504; .2510 (DeLuca)

- Examiners for Speech and Language Pathologists & Audiologists – 21 NCAC 64 .0212; .0213 (DeLuca)

IV. Review of Rules (Log Report #207)
V. Commission Business
VI. Next meeting: April 15, 2004

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at the following address: http://www.ncoah.com/hearings.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Sammie Chess Jr.	James L. Conner, II
Beecher R. Gray	Beryl E. Wade
Melissa Owens Lassiter	A. B. Elkins II

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION				
Ice 2 K t/a Sports Dimensions, Inc. v. ABC Commission	02 ABC 0683	Gray	11/25/03	
Carolina Sports Arena LLC T/A NC Sports Arena v ABC Comm.	02 ABC 1491	Conner	09/11/03	
ABC v. Fast Fare Inc, T/A Fast Fare NC 576	02 ABC 1882	Gray	09/22/03	
Ki Young Kim v. Ann H. Johnson, ABC Commission in Raleigh	03 ABC 0177	Mann	06/17/03	
ABC Commission v. Pantana Bob's, Inc. T/A Pantana Bob's	03 ABC 0233	Mann	10/03/03	
C&C Entertainment, Inc. d/b/a Carolina Live	03 ABC 1037	Lassiter	09/30/03	
ABC v. Lake Point Restaurant, Inc. T/A Larkins on the Lake Bay Front Bar and Grill	03 ABC 1246	Hunter	01/01/04	18:17 NCR 1540
ABC Commission v LLPH Inc T/A Tsunami Sportsbar & Grill, 947 Carter Dr, Suite 4, Calabash, NC 28467	03 ABC 1530	Conner	02/05/04	
ABC Commission v. Jose-Martin Ortega Ramirez T/A Dona Ole Rest.	04 ABC 0094	Gray	03/02/04	
ABC Commission v. Taqueria El Azteca Inc T/A Taqueria El Azteca	04 ABC 0095	Gray	03/02/04	
AGRICULTURE				
Phoenix Ski Corp. v. Dept. of Ag. & Cons. Svcs. & Dept. of Admin. & Carolina Cable Lift, LLC.	02 DAG 0560	Lewis	06/30/03	18:03 NCR 217
CRIME CONTROL AND PUBLIC SAFETY				
Myrtle J. Price v. Crime Victims Comp. Comm, Dept. of Crime Control & Public Safety, Victims Compensation Services Division	03 CPS 0173	Wade	06/27/03	
Regis A Urik v DOCCPS, Div. of Victim Comp. Services	03 CPS 0707	Gray	10/21/03	
Fredrica Wood-Jones v DOCC&PS, Div of Victim Comp. & Svcs.	03 CPS 0804	Gray	10/06/03	
Michael L Pompey v. Crime Control & Public Safety, Div. of Victim Compensation Services	03 CPS 0828	Gray	09/03/03	
Frances H Abegg v Bryan E Beatty, Sec DCCPS	03 CPS 1359	Gray	01/23/04	
Tricia Diane Gerke v. Victim's Compensation Commission	03 CPS 1413	Gray	10/06/03	

HEALTH AND HUMAN SERVICES

A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions.

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
Yelton's Healthcare v DHHS, Div of Fac. Svcs, Group Care Lic Sec	00 DHR 0249	Gray	01/16/04	
Guilford Co Comm Action Program Inc v. DHHS	00 DHR 0984	Gray	09/08/03	
Mary Edge v DHHR, Div of Child Development	01 DHR 0720	Gray	09/23/03	
Richard Hart & Jeannette Hart, Little People Day Car, ID 3355048	01 DHR 1464	Wade	11/14/03	
v. Div of Child Dev Health & Human Services	01 DHR 1464	Wade	11/14/03	
Sunshine Schools, Inc. ID No. 9255424 v. DHHS, Div. of Child Dev.	02 DHR 0708	Wade	11/24/03	18:14 NCR 1209
Robbie Cummings v. DHHS	02 DHR 0815	Conner	06/09/03	
Lee Co. Dept of Social Services v. DHHS	02 DHR 1021	Elkins	12/01/03	18:14 NCR 1212
Linda Ann Tyson v. Div. of Facility Services, Health Care Personnel Registry Section	02 DHR 1103	Lassiter	05/12/03	
Ricky Roberts for Angela Roberts v. DHHS, Div. of Med. Assistance	02 DHR 1138	Lassiter	04/25/03	18:01 NCR 52
Wanda J. Vanhook v. DHHS, Div. of Med. Assistance	02 DHR 1459	Gray	04/24/03	
Elaine B Shelton v. DHHS, Div. of Facility Services	02 DHR 1489	Conner	05/28/03	
Juli A Murphy, Murphy's Munchkin Land Daycare ID 54000197 v.	02 DHR 1555	Lassiter	09/05/03	

Case	Case No.	ALJ	Date	Publication
Div. of Child Development				
Jones Hill Day Care, Ola M Jones v. (CACPP) Child & Adult Care Food Program	02 DHR 1601	Lassiter	05/16/03	
Michelle's Lullaby Day Care, Jerri Howell v. Div. of Child Development June Locklear	02 DHR 1672	Wade	06/10/03	
Bibby's Group Home, Billy McEachern v. Mental Health Licensure and	02 DHR 1749	Gray	12/08/03	
Joanne F Ranta v. DHHS, Div. of Facility Services	02 DHR 1752	Mann	05/15/03	
Gregory Tabron v. DHHS, Div. of Facility Services	02 DHR 1789	Elkins	05/16/03	
Oncology Svcs Corp & Mountainside Holdings LLC v. DHHS, Div of Fac Svcs, Cert of Need Section & Scotland Mem Hospital, Inc.	02 DHR 1983	Wade	08/13/03	18:06 NCR 439
Doretha Leonard v. DHHS, Div. of Medical Assistance	02 DHR 2183	Lassiter	06/13/03	
Jonathan Louis Jefferson, a minor by & through his parents, Cynthia & Louie Jefferson v. DHHS< Div. of Medical Assistance	02 DHR 2186	Lassiter	10/08/03	
Orlando Stephen Murphy v. DHHS, Div. of Fac Svcs, Health Care Personnel Registry Section	02 DHR 2206	Wade	11/04/03	
Tanile Woodberry, By & Through Her Attorney-in-Fact, Linda Monroe v. DHHS, Division of Medical Assistance	02 DHR 2212	Chess	11/06/03	18:15 NCR 1353
Veronica Walker, Ph.D v. DHHS, Div. of Facility Services	02 DHR 2246	Chess	06/20/03	
Gloria Howard v. DHHS	02 DHR 2256	Gray	09/04/03	
Latrese Sherell Harris v. Nurse Aide Registry	02 DHR 2290	Chess	06/16/03	
Wanda S Hudson v. Wake County Public School System	02 DHR 2305	Wade	09/22/03	
Lawyers Glen Retirement Living Ctr, Charlotte Elliotte v DHHS, Div of Facility Svcs, Mecklenburg Co Dept of Social Services	02 DHR 2319	Chess	10/22/03	
James E Hill v. DHHS, Div. of Facility Services	03 DHR 0028	Wade	05/30/03	
Duffie G Hunt v. Medicaid	03 DHR 0085	Conner	06/06/03	
Valencia L Brown v Division of Medical Assistance (DMA)	03 DHR 0099	Chess	11/17/03	
Sarah P Jordan v. DHHS, Div. of Facility Services	03 DHR 0155	Gray	06/18/03	
Martha Banks (ID #72000027) v. Div. of Child Dev., Child Abuse/Neglect Dept., Perquimans Co. DSS	03 DHR 0168	Wade	06/12/03	
Southeastern Reg Med Ctr & Lumberton Radiological Assoc P.A. v DHHS, Div. of Facility Services	03 DHR 0226	Wade	10/31/03	18:12 NCR 1011
Little Angels Child Care Center v Arnette Cowan, Sup of Spec Nut. Prog.	03 DHR 0229	Lassiter	11/24/03	
Aaron Atwater v. DHHS, Div. of Medical Assistance	03 DHR 0262	Chess	08/18/03	
Grace Browning, Grorge D Browning Jr v John Umstead Hospital	03 DHR 0285	Mann	10/03/03	
Vivian P Bailey v. DHHS, Div. of Child Development	03 DHR 0296	Gray	12/18/03	
Nakeisha Shawon Leak v. DHHS, Office of Legal Affairs	03 DHR 0308	Wade	06/25/03	
Krystal Hyatt v. Broughton Hospital	03 DHR 0316	Chess	07/07/03	
Cahterine Williams v. DHHS	03 DHR 0320	Mann	07/17/03	
Rachel Peek,Yancey Co. DSS v. DHHS	03 DHR 0330	Chess	07/24/03	
Penny Yvette McCullers v DHHS, Div. of Facility Services	03 DHR 0336[10]	Mann	01/08/04	18:17 NCR 1543
Lisa Mendez v. Health Care Personnel Registry	03 DHR 0351	Gary	06/27/03	
Twan Fields v. DHHS, Div. of Facility Services	03 DHR 0355	Morrison	09/10/03	
Kevin Douglas Heglar v. DHHS, Dorothea Dix Hospital	03 DHR 0357	Gray	09/17/03	
Yolanda Covington v. RHA Health Svcs, DHS	03 DHR 0360	Lassiter	07/17/03	
Constance Basnight v. Pasquotank County DSS	03 DHR 0385	Lassiter	05/29/03	
Waddell B Taylor v DHHS, John Umstead Hospital	03 DHR 0394	Gray	09/23/03	
Dorothy Ann Bell v. DHHS, Div. of Facility Services	03 DHR 0437	Morrison	06/30/03	
Edmund Bond Small v. DHHS, Walter B Jones, ADATC	03 DHR 0445	Lassiter	07/21/03	
Janitta Brown v. DHHS, Dorothea Dix Hospital	03 DHR 0461	Lassiter	09/15/03	
Gerry Dwayne Cashwell v. DHHS	03 DHR 0469	Gray	07/28/03	
Total Renal Care of NC, LLC v DHHS, Div. of Facility Services, CON Section & Bio-Medical Applications of NC	03 DHR 0499	Conner	12/09/03	18:17 NCR 1548
Charlotte Orthopedic Specialists, P.A. v DHHS, Div. of Facility Svcs CON Section & Orion Imaging LLC Mercy Hospital Inc d/b/a Carolinas Medical Center-Pineville	03 DHR 0505	Gray	12/23/03	18:19 NCR 0000
Gregory Lewis Berry v. Burke Co. Dept of Social Services	03 DHR 0514	Wade	08/19/03	
Robert L Scott v DHHS	03 DHR 0527	Conner	12/02/03	
Donna Kay Kirkland v. DHHS, Broughton Hospital	03 DHR 0547	Wade	08/29/03	
Penny Yvette McCullers v DHHS, Div. of Facility Services	03 DHR 0558[10]	Mann	01/08/04	18:17 NCR 1543
The Presbyterian Hospital v. DHHS, Division of Facility Services and Mooresville Hosp Mgmt Assoc Inc d/b/a Lake Norman Reg Med Ctr	03 DHR 0567	Wade	12/19/03	18:15 NCR 1362
Grace Browning v. John Umstead Hospital	03 DHR 0571	Mann	10/03/03	
Becky Wood, Guardian Rep The Arc/NCLifeguardianship on behalf of Mary Short (Ward) v. Richard Visingardi, Dir, Div of MH, DD, SAS	03 DHR 0575	Chess	12/22/03	
Sabrina Regina Betts v. DHHS, Div. of Facility Services	03 DHR 0595	Gray	09/12/03	
Andrea Ford v DHHS, Div. of Facility Services	03 DHR 0609	Morrison	06/04/03	
Wallace C Levi v. Div. of Medical Assistance	03 DHR 0633	Wade	08/12/03	
Timothy Batts v. DHHS, Div. of Facility Services	03 DHR 0640	Gray	09/12/03	
Bestway Food's, Osama M Dari v. DOH WIC, Cory Menees, Unit Super.	03 DHR 0662	Morrison	07/28/03	
Charles Wakild & Susan Wakild v DENR, Div of Coastal Management	03 DHR 0663	Morrison	12/09/03	
Denise A Worthington v. DHHS, Office of the Controller	03 DHR 0672	Gray	10/06/03	
Wake Radiology Services, LLC, Wake Radiology Consultants, P.A., Raleigh MR Imaging Center Ltd Partnership & Wake Radiology Diagnostic Imaging, Inc. v. DHHS, Div. of Facility Svcs., CON Sec., Robert J. Fitzgerald, Dir, Lee B Hoffman, Chief of CON Sec. & Mobile Imaging of North Carolina, LLC	03 DHR 0676	Gray	07/07/03	
Nedall H Hassan d/b/a GNS Express Mart v. DHHS	03 DHR 0695	Lassiter	10/14/03	
Samantha Jacobs v. DHHS, Div. of Facility Services	03 DHR 0697	Lassiter	06/19/03	
Jane McMillan v. DHHS, Div. of Facility Services	03 DHR 0698	Lassiter	06/19/03	

Veronica Williams v. Div. of Med. Assistance, Dana Harris, Super.	03 DHR 0737	Mann	08/28/03	
Patti L Cain Small Fries by Patti v. Nutrition Services	03 DHR 0768	Morrison	07/31/03	
Humans United Giving Greater Services "Huggs" v DHHS	03 DHR 0767	Lassiter	01/15/04	
Brian Keith Heilig v. DHHS, Div. of Medical Assistance	03 DHR 0779	Mann	07/17/03	
Mrs Soon Ja An v. DHHS	03 DHR 0780	Morrison	07/28/03	
Kimberly Donyelle Miles v. DHHS, Div. of Facility Services	03 DHR 0795	Lassiter	09/11/03	
Sharmia Barnes v DHHS, Div of Facility Services	03 DHR 0830	Conner	01/05/04	
Pamela Powell v. DMA Outpatient Therapy	03 DHR 0834	Lassiter	10/13/03	
Angela Carter Precious Love Turtledove v. Tarin Goodwin, St. of NC, DCD	03 DHR 0850	Connor	09/23/03	
Donald Eugene Lowery by & through his guardian, Dennis Parise v. CAP (DMA) Div. of Medical Assistance	03 DHR 0868	Gray	12/17/03	
Nequita Williams v. DHHS, Div. of Medical Assistance	03 DHR 0895	Wade	11/21/03	
Ali Alsaras d/b/a University Market v. DHHS	03 DHR 0917	Conner	12/02/03	
Kimberly Roberts v. DHHS, Div. of Facility Services	03 DHR 0927	Gray	08/15/03	
Michael Hillis v. Department of Revenue	03 DHR 0935	Conner	07/28/03	
Rose McCallum, Individually & as Owner & Representative of NC Preschool Academy & Tina Octetree, Individually & as Director & Representative Of NC Preschool Academy v. DHHS, Div. of Public Health	03 DHR 0951[11]	Elkins	02/02/04	18:17 NCR 1571
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William Russell Robinson v School of Science & Math et. Al.	03 OSP 1977	Lassiter	02/16/04
Elizabeth A Gregory, Correction Officer v Pasquotank Corr Inst #3740	03 OSP 2209	Lassiter	02/23/04
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Ieshia Marlina Baskett v. UNC Hospitals, Patient Account Services	03 UNC 0894	Gray	09/04/03
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STATE OF NORTH CAROLINA | **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

COUNTY OF MECKLENBURG | **03 DHR 0505**

CHARLOTTE ORTHOPEDIC SPECIALISTS, P.A.,
Petitioner,

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION,
Respondent,

and

ORION IMAGING, LLC, MERCY HOSPITAL, INC. d/b/ a CAROLINAS MEDICAL CENTER-PINEVILLE,
Respondent-Intervenors.

RECOMMENDED DECISION

In the above-captioned contested case, Petitioner Charlotte Orthopedic Specialists, P.A. ("COS") challenges the decision of the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section ("CON Section" or "the Agency") to award a Certificate of Need ("CON") to Orion Imaging, LLC ("Orion") and to deny COS' application for a CON.

Pursuant to N.C.G.S. § 131E-188(a) and 150B-23, a contested case hearing was held in this matter on November 13-19, 2003, in Raleigh, North Carolina before Administrative Law Judge Beecher R. Gray.

APPEARANCES

Renée J. Montgomery and Susan L. Dunathan of Parker, Poe, Adams & Bernstein, LLP represented Petitioner Charlotte Orthopedic Specialists, P.A. Melissa L. Trippe, Special Deputy Attorney General, and Jane L. Oliver, Assistant Attorney General, represented Respondent CON Section. Frank S. Kirschbaum and David P. Nanney, Jr. represented Respondent-Intervenor Orion Imaging, LLC. Gary S. Qualls and Colleen Crowley represented Respondent-Intervenor CMC-Pineville Hospital, Inc. d/b/a Carolinas Medical Center-Pineville.

APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is Article 3 of the North Carolina Administrative Procedure Act, N.C.G.S. § 150B-22 et seq. and § 131E-188 of the North Carolina Certificate of Need law.
2. The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need law, N.C.G.S. § 131E-175 et seq.
3. The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Regulations, 10 N.C.A.C. 3R.0100 et seq., in particular 10 N.C.A.C. 3.R.2700 et seq. (Criteria and Standards for Magnetic Resonance Imaging Scanners). The Office of Administrative Hearings Regulations, 26 N.C.A.C. 3.0001 et seq. are also applicable to this contested case hearing.

ISSUES

The issue in this contested case is:

Whether the CON Section, in making its decision to deny the application of Charlotte Orthopedic Specialists and to conditionally approve the application of Orion Imaging, violated the standards of N.C.G.S. § 150B-23(a) by (1) exceeding its

authority or jurisdiction; (2) acting erroneously; (3) failing to use proper procedure; (4) acting arbitrarily or capriciously; or (5) failing to act as required by law or rule.

PRELIMINARY MATTERS

The parties filed a Final Prehearing Order at the outset of this contested case hearing which, among other things, stipulated that notice was proper. Before the hearing in this case, Petitioner COS and Respondent-Intervenor Orion filed Motions for Summary Judgment or Partial Summary Judgment addressing specific is sues regarding each other's applications. All Motions were denied with the exception of Petitioner COS' Motion for Partial Summary Judgment regarding Orion's nonconformance with the requirements of 10 N.C.A.C. 3R.2714(b)(1). The undersigned determined that based upon the information in Orion's application (p. 24), Orion's proposed MRI scanner would be available and staffed for use only 63 hours per week, rather than the required 66 hours per week. As a result, Orion's application failed to demonstrate conformity with 10 N.C.A.C. 3R.2714(b)(1) and there were, at the time of the summary judgment motion, no genuine issues of material fact concerning this lack of conformity. At the request of Respondent Agency and Respondent-Intervenor Orion, the parties were permitted to present evidence concerning this issue for the Record.

This case is before the Office of Administrative Hearings in a unique posture. Evidence of errors and omissions in Orion's application were realized by the Agency for the first time during the contested case proceeding and the Agency had not considered these errors and omissions in reaching its decision. The errors and omissions are not disputed by any of the parties. (Hoffman, pp. 580-588; Edwards, Vol. I, pp. 57, 60-64; Barbee, pp. 809-815). The chief of the Certificate of Need Section testified that she is unsure how the errors and omissions effect the information in Orion's application, and whether Orion's application should be approved. (Hoffman, pp. 587-588). A *de novo* standard of review must therefore be applied to those issues upon which the Agency has taken no position. Britthaven, Inc. v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995). 10 N.C.A.C. 3R.0306; In Re Wake Kidney Clinic, Id.

After exa mination of the Record and consideration of the evidence presented at the hearing and the proposed Findings of Fact and Conclusions of Law presented by the parties, the Administrative Law Judge makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Parties

1. Petitioner COS is an orthopedic group practice with 37 physicians at 11 different locations in Charlotte or within an hour's drive of Charlotte. (COS Application, Ex. 2, p. 7). COS' main office is at the Charlotte Spine Center near downtown Charlotte. (Id.)

2. Respondent CON Section is the Agency responsible for the administration of North Carolina's Certificate of Need law, N.C.G.S. Chapter 131E, Article 9.

3. Respondent-Intervenor Orion was organized in February of 2001 and its members are the physician shareholders of Mecklenburg Radiology Associates, a radiology group in Charlotte comprised of 32 radiologists. (Orion Application, pp. 82-84; Barbee, pp. 752-754).

4. Respondent-Intervenor CMC-Pineville Hospital, Inc. d/b/a Carolinas Medical Center-Pineville ("CMC-Pineville") is a hospital located in the Pineville area of Mecklenburg County.

Procedural Background

5. The 2002 State Medical Facilities Plan ("SMFP") allocated one additional fixed Magnetic Resonance Imaging Machine ("MRI") for MRI Service Area 17 which includes the counties of Mecklenburg, Union, and Anson. (Pet. Ex. 10, p. 126) COS, Orion, and CMC-Pineville submitted applications to acquire the fixed MRI in a review which commenced on October 1, 2002. These applications were required to be reviewed competitively since only one additional MRI could be allocated from the review. (Agency File, Pet. Ex. 1, pp. 337-339).

6. By letter dated February 27, 2003, the CON Section notified all the applicants that Orion's application was approved and the applications of COS and CMC-Pineville were disapproved. (Agency File, Pet. Ex. 1, pp. 26-31, 39-42). On March 6, 2003, the CON Section issued the written findings upon which it based its decision. (Agency File, Pet. Ex. 1, pp. 337-382).

7. COS and CMC-Pineville filed Petitions for Contested Case Hearing challenging the approval of Orion's application and the disapprovable of their applications. By Order dated August 8, 2003, Orion was permitted to intervene in the contested cases initiated by COS and CMC-Pineville. In the same Order, COS was permitted to intervene in the contested case initiated by CMC-Pineville and CMC-Pineville was permitted to intervene in the contested case filed by COS. By Order dated August 8, 2003, the COS and CMC-Pineville contested cases were consolidated for hearing.

8. On October 27, 2003, CMC-Pineville filed a Notice of Dismissal of its Petition for Contested Case. CMC-Pineville remains an Intervenor in the contested case initiated by COS.

The Agency's Decision

9. Mary Edwards was the project analyst who reviewed the three competing applications. She was the only person at the CON Section who reviewed the applications. (Edwards, Vol. 1, p. 52). Lee Hoffman, the Chief of the CON Section, edited Ms. Edwards' findings and signed the Agency Decision but did not review the applications. (Edwards, Vol. 1, pp. 53-54; Hoffman, pp. 473-474).

10. The CON Section determined that COS' application failed to conform with N.C.G.S. § 131E-183(a), (4), (5), (14), and (18)(a) (hereinafter referred to as "Criteria" or "Statutory Criteria" 4, 5, 14, and 18(a); (Agency File, Pet. Ex. 1, pp. 337-382). The Agency's determination on Criteria 4 and 18(a) was entirely dependent upon its findings on Criteria 5 and 14. (Id. at pp. 347 and 364; Edwards, Vol. 1, p. 86).

11. The Agency found certain deficiencies in Orion's application on Criterion 5 and special Criterion 10 N.C.A.C. 3R.2717(c), so the Agency did not find Orion's application conforming with these Criteria. (Agency File, Ex. 1, pp. 351-353, 374). Instead, the approval of Orion's application was conditioned upon the CON Section receiving documentation from Orion that it would meet the requirements of these Criteria prior to the issuance of the Certificate of Need. (Id. at pp. 353 and 374).

12. Although the Agency findings include a "Comparative Analysis" section, the analysis set forth in that section was not considered by the Agency in making its decision because the Agency determined that Orion submitted the only "approvable" application. (Edwards, Vol. 1, p. 56; Hoffman, pp. 530-534).

13. Because the Agency determined that COS' application was "unapprovable" based on its determination of nonconformance with one criterion, Criterion 5, it did not make a conclusive determination on any of the other comparative review factors, allowing Criterion 5 to override all other criteria and comparative factors. (Hoffman, pp. 532-538).

Review Criterion 5

14. N.C.G.S. § 131E-183(a)(5), review Criterion 5, requires that

"[f]inancial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service."

15. The project analyst determined that the documentation from financial institutions submitted by both COS and Orion was deficient in similar ways. (Edwards, Vol. I, pp. 75-78). The applicant's name on the financing letter was not exactly correct and the financing letters contained an expiration date before the review could be completed. (Agency File, Ex. 1, pp. 349-353). COS' bank letter also stated that the bank would lend 100% of the project costs and did not state a dollar amount. (Agency File, Pet. Ex. 1, pp. 349-353). However, because the CON Section decided to approve Orion's application, the Agency found Orion's application conditionally conforming with Criterion 5. (Id. at p. 353). At the hearing, the project analyst testified that if the Agency had decided to approve COS' application, any deficiencies in the bank documentation could have been the subject of a condition. (Edwards, Vol. 1, pp. 77-78).

(A) COS' Application

16. In applying Criterion 5, the Agency determined that COS' application must be found nonconforming because COS' pro forma financial statement for the MRI service did not include costs for other supplies, general and administrative costs, overhead or rent/leases. (Agency File, Pet. Ex. 1, p. 351). The Agency also determined that gross patient revenue and operating revenue figures in Form B-1 were not increased by 2.5% as stated in COS' assumptions. (Id. at p. 350).

17. COS' pro forma financial statements included two sets of financial projections: one for total operations including the MRI service and another pertaining only to the MRI service. (COS Application, Ex. 2, pp. 179-180; Edwards, Vol. 1, pp. 68, 72-73). In

preparing the financial pro forma for the MRI service only, COS showed new costs that would be incurred as a result of the MRI project and not costs that would be incurred by COS whether or not the project was developed that could be allocated to the MRI service based on some formula. (Ellis, pp. 168-169). These costs have been referred to as "allocated costs". (Ellis, pp. 168-169; Clary, pp. 640-641; Edwards, Vol. 1. p. 66). All costs, allocated and unallocated, were included in the pro forma for total operations. (Id.)

18. The Agency does not dispute that all costs were included in the financial projections for COS' total operations. (COS Application, p. 179; Edwards, Vol. 1, pp. 67-68). The Agency also does not dispute that COS' operations with the MRI service show a profit each year and would be financially feasible. (Id.) The project analyst testified that she had no doubt that COS' project would be financially feasible. (Edwards, Vol. 1, p. 74). Nevertheless, the Agency contends that COS should have included "allocated costs" in the pro forma addressing only the MRI service. (COS Application, Ex. 2, p. 180; Edwards, Vol. 1, p. 68; Hoffman, pp. 503-504).

19. The application form states: "Specify each direct and indirect cost item in its related amount for the proposed project for the first three years of operation after completion of the project." (COS Application, p. 65). The Chief of the Agency admits that the terms "direct" and "indirect" are not defined and that the terms "allocated" or "allocated costs" are not used in requesting cost information. (Hoffman, pp. 501-502, 506). The terms "direct" and "indirect" have different meanings to different people. (Clary, pp. 641-642).

20. The instruction to specify "each direct and indirect cost item" does not instruct an applicant to allocate costs from the rest of the applicant's operations. (Clary, pp. 641-642). Direct costs are costs incurred from hands-on service while indirect costs can mean expenses that are not hands-on, such as maintenance. (Clary, p. 642). The form should specifically instruct an applicant to include allocated costs if the CON Section wants them included. (Clary, p. 643).

21. In this review, neither COS nor CMC-Pineville interpreted the application form to require that the MRI pro forma include allocated costs – costs that would be incurred regardless of whether the project is developed. (Agency Findings, Ex. 1, pp. 349-351, 353-355; Hoffman, p. 504). If the Agency is requiring that applicants include allocated costs, it should inform applicants that it expects these costs to be included by clarifying the application form and notifying applicants prospectively. (Clary, p. 643). The application form is not clear that allocated costs must be included. (Id.)

22. In preparing its MRI pro forma, COS relied upon the application of Charlotte Mecklenburg Hospital Authority d/b/a Carolinas Medical Center ("CMC") for an MRI that was approved in February of 2002. (Ellis, pp. 163, 168-69). The application filed by CMC, which was found to be conforming with Criterion 5 and the most effective alternative of all the applications in that review, included a financial pro forma for the proposed MRI that did not allocate existing costs. (Clary, pp. 644-645; Egan Dep., pp. 26-27; Pet. Exs. 11, 12, and 13).

23. Ms. Hoffman and the project analyst who conducted the CMC review admitted that there are no entries on the CMC pro forma for other supplies, general and administrative, and rent/leases – the same items that the Agency determined should have been in COS' pro forma for the MRI. (Hoffman, pp. 496-500; Egan Dep., pp. 26-27). The project analyst who conducted the CMC review determined that all necessary costs had been included by CMC in its pro forma for the MRI. (Egan Dep., p. 27). It was reasonable for COS to rely upon the CMC application in presenting the financial information in its application. (Clary, pp. 643-644). Without any change in the statutory review criteria, the Agency applied Criterion 5 in an entirely different way in reviewing CMC's application from the way in which it applied Criterion 5 in reviewing COS' application. (Clary, pp. 644-645).

24. The CON Section encourages perspective applicants to review previously approved CON applications and the Agency's past findings. (Edwards, Vol. I, p. 54). Ms. Hoffman attempted to rationalize the decision on CMC by testifying that the project analyst only had been employed one year. (Hoffman Dep., p. 43). However, Ms. Hoffman herself signed the decision approving CMC's application and there was no notification to COS or any other applicants that the Agency's decision approving the CMC application was erroneous and should be ignored. (Id.)

25. The CON Section also found an application for an MRI submitted by Mercy Hospital financially feasible when Mercy Hospital failed to submit any separate projections for its proposed MRI. (Pet. Ex. 11, pp. 30-31). Instead, the CON Section relied upon the fact that the entire hospital showed that it would operate at a profit with the MRI. (Id.) In the case of COS, COS submitted a pro forma for its entire medical practice, including the MRI, showing that its entire operations would be profitable. (COS Application, Ex. 2, p. 179; Edwards, Vol. I, pp. 67-68). Without any change in the statutory review criteria, the Agency applied Criterion 5 in an entirely different way in reviewing Mercy's application from the way in which it applied Criterion 5 in reviewing COS' application.

26. Orion did not allocate costs from existing operations. As a manager of Orion, Joe Barbee spends approximately 20% of his time managing Orion's activities. (Barbee Dep., pp. 104-105). None of Mr. Barbee's salary was allocated to Orion's proposed MRI service. (Barbee, Dep., p. 104-105).

27. It was an oversight that COS did not inflate gross and net revenues in its pro forma. (Wellborn, pp. 421-422). However, the information about COS' intended inflation factor is stated in its application and the Agency does not need to depend upon information outside the application to calculate the impact upon gross and net revenues. (COS Application, pp. 65, 184; Agency Findings, p. 350; Wellborn, pp. 421-422).

28. The project analyst admitted that it would be a simple calculation to inflate COS' charges by 3% and that the math was included in comments presented to her during the review. (Edwards, Vol. 1, p. 99). She also admitted that the impact of inflating charges by 2.5 or 3% was not great. (Id., pp. 97, 99-100). Orion failed to inflate its gross and net revenues by any amount which is not realistic and which the Agency failed to even mention in its findings. (Clary, pp. 666-667).

29. Additional issues raised by Orion that were not cited by the Agency in Criterion 5 about start-up costs and alleged damages for COS' termination of its lease of the mobile MRI from Alliance. COS does not anticipate having any startup costs because it is currently operating the mobile MRI at the same site and any expenses for startup of the fixed MRI would be very minimal. (Clary, p. 646; Ellis, pp. 164-165). MRI training will not be required since the MRI technicians already will be trained. (Templeton, p. 137). COS does not anticipate that it will have to pay any termination fee or other damages for terminating its mobile Lease Agreement with Alliance. (Templeton, pp. 159-160).

(B) Orion's Application

30. In reviewing Orion's application, the Agency erroneously determined that Orion's pro forma for its MRI included all necessary costs. (Agency Findings, Ex. 1, p. 381). The Agency's findings upon which it based its decision that Orion's pro forma had included all costs is admittedly in error. (Hoffman, pp. 580-588; Edwards, Vol. I, pp. 57, 60-64). Numerous witnesses at the hearing agreed that Orion had failed to include certain expenses that would be incurred by Orion as a result of acquiring the MRI. (Barbee, pp. 809-815; French, p. 884; Clary, pp. 647-656). These omissions are not disputed by Orion or the Agency. (Id.; Hoffman, pp. 580-588; Edwards, Vol. 1, pp. 57, 60-64).

31. In its pro forma for the MRI, Orion omitted interest on working capital and the depreciation for its leasehold improvements. (Barbee, pp. 809-812; Clary, pp. 647-648). The depreciation on leasehold improvements could be over $100,000 per year. (Clary Dep., pp. 36-37). Orion's MRI pro forma also included an expense item for principal and interest on the loan for the capital lease of the MRI, when only the interest expense should be included. (Clary, pp. 651-653; Barbee, pp. 809-810).

32. The Chief of the Agency, Ms. Hoffman, testified at her deposition (before she became aware of Orion's omitted costs) that the Agency will not redo an applicant's pro formas and that if Orion had not included all costs in its pro forma financial statements, the application is nonconforming with Criterion 5 and must be disapproved. (Hoffman Dep., pp. 64, 67-69; Hoffman, p. 579). However, Ms. Hoffman testified at the hearing that Orion's application still could be found conforming with Criterion 5, depending upon the testimony of Orion's expert, if information was available in the application or under generally accepted accounting principles (GAAP) to make the calculations. (Hoffman, pp. 582-587).

33. In attempting to defend its decision, after realizing its failure to recognize that Orion's pro forma had omitted certain costs, the Agency has changed its standard for reviewing and approving Orion's application and has admitted its willingness to apply different standards to review the Orion and COS applications. If the Agency had applied the standard articulated by Ms. Hoffman at her deposition, Orion's application would be required to be denied because Orion's application had admittedly not included all costs and the Agency will "not redo" an applicant's pro formas. (Hoffman Dep., pp. 60-61). However, at the hearing, Ms. Hoffman indicated a willingness by the Agency to "redo" an applicant's pro forma if information is available in the application to do the calculations. (Hoffman, pp. 586-588). This is directly contrary to the Agency's refusal to inflate COS' charges by 3% based on information in the application. (Edwards, Vol. I, p. 99). Testimony by the project analyst that she is not able to make any calculations in Orion's application to determine the amount of missing expenses shows that the calculations required to analyze the affect of the missing expense items in Orion's application cannot be determined from information in the application. (Edwards, Vol. I, p. 65). Undeterred from the obvious inconsistency in the Agency's position, however, Ms. Hoffman testified that if missing cost items could be calculated from other information, then Orion's application should still be found conforming with Criterion 5 and approved. (Hoffman, pp. 586-588).

34. The information needed to make the calculations of missing expense items and the interest expense on the capital lease for the MRI requires information outside of Orion's application. (Barbee, pp. 809-811; Clary, pp. 650-651). There is no information in Orion's application to determine the amount of depreciation on leasehold improvements which should have been included in Orion's

MRI pro forma. (Barbee, p. 814; Clary, pp. 647-648). Furthermore, there is no set time period for depreciating leasehold improvements on space for an MRI that could be supplied by the analyst. (Clary, p. 648). Generally accepted accounting principles (GAAP) sets forth a number of factors that should be considered in setting a depreciation schedule and there is a range of acceptable options. (Clary, pp. 647-648). Without Orion stating the time period for depreciation it intends to use, the analyst could not compute the amount of depreciation on leasehold improvements. (Clary, p. 648).

35. The principle payments on the loan for the MRI should not have been included in Orion's pro forma because it was proposing a capital lease. (Clary, pp. 652-653; Whitten Dep., p. 80; Barbee, pp. 809-810). The entry "Capital Lease MRI" in Orion's listing of expenses includes both principle and interest. (Orion App., p. 282). The amount of interest that should be deducted cannot be determined from information in the application. (Clary, pp. 653-654). As Orion's Manager admitted, an amortization schedule would be required because more interest is paid in the first years of the loan than in the latter years. (Barbee, pp. 810-811; Clary, pp. 650-651). Mr. French, Orion's expert, testified at the hearing that an amortization schedule would not be required. (French, pp. 887-888). However, Mr. French admits in his deposition that such a schedule would be required. (French Dep., p. 109). There is no such amortization schedule included in Orion's application. (Clary, pp. 725-726; French Dep., p. 887).

36. The Orion application also contains inconsistent information for purposes of calculating the interest expense on working capital. (Orion Application, pp. 124 and 129). The financial letter in Orion's application indicates an interest rate of 3.81% and a statement in the same section entitled "Documentation of Financing" states an interest rate of 5.5%. (Id.) If the Agency had applied consistent standards in this review, then the discrepancy in interest rates in the application would prevent the Agency from calculating this expense for Orion. In the case of COS, Ms. Hoffman testified that she would not inflate COS' charges because one statement in the application stated a rate of 2.5% and other statements indicated 3%. (Hoffman, p. 553; Hoffman, Dep., pp. 128-129).

37. Orion's application also failed to explain why some expenses were inflated by 3% in its pro forma and other expenses were not. (Clary, pp. 662-666). Orion's application states that expenses will be inflated by 3%. (Orion Application, pp. 279). There also are inconsistencies in staffing and benefits that were not explained in the application. (Clary, pp. 662-666). Orion failed to provide sufficient assumptions to make a reasonable decision on the impact of these omissions. (Id. at 665-666).

38. Orion's application also failed to show the availability of financing for the total capital cost of the project. (Orion Application, pp. 123-128; Clary, pp. 655-658). The letters submitted by Orion to show financing falling approximately $34,000 short of the total needed to finance its projected capital costs. (Clary, p. 656; Edwards, Vol. 2, p. 317). Although the project analyst testified that some items shown on the capital cost form could be expensed by Orion, rather than capitalized, all of those expenses should be capitalized. (Clary, pp. 659-660). Furthermore, Orion cannot fund the $34,000 shortfall of its working capital line of credit because that line of credit will be needed to fund Orion's projected operating losses. (Clary, pp. 660-662).

39. The CON Section erred in failing to realize that Orion's application did not include all expenses for its MRI and in determining that Orion had demonstrated the availability of financing for the total cost of its project. (Wellborn, pp. 349-352; Clary, pp. 662-666).

40. The CON Section also applied different standards to review the COS and Orion applications on Criterion 5. COS' application was found nonconforming with Criterion 5 because it did not allocate costs from existing operations while Orion's application was found conforming with Criterion 5 when Orion failed to include all costs directly attributable to the development of the MRI service. After it was brought to the attention of the Agency that the Agency had overlooked certain errors and omissions from Orion's pro forma, the Agency indicated a willingness to "redo" Orion's pro forma, directly contrary to the position the Agency articulated before realizing its mistake, while at the same time continuing to insist that it would not accept COS' proposed charges because COS forgot to inflate those charges by the inflation factor stated in its application, a simple calculation based on information contained within COS' application.

Review Criterion 14

41. N.C.G.S. § 131E-183(a)(14), review Criterion 14, requires that the applicant demonstrate "… that the proposed health services accommodate the clinical needs of health professional training programs in the area, as applicable."

42. COS is involved in training programs. COS' application indicates that it trains two orthopedic specialists each year but that MRI is not expected to be a factor in that training. (COS Application, p. 44). COS states that the project will not be utilized in health professional training programs and that MRI already is available to all students and clinicians in training as a standard diagnostic tool, in the hospital setting. (Id.) The Agency found COS' application nonconforming with Criterion 14.

43. In applying Criterion 14, the Agency did not determine whether there were any clinical training needs that were unmet. In fact, the Agency believes there should not be an assessment of training needs as a part of complying with Criterion 14. (Id.) (Hoffman Dep., pp. 17-18). As shown by COS' response in its application, it did not believe that there were any clinical needs that its project needed to accommodate. (COS Application, p. 44). By including "if applicable" in Criterion 14, the statute indicates that it is not necessary to indicate a relationship with a training program where there are no clinical needs. (Wellborn, pp. 361-362).

44. According to Ms. Hoffman, the applicant proposing to acquire an MRI must demonstrate efforts to make itself available to a local training program. (Hoffman, p. 514). There are no MRI training programs in the Mecklenburg County area. (Barbee, p. 804; Templeton, pp. 141-142).

45. The language used in Criterion 14, "in the area", is not defined. However, Ms. Edwards provided three different definitions of "area" when asked during her testimony. She first testified that "in the area" meant half of North Carolina, then all of North Carolina, then states other than North Carolina. (Edwards, Vol. 1, p. 83, Vol. 2, pp. 293-294). The Agency has no clear standards for applying this Criterion.

46. Orion's attempt to "accommodate the clinical needs of health professional training programs" resulted in Orion submitting an affiliation agreement with an MRI training program in Greenville, South Carolina, 100 miles from Charlotte. (Orion Application, p. 253). It is unreasonable to assume that in adopting North Carolina's Certificate of Need statute, the General Assembly intended to accommodate the needs of health professional training programs in other States.

47. If COS had understood that the CON Section would apply this criterion to require a positive statement about affiliations with health professional training programs, even though there were no clinical needs for MRI training to be accommodated in the service area, COS could have provided other information about training that is not specific to MRI services. (Templeton Dep., pp. 16-17). In addition to COS' Physician Fellowship Training Programs, COS has physicians who are part of the Faculty Residency Training Program at Carolinas Medical Center and has intermittent relationships with various schools and programs. (Id.)

The Agency's Use Of Conditions

48. Ms. Hoffman is unsure whether Criterion 14 could have been the subject of a condition for COS if COS had been the "approved" applicant. (Hoffman, pp. 520-521). In reviewing the application, Ms. Edwards was looking for a letter from COS indicating its interest in affiliating with a health professional training program. (Edwards, Dep., pp. 53-54). If Criterion 14 were applicable, the Agency still could have approved COS' application conditioned upon providing this documentation.

49. There are no Certificate of Need rules or written guidelines used by the Agency in determining when it will and when it will not impose a condition to be able to approve an applicant that does not entirely conform with the statutory and regulatory criteria. (Hoffman, pp. 521, 538-539). Whether a deficiency can be conditioned is a determination that is made solely by Chief Hoffman without any written guidelines or rules. (Id.) 10 N.C.A.C. 3R.0313(a) provides in part that

"[i]f a proposal is not consistent with all applicable standards, plans, and criteria, the Agency decision shall be to either not issue the Certificate of Need or issue one subject to those conditions necessary to insure that the proposal is consistent with applicable standards, plans, and criteria. The Agency may only impose conditions which relate directly to applicable standards, plans, and criteria."

Conditions should be used whenever necessary to approve the most effective alternative among completing applicants.

50. In this case, the Agency decided to approve the Orion application and conditioned its decision on the receipt by the Agency of certain documentation from Orion that would make Orion's application conforming to Criterion 5 and the special Criterion, 10 N.C.A.C. 3R.2717(c). If COS' application were deficient under Criterion 14, a condition requiring that COS submits documentation showing compliance with Criterion 14 could have been imposed.

The Disqualification Of COS' Application As "Unapprovable"

51. The Agency findings include a section entitled "Comparative Analysis". (Agency findings, Ex. 1, pp. 376-381). However, the Comparative Analysis made no difference in the Agency's decision because the Agency determined that Orion had the only "approvable" application. (Agency Findings, Ex. 1, p. 378-379; Edwards, pp. 269-270; 272; Hoffman pp. 532-533). The Agency determined that its findings on the COS application under Criterion 5 pertaining to allocated costs made COS' application "unapprovable" meaning that, regardless of COS' application strengths in other areas, it could not be approved. (Edwards, Vol. 1, p. 56; Hoffman, pp. 511, 526).

52. For the reasons set forth above, COS' application should not have been faulted for failing to allocate costs. COS included all costs in its pro forma for total operations; the application form is not clear that allocated costs should be included; and COS reasonably relied upon the approval of CMC's application for an MRI in which CMC did not allocate costs. (See Findings 8-22, above).

53. The term "unapprovable" or "unapprovable application" is not contained in any Certificate of Need regulations or the Certificate of Need statute. (Edwards, Vol. 2, pp. 272-273; see also, N.C.G.S. § 131E-175 et seq.). Under Living Centers v. North Carolina Department of Health & Human Services, 138 N.C. App. 572, 532 S.E.2d 192 (2000), competing applications that meet the majority of the review criteria will always result in an issue as to which is the superior application. In Britthaven, Inc. v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 455 S.E.2d 455 (1995), the Court determined that the CON Section was required to engage in a two-part review. First, the Agency must review each application individually against the review criteria. Then the Agency is required to decide which of the competing applications should be approved. "This decision may include not only whether and to what extent the applications meet the statutory and regulatory criteria, but it may also include other "findings and conclusions upon which it based its decision." G.S. §131E-186(b). As the Court of Appeals reasoned, ". . . the stated purpose of the CON law to `control the cost, utilization, and distribution of health services and to assure that the less costly and more effective alternatives are made available,' [CITATIONS OMITTED], is fulfilled by the Agency's second step of making an overall comparison of the applications and supporting its decision to grant the certificate to one applicant, and not the other, with written findings and conclusions explaining its decisions." 118 N.C. App. at 385-386.

54. The CON Section has statutory authority to approve an application with conditions. N.C.G.S. § 131E-186(a); 10 N.C.A.C. 3R.0313(a). Conditions can be used to ensure that the approved application meets the review criteria as required in the first stage of reviewing a Certificate of Need application. Britthaven, supra.

Comparison Of COS' And Orion's Applications

For judicial efficiency, this decision will address a comparison of the COS and Orion applications, based upon the extent to which each of the applications conformed with the review criteria and other relevant factors that the Agency considered or should have considered in this review, based upon the evidence produced in this contested case hearing.

Net And Gross Revenues

55. Comparing CON applications on the net revenues projected is very important because net revenues are the amounts that the health care system will pay for the services at issue. (Wellborn, pp. 369-370; Edwards, Vol. 2, pp. 278-279; Hoffman, p. 536). Net revenues are gross revenues less the contractual adjustments and other discounts from gross charges. (French, pp. 873-874). Charges are very seldom paid since most payers for health care services pay less than charges. (Id.) Net revenues are what the public ends up paying and represent the financial impact on the public. (Wellborn, pp. 369-370)

56. In the review at issue, as well as in other MRI reviews, the Agency prepares tables comparing the applications on net and gross revenues. (Agency Findings, Ex. 1, pp. 379 and 380; Pet. Exs. 14, 18, pp. 35-36, and 19, pp. 63-65). In this review, the CON Section prepared charts which show how the applications compare on gross and net revenues but refused to consider this information for COS because COS had not inflated charges in its pro forma financial statements. (Agency Findings, Pet. Ex. 1, p. 380). At the hearing, both the project analyst and the Chief of the Certificate of Need Section admitted that whether or not COS' gross revenues were inflated by 3%, COS still had lower gross and net revenues per procedure than Orion. (Edwards, Vol. 1, p. 100, Vol. 2, p. 279; Hoffman, pp. 482-483).

57. The project analyst could have performed the mathematical computation and estimated the 3% increase in her head. (Edwards, Vol. 1, p. 97, Vol. 2, p. 280). Also, during the review, COS submitted comments, as allowed under N.C.G.S. § 131E-185(a1)(1). (Agency File, Pet. Ex. 1, p. 70; Pet. Ex. 23). In its comments, COS compared the applications on gross and net revenue per procedure inflating COS' charges by 3%. (Id.) A comparison of net revenue per procedure shows the following: Year 1 – Orion $911 and COS $681; Year 2 – Orion $911 and COS $701; and Year 3 – Orion $911 and COS $722. (Id.). Orion failed to inflate its charges each year so this comparison even assumes Orion's charges will remain the same which is not realistic. (Wellborn, pp. 371-372; Clary, pp. 666-667).

58. Based upon the savings per procedure between COS and Orion and assuming Orion's projected procedures for the first three years (1452, 2221, and 2904), there would be a total savings for the three year period of $1,328,226. (Pet. Ex. 24; Wellborn, pp. 372-373). COS also has shown that it will save $527,823 in the first year and $347,814 thereafter by having a fixed MRI rather than continuing to lease a mobile MRI. (COS Application, pp. 12-13; Pet. Ex. 22).

59. Orion contends that COS' charges are higher than Orion's and presented a chart showing charges for 14 procedures and indicating that the average of these charges for COS is $53.57 per procedure higher for COS than Orion. (Orion's Ex. 4). This chart does not indicate that Orion will have a lower cost to the health care system than COS for the following reasons:

(1) Charges are not what the health care system pays because of contractual allowances and deductions. Instead, net revenues are what the health care system pays. (Clary, pp. 669-670; French, pp. 873-874; Wellborn, pp. 369-370; Hoffman, p. 536; Barbee, p. 819).

(2) The chart looked at only 14 procedures and did not take into account that some procedures are performed more often than other procedures – the procedures were not weighted. (Barbee, pp. 819-820). Orion's application sets forth charges for 26 procedures and COS' application sets forth charges for 24 procedures. (Barbee, pp. 819-820).

(3) Orion's own chart shows that in year one, its average net revenue per procedure will be $911 whereas COS' average net revenue per procedure will be $681. (Orion's Ex. 4).

60. Savings to the health care system should be a very important factor in a CON review. (Wellborn, pp. 367, 404, 462-463). Instead, the CON Section completely failed to consider the substantial savings of COS' project. (Id.)

61. Based upon the difference in net revenue per procedure and the savings that will be realized in the first three years based upon the applicant's projections, COS is the most effective alternative on gross and net revenue per procedure.

Demonstration Of Need And Projected Utilization Of Proposed MRI Scanner

62. Over the first three years, COS projects providing 13,728 procedures as compared to Orion's projection of 6,477 procedures. Orion projects being only slightly above the minimum threshold of 2900 procedures in year three by projecting 2,904 procedures in year three. (Orion application, p. 143; Pet. Ex. 21). Orion proposes that its MRI would be less than 50% utilized in year one and less than two-thirds utilized in year two. (Edwards, Vol. 2, pp. 309-310).

63. In other Certificate of Need reviews for MRI services, the CON Section has considered the comparison of projected procedures. (Pet. Ex. 18, p. 35; Pet. Ex. 19, p. 63). Although the Chief of the CON Section testified at her deposition that the Agency stopped using a comparison of projected utilization as a factor in MRI reviews, an MRI review concluded just three months before the review at issue shows that the Agency compared the applications on projected utilization. (Pet. Ex. 19, p. 63). Ms. Hoffman also indicated that her Agency would not consider this factor because this could prejudice new providers of MRI services. (Id.; Hoffman Dep., pp. 104-107). However, two of the three applicants in the review considered three months before the review at issue were new providers. (Pet. Ex. 19, p. 62).

64. The physicians at COS at the time of the application were generating almost 7,000 MRI referrals per year. (COS Application, p. 7; Pet. Ex. 20). This is equivalent to utilization of 2.35 MRI units at the state minimum threshold of 2900 procedures per year. (COS Application, p. 8; Pet. Ex. 20). Through a contract with Alliance Imaging, COS has a mobile MRI on-site four days per week – Friday through Monday. (COS Application, p. 7). COS is not able to accommodate all of its patients who need an MRI and shows in its application that it referred 4,557 procedures to other MRI's in Mecklenburg and other counties. (COS Application, p. 7; Pet. Ex. 20). Even with a fixed scanner operating a minimum of 66 hours per week, COS still will be referring many of its patients to other MRI's. (Murrey, pp. 217; COS Application, p. 7). COS' MRI is projected to provide 4,576 procedures each year and the numbers of MRI procedures referred by COS physicians is expected to increase to over 6,816 procedures per year referred at the time of the application. (Templeton, pp. 124-125; COS Application, p. 7; Pet. Ex. 20, 21).

65. Because of federal requirements that became effective in January of 2002, COS also is not able to accommodate its Medicare and Medicaid patients on its mobile MRI. (Templeton, pp. 121-122). It would be a great advantage to COS' patients if it had a fixed MRI that would allow COS to serve all of its Medicare and Medicaid patients instead of referring those patients to other MRI providers. (Templeton, pp. 120-121).

66. Orion has raised the issue of whether treating physicians owning an MRI results in over-utilization of MRI procedures. (Toothman, pp. 619-620). However, Orion's representatives have admitted that they have no reason to believe that COS physicians would over-prescribe MRI procedures. (Toothman, pp. 619-620). Furthermore, there would be no motivation for COS physicians to over-prescribe MRI procedures since their patients will need thousands more MRI's than their own fixed MRI unit could accommodate. (Murrey, pp. 216-217).

67. The physician investors in Orion who are the physician shareholders of Mecklenburg Radiology Associates cannot refer patients to Orion's proposed MRI scanner. (Barbee, pp. 789-792). This is because of the federal Stark law, state anti-referral law,

and the fact that Orion is separate from MRA. (Barbee, pp. 791-792; 42 U.S.C. 1395nn(a)(1)(A); N.C.G.S. § 90-405, *et seq*.). Only two of MRA's physicians refer patients for MRI's since most radiologists are not treating physicians, and these physicians will not be able to refer their patients to Orion for an MRI. (Barbee Dep., pp. 790-792).

68. Orion will be entirely dependent upon referrals from other physicians to utilize its proposed MRI. (Barbee, p. 792). Orion presented letters from physicians in its application indicating the number of referrals that certain physician groups anticipated making to Orion's MRI. (Orion Application, pp. 29-31). The number of anticipated referrals from these physician groups totals only 1230 procedures which is an insufficient number of referrals for even the number of procedures Orion projects doing in year one – 1452. (Compare Orion Application pp. 29-31 with p. 143). Orion has not shown that it will have sufficient referrals to meet the 2900 minimum threshold required in year three under the CON regulations. (Wellborn, pp. 379-380; 10 N.C.A.C. 3R.2715(b)(2); Pet. Ex. 5).

69. Orion's application states that it is possible that 100% of its first year utilization will come from the six zip code primary service area. (Orion Application, p. 22). Many of the physicians providing letters indicating numbers of referrals do not have offices within the six zip code service area that Orion proposes in its application. (Barbee, pp. 794-796; Orion Application, pp. 21, 29-30).

70. The use of MRI's has expanded greatly over the last several years and there is currently a shortage of MRI's in MRI Service Area 17. (Murrey, pp. 202-203; Edwards, Vol. 1, p. 109). Many people are having to wait to receive MRI's and many MRI's are being scheduled at all hours of the day and night and on weekends. (Murrey Dep., pp. 208-209).

71. In comparing the COS and Orion applications, COS has made a stronger showing of need which should be a consideration in a competitive MRI review. (Wellborn, pp. 380-381). The project analyst had no doubt that COS' proposed MRI would be fully utilized, as COS already had enough referrals to justify an MRI machine. (Edwards Dep. p. 32). In contrast, Orion 's application indicates it will be less than 50% utilized in year one and just will meet the minimal threshold number of procedures in year three. (Orion Application, pp. 143).

72. There will be many advantages to COS' patients in receiving MRI's from COS. (Murrey, pp. 205-206). COS patients who are able to receive an MRI at COS receive only one bill for services, rather than two or three. (Murrey, pp. 213-214). The waiting time for receiving an MRI will be reduced and many patients will be able to receive an MRI on the same day they see their treating physician at COS. (Murrey, p. 207). There also will be a reduced waiting time for the results and in many cases, results will be obtained the same day. (Id.). When a COS patient receives an MRI from another MRI provider, usually there is a waiting time in receiving a radiologist's report. (Murrey, p. 210). The films cannot be transmitted electronically without expensive computer technology upgrades at all facilities in the area. (Murrey Dep., pp. 54-54). Therefore, patients often have to transport their films from one location to another, which causes delays and patient inconvenience. (Id. at 210).

73. Orion contends that in considering the number of procedures projected by COS, one should deduct the procedures that can be performed on the mobile MRI that COS is leasing from Alliance and consider only the increase in number of scans. (Barbee, pp. 783-784). However, Orion's project, if approved, also would displace a mobile provider at the same location that Orion is proposing. (Id.) (Barbee, pp. 797-799). It is reasonable to assume that the mobile provider serving COS' location and the mobile provider currently serving Orion's location would remain in the service area because of the high demand for MRI procedures in that area. (Barbee Dep., pp. 77-78). The substitution of a lower cost fixed scanner for a lease arrangement with a mobile provider was cited by the CON Section as a reason for preferring CMC's application in the MRI review concluded a year before this review. (Pet. Ex. 12, p. 69).

74. In considering all of these factors, COS has made the strongest showing of need. COS has shown that its proposed MRI will serve an immediate need, will improve the healthcare of COS' patients, will be better utilized, and will serve a greater number of patients. (Wellborn, pp. 346, 380-381).

Location

75. Orion proposes locating its MRI at Medical Plaza Drive in Charlotte, approximately 2.5 miles from the fixed scanner at University Hospital. (Agency Findings, Ex. 1, p. 376; Orion Application, pp. 4, 7). At the present time, Presbyterian Hospital is operating a mobile MRI two days per week at the same location where Orion proposes locating its fixed scanner. (Orion Application, pp. 55, 145; Barbee, p. 797). Orion's location is north of downtown Charlotte in the University area. (Orion Application, p. 145).

76. COS proposes locating its fixed MRI at the Charlotte Spine Center which is COS' main office. (COS Application, pp. 2-3). COS is located in the center of medical activity in Charlotte where the major hospitals are located and the majority of physician

offices. (Templeton, pp. 127-128; Murrey, p. 215-216). There currently are 12 MRI's in the vicinity of the Charlotte Spine Center. (Orion's Ex. 8).

77. While geographic distribution of MRI's is a factor to be considered, other factors may be equally or more important in determining where an MRI should be located. (Murrey, pp. 214-216; Wellborn, pp. 385-386). Having an integrated health care delivery system in which treating physicians have easy access to important diagnostic equipment, such as an MRI, should be an important consideration. (Murrey, pp. 212-215).

78. It is critical to an orthopedic practice, like COS, that its physicians have easy access to an MRI and receive quick results from MRI procedures so that orthopedic problems can be diagnosed and treatment begun as soon as possible. (Murrey, pp. 203-204). Otherwise, patients may be in pain much longer than they need to be. (Murrey, pp. 211).

79. Most patients would rather drive 20 minutes for an MRI at their treating physician's office than deal with the additional paperwork and inconvenience of picking up films and transporting them to their physicians when the MRI cannot be done at their treating physician's office. (Murrey, pp. 205-206, 210). Even though Presbyterian Hospital has an MRI in close proximity to COS' proposed location for a fixed MRI, Presbyterian proposed a leasing agreement priced well above what would be economically feasible, and Presbyterian's equipment does not have the technological capability to produce images of high enough quality to be useful to COS' physicians and patients. (Templeton, pp. 129-130).

80. COS is centrally located to all of Mecklenburg County. (COS Application, p. 140; Orion's Ex. 145). Many people would prefer to receive their MRI's at the same location that they receive all their medical care. (Murrey, pp. 215-216). Patients must come to their physician's office to initiate treatment, and return for follow-up appointments, and are most comfortable having their MRI scan done at the same location. (Murrey, pp. 214-215; Murrey Dep., pp. 56-57). In proposing to serve a six zip code service area north of Charlotte, Orion did no studies on where patients within its proposed service area work or where they prefer receiving MRI's. (Barbee, pp. 801-802).

81. Considering all of the relevant circumstances, geographic location of the MRI, while a relevant consideration in MRI reviews, should not be a critical factor in this particular review.

Capital Costs And Funding

82. The CON Section has used the factor of capital costs and funding in a competitive MRI review. (Pet. Ex. 16, pp. 41 and 42). It is appropriate to compare these applications on capital costs and each applicant's demonstration of ability to finance its proposal. (Wellborn, pp. 367-368).

83. As addressed above (Findings 31 through 32), Orion has failed to show that it has the funding for 100% of the capital costs proposed. (Clary, p. 656; Orion Application, pp. 44-45, 125-128). The $500,000 line of credit proposed for working capital is not likely to be available to fund this shortfall because this entire line of credit may be necessary to fund operating losses projected by Orion the first two years. (Clary, pp. 658-659).

84. The documentation presented by Orion to fund the purchase of the MRI, an unsigned letter from GE Healthcare Financial Services, also is weak. (Wellborn, pp. 350-352; Orion Application, pp. 127-128). This letter is more like a quote. (Wellborn, p. 351). The unsigned letter states it is merely an expression of interest and does not indicate that GE Healthcare Financial Services has examined the applicant's financial status and has found it to be acceptable to lend the funds needed to purchase the MRI. (Orion Application, pp. 127-128; Wellborn, p. 352).

85. In contrast, COS submitted a commitment from BB&T to fund 100% of project costs. (COS Application, pp. 161-163). The letter expressly states that the bank, BB&T, has examined the financial condition of the Borrowers and finds it adequate to fund the purchase of the MRI. (Id. at 163). COS has not violated the Certificate of Need law by submitting such documentation since it is clear from the context of the bank's commitment letter that the bank is only committing to lend the funds for purchase of the MRI if COS receives a Certificate of Need. The letter indicates that bank must have a first lien on the MRI as a condition of the financing which would be impossible if COS does not receive a CON allowing it to purchase the MRI. (Id.)

86. In contrast to Orion, COS has demonstrated through bank letters that it will be able to receive funding for 100% of the project cost. (COS Application, pp. 161-164; Orion Application, pp. 125-128). If GE Financial Services is unwilling to loan money to Orion to purchase the MRI, there is no showing in Orion's application of the ability to secure financing from any other source. (Wellborn, p. 354; Clary, p. 662). Orion's financial statements show that it was operating at a loss at the time of the application and there are no financial statements submitted by Mecklenburg Radiology Associates or the individual investors in Orion. (Orion Application, p. 277; Wellborn, pp. 355-356).

87. COS also proposes lower capital costs than Orion. COS' proposed capital costs is $2,206,697 as compared to Orion's proposed capital costs of $2,731,537 – a difference of $524,840. (Pet. Ex. 26; COS Application, p. 59; Orion Application, p. 44).

88. On the factors of capital costs and demonstration of the availability of financing, COS' proposal is a more effective alternative than Orion's.

Operating Costs

89. Based upon information presented in the application, COS' operating costs are projected to be much lower than those of Orion. (Pet. Ex. 25; Agency Findings, Ex. 1, pp. 377-379). COS projects operating costs of $151, $189, and $187 per procedure in years one through three, while Orion proposes operating costs of $1,050, $803, and $601 per procedure in years one through three. (Agency Findings, Ex. 1, p. 378).

90. As addressed above (Findings 23 through 33), Orion failed to include all of its costs that would be incurred as a result of the MRI service. Orion also did not allocate all administrative costs since a percentage of Joe Barbee's salary was not included in Orion's pro formas. (Barbee, Dep. pp. 104-105; Wellborn, pp. 359-360). COS' MRI pro forma includes only those costs that will be incurred because of the MRI. (See Findings 8 through 22). COS did not allocate costs that will be incurred regardless of whether the project is developed because the application form does not clearly request that such costs be included and because the approved applicant one year earlier had not allocated costs.

91. Because of the differences in the way each applicant presented costs in its MRI pro formas and the omissions of certain costs by Orion, it is impossible to do an exact comparison of operating costs between these applicants. If COS had allocated costs, the added costs would be minimal. (Ellis, pp. 164-165, 171-172). COS is proposing lower costs, but the exact difference between the two applicants cannot be determined.

Access By Underserved Groups

92. The percentage of total procedures to Medicare and Medicaid is higher for Orion than COS. (Agency Findings, Ex. 1, p. 377). However, much of this difference can be attributed to the fact that COS will be using its MRI for orthopedic procedures whereas Orion's MRI will be used for a mix of procedures. (Murrey, p. 219). In an orthopedic practice, MRI's are more often used by persons below the Medicare age. (Id.). The types of orthopedic problems that the elderly have often require other diagnostic equipment, such as x-ray, and not MRI. (Murrey, pp. 219-220).

93. Neither COS nor Orion have indicated any intent to not allow access for Medicare and Medicaid. Both applicants indicate that they will not discriminate in providing services to these groups. (COS Application, p. 47; Orion Application, p. 33).

94. In considering the number of patients that are Medicaid and charity care that will be served by each of these applicants, COS will serve 276 charity care and Medicaid patients over a three year period, while Orion will serve 227 charity care and Medicaid patients over the same time period. (Wellborn, pp. 397-398). COS also projects providing 1% charity care or $31,163 per year, while Orion projects providing .5% charity care or $11,829 per year. (Wellborn, p. 399). On the issue of access by underserved groups, there does not appear to be any substantial difference between COS and Orion. (Wellborn, pp. 398-399).

The Extent To Which The Applicants Conform With The Review Criteria

95. For the reasons addressed above, Orion's application fails to conform to all the requirements of statutory Criterion 5 and 10 N.C.A.C. 3R.2714(b)(1). Therefore, in considering the extent to which these two applicants conform with the review criteria, COS is a more effective alternative than Orion.

96. Considering all of the factors addressed above, COS has presented the most effective alternative when compared with Orion and should have been the approved applicant in this review, based upon the evidence produced during this contested case hearing, all of which was available to or before the analyst at the time of her review of these competing applications.

Based upon the foregoing findings of fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.

2. COS has met the requirements of Criterion 5 to demonstrate the immediate and long-term financial feasibility of its project based upon reasonable projections of costs and charges. (Clary, p. 646). COS shows in its financial pro formas that it will have a profit for total operations and for the MRI service alone. (COS Application, pp. 179-180; Edwards, Vol. I, pp. 72-73). The Agency erred in its determination that COS' application failed to conform with Criterion 5.

3. In completely overlooking the omissions from Orion's pro forma financial statement and erroneously concluding that Orion's application included all direct and indirect costs as a reason for approving Orion in this review, the CON Section acted erroneously. The Agency also acted erroneously and arbitrarily and capriciously in disqualifying COS' application from any meaningful review because its separate pro forma for its MRI did not allocate costs that were going to be incurred regardless of the development of the project. It is arbitrary or capricious for the Agency to disqualify COS' application on this basis, especially considering that an applicant one year earlier did not allocate existing costs and was approved for an MRI and found to be the most effective alternative in the comparative review. Since the Agency did not clearly instruct applicants that allocated costs are required, denial of COS' application on this basis is a failure by the Agency to use proper procedure.

4. The Agency's failure to do a meaningful comparative review because it had disqualified COS' application as "unapprovable" is erroneous and a failure to use proper procedure. As set forth in Living Centers-Southeast, Inc. v. N.C. Dept. of Health and Human Services, 138 N.C. App. 572, 532 S.E.2d 192 (2000), ". . . it is inherent that where two or more Certificate of Need applications *conform to the majority of the criteria in N.C. Gen. Stat. § 131E-183,* as in the case at bar, and are reviewed comparatively, there will always be genuine issues of fact as to who is the superior applicant." The Agency's practice, at least as demonstrated in this case, of not conducting a meaningful comparative review if it determines that an application is "unapprovable" can result in decisions to approve the least effective or most costly application. This contravenes an express purpose of the Certificate of Need, law which is to help contain the spiraling cost of health care. N.C.G.S. § 131E-176. In this case, because the Agency determined the COS application to be "unapprovable", it did not matter to the Agency which of the applications had the lowest cost and charges, which demonstrated the most need, or whether there were benefits to patients and the health care system by approving one application versus another. (Edwards, Vol. 2, pp. 269-272; Hoffman, pp. 511, 533-534). Using this method to disqualify applications, and going through the motions of a comparison between applications for litigation purposes, rather than conducting a meaningful comparative review considering all the relevant factors, is contrary to the express purpose and intent of the Certificate of Need law. N.C.G.S. §131E-175.

By disqualifying COS as "unapprovable", COS was denied the right to a meaningful comparative review on the full merits of its application. The Agency acted erroneously, failed to use proper procedure, and failed to act as required by law and rule.

5. The Agency also acted erroneously in determining that COS' application failed to conform with Criterion 14, N.C.G.S. § 131E-183(a)(14). Because there are no MRI training programs in COS' proposed service area, it was error for the Agency to consider that this Criterion should be applicable to this review. It is not a reasonable interpretation of Criterion 14 that an applicant should be expected to accommodate the clinical needs of health professional training programs outside the applicant's proposed service area and even outside North Carolina. N.C.G.S. § 131E-183(a)(14) only is applicable, by its own language, when there is an available training program in the field for which the applicant is applying in the service area and that training program has clinical needs that can be accommodated.

6. The Agency acted erroneously in determining that COS' application failed to conform with N.C.G.S. § 131E-183(a)(4), (5), (14), and (18a).

7. The Agency acted erroneously in determining that Orion's application conformed with N.C.G.S. § 131E-183(a)(5) and 10 N.C.A.C. 3R.2714(b)(1).

8. By refusing to inflate COS' proposed charges based upon information in its application and denying COS' application for not doing the computation in the application, and at the same time stating that Orion's application could be approved when Orion overlooked major expense items in its MRI pro forma, the Agency erred and acted arbitrarily or capriciously.

9. The Agency erred in failing to determine by actual comparative analysis that COS' application is the best alternative for the acquisition of the MRI in MRI Service Area 17 and should have been the approved applicant.

RECOMMENDED DECISION

It hereby is recommended, based upon the evidence produced in this contested case hearing, that the Director of the Division of Facility Services, Department of Health and Human Services, enter a final agency decision denying summary judgment against Orion on the issue of the availability of the MRI for at least 66 hours per week. It further is recommended, based upon the evidence presented, including a comparative analysis of the COS and Orion applications, that the application of Charlotte Orthopedic

Specialists, P.A. for a Certificate of Need to acquire a fixed MRI in MRI Service Area 17 be approved and that the application of Orion Imaging, LLC to acquire a fixed MRI in MRI Service Area 17 be denied.

ORDER

It is hereby ordered that the Agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

NOTICE

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

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

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

This the 23rd day of December, 2003.

By: ______________________________

Beecher R. Gray
Administrative Law Judge