

**NORTH CAROLINA
REGISTER**



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<http://oahnt.oah.state.nc.us/register/CI.pdf>

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		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
12	JUSTICE	17 Dietetics/Nutrition	
13	LABOR	18 Electrical Contractors	
14A	CRIME CONTROL & PUBLIC SAFETY	19 Electrolysis	
15A	ENVIRONMENT & NATURAL RESOURCES	20 Foresters	
16	PUBLIC EDUCATION	21 Geologists	
17	REVENUE	22 Hearing Aid Dealers and Fitters	
18	SECRETARY OF STATE	25 Interpreter/Transliterater (Reserved)	
19A	TRANSPORTATION	26 Landscape Architects	
20	TREASURER	28 Landscape Contractors	
21*	OCCUPATIONAL LICENSING BOARDS	29 Locksmith Licensing	
22	ADMINISTRATIVE PROCEDURES (REPEALED)	30 Massage & Bodywork Therapy	
23	COMMUNITY COLLEGES	31 Marital and Family Therapy	
24*	INDEPENDENT AGENCIES	32 Medical Examiners	
25	STATE PERSONNEL	33 Midwifery Joint Committee	
26	ADMINISTRATIVE HEARINGS	34 Funeral Service	
27	NC STATE BAR	36 Nursing	
28	JUVENILE JUSTICE AND DELINQUENCY PREVENTION	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		44 Osteopathic Examination (Repealed)	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	

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)	270 th 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	09/10/04	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.

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

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

Notice of Rule-making Proceedings is hereby given by the N.C. Building Code Council in accordance with G.S. 150B-21.5(d).

Citation to Existing Rule Affected by this Rule-Making: *North Carolina Accessibility Code, North Carolina Energy Code, North Carolina Plumbing Code, and North Carolina Residential Code*

Authority for Rule-making: *G.S. 143-136; 143-138.*

Reason for Proposed Action: *To incorporate changes in the NC Building Code as a result of rulemaking petitions filed with the N.C. Building Code Council and incorporate changes proposed by the Council.*

Public Hearing: *September 13, 2004, 1:00PM, Hickory Metro Convention Center, 1960 13th Avenue Drive, Southeast, Hickory, NC*

Comment Procedures: *Written comments may be sent to Barry Gupton, Secretary, N.C. Building Code Council, c/o N.C. Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comment period expires on September 13, 2004.*

1. REVISE TABLE 403.1 IN THE NORTH CAROLINA PLUMBING CODE AS FOLLOWS:

Table 403.1 – Minimum number of plumbing facilities.

Footnote #26:

26. For health clubs, dance studios, and similar facilities, the number of persons equals the activity floor area divided by 30 50 with the female-male ratio 50% -50%. Drinking fountains 1 per 75 persons.

This code proposed for consistency between the Building and Plumbing Codes

2. REVISE TABLE 403.1 IN NORTH CAROLINA PLUMBING CODE AS FOLLOWS:

Table 403.1 – Minimum number of plumbing facilities.

Footnote #26:

26. For health clubs, dance studios, college recreational gymnasiums exclusive of seating areas, and similar facilities, the number of persons equals the activity floor area divided by 30 with the female-male ratio 50% -50%. Drinking fountains 1 per 75 persons.

This Code is proposed for consistency between the Building and Plumbing Codes.

3. REVISE SECTION 503.3.3.4.2 IN THE NORTH CAROLINA ENERGY CODE AS FOLLOWS:

503.3.3.4.3 Low-Pressure Duct Systems

Low pressure return ducts, located in unheated crawl space, shall be leak tested in accordance with SMACNA HVAC Air Duct Leakage Test Manuel with the rate of air leakage not to exceed the maximum rate specified in the standard. All longitudinal and transverse...

This Code change is proposed to provide a referenced standard for duct testing.

4. ADD A NEW SECTION R403.1.6 IN THE NORTH CAROLINA RESIDENTIAL CODE AS FOLLOWS:

R403.1.6 (in part) The wood sole plate at exterior walls on monolithic slabs and wood sill plates shall be anchored to the foundation with anchor bolts spaced a maximum of 6 feet on center and not more than 12 inches from the corners. ~~Anchor bolts shall also be located within 12 inches from the ends of each plate section.~~ In Seismic Design Categories D1 and D2, anchor bolts...

This Code change is proposed to simplify the anchorage requirements.

5. ADD THE FOLLOWING TO TABLE R602.10.3 OF THE NORTH CAROLINA RESIDENTIAL CODE:

Footnote: ç Braced wall panels, assembled in accordance with Section R602.10.3, Method 3, with wood structural panel sheathing on both sides, may be used to reduce the panel lengths shown by 50%.

This code change is proposed to allow for alternate braced wall construction.

6. ADD NEW ITEM (5) TO SECTION 700.9 (B) OF THE NORTH CAROLINA ELECTRICAL CODE AS FOLLOWS:

(B) Wiring. Wiring of two or more emergency circuits supplied from the same source shall be permitted in the same raceway, cable, box, cabinet. Wiring from an emergency source or emergency source distribution overcurrent protection emergency loads shall be kept entirely independent of all other wiring and equipment, unless otherwise permitted in (1 through 4-5):

- (1) Wiring from the normal power source located in transfer equipment enclosure
- (2) Wiring from two sources in exit or emergency luminaries (lighting fixtures)
- (3) Wiring from two sources in a common junction box, attached to exit or emergency luminaries (light fixtures)
- (4) Wiring within a common junction box attached to unit equipment, containing only the branch circuit supplying the unit equipment and the emergency circuit supplied by the unit equipment
- (5) Wiring consisting of feeders from one or more alternate power source(s) supplying an alternate power source distribution board with overcurrent protective devices, feeding separate transfer equipment for each type of load served (emergency, legally required standby and optional standby), provided the feeder wiring from alternate power source distribution board to each load's transfer equipment is kept entirely independent of all other wiring.

This code change is proposed to allow feeders from an alternate power source distribution board.

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

Notice of Rule-making Proceedings is hereby given by the N.C. Building Code Council in accordance with G.S. 150B-21.5(d).

Citation to Existing Rule Affected by this Rule-Making: *North Carolina Electrical Code, and North Carolina Administrative Code*

Authority for Rule-making: *G.S. 143-136; 143-138.*

Reason for Proposed Action: *To incorporate changes in the NC Building Code as a result of rulemaking petitions filed with the N.C. Building Code Council and incorporate changes proposed by the Council.*

Public Hearing: *September 13, 2004, 1:00PM, Hickory Metro Convention Center, 1960 13th Avenue Drive, Southeast, Hickory, NC*

Comment Procedures: *Written comments may be sent to Barry Gupton, Secretary, N.C. Building Code Council, c/o N.C. Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comment period expires on September 13, 2004.*

1. ADOPTION OF THE 2005 NEC, INCLUDING AMENDMENTS FROM THE 2002 NC ELECTRICAL CODE AS REQUESTED BY THE STAFF OF NCDOL.

This code change is proposed to update the current edition of the National Electric Code.

2. ADD A NEW SECTION 102.5 IN THE ADMINISTRATIVE CODE TO NOTIFY OWNERS, DESIGNERS, CONTRACTORS AND LICENCIES THAT OTHER AGENCIES, BOARDS AND COMMISSIONS MAY HAVE ADDITIONAL MINIMUM CONSTRUCTION REQUIREMENTS FOR LICENSURE.

102.5 Requirements of other State agencies, occupational licensing boards or commissions

The North Carolina State Building Codes do not include all additional requirements for buildings and structures that may be imposed by other State agencies, occupational licensing boards or commissions. It shall be the responsibility of a permit holder, design professional, contractor or occupational license holder to determine whether any additional requirements exist.

This code change is proposed for clarification and cross reference.

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY**

Ecusta Business Development Center, LLC

Pursuant to N.C.G.S. § 130A-310.34, Ecusta Business Development Center, 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 Brevard, Transylvania County, North Carolina. The Property consists of 243.79 acres and is located at 1 Ecusta Road. Environmental contamination exists on the Property in soil and groundwater. Ecusta Business Development Center, LLC intends to reuse the Brownfields Property for manufacturing consisting primarily of pulp production. Additional approved uses include manufacturing for paper production, the redevelopment of portions of the site as a mixed industrial/commercial/retail business park, supplying potable water and wastewater treatment to local municipalities, and the commercial sale of electrical power. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Ecusta Business Development Center, 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 the Transylvania County Library, 105 S. Broad Street, Brevard, NC 28712 by contacting Lisa Sheffield at (828) 884-3151 or at lsheffield@transylvania.lib.nc.us; 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 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

- Local
- Substantive (≥\$3,000,000)
- None

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Agriculture intends to amend the rules cited as 02 NCAC 48A .1701, .1703.

CHAPTER 48 – PLANT INDUSTRY

SUBCHAPTER 48A - PLANT PROTECTION

SECTION .1700 - STATE NOXIOUS WEEDS

Proposed Effective Date: November 1, 2004

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than July 30, 2004 to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.

02 NCAC 48A .1701 DEFINITIONS

The following definitions shall apply to this Section:

Reason for Proposed Action: To permit the movement of Oriental Bittersweet within certain counties where it already exists and to make technical and conforming changes.

Procedure by which a person can object to the agency on a proposed rule: Any person may object to the proposed rules by submitting a written statement of objection(s) to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.

Written comments may be submitted to: David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001, phone (919) 733-7125 x. 249, fax (919) 716-0105, and email david.mcleod@ncmail.net.

Comment period ends: September 13, 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

- (1) Administrator. The Plant Pest Administrator of the North Carolina Department of ~~Agriculture, —Agriculture and Consumer Services,~~ Plant Industry Division;
- (2) Board. The North Carolina Board of Agriculture;
- (3) Certificate. A document issued by a specialist to allow the movement of noncontaminated regulated articles to any destination;
- (4) Class A. Any noxious weed on the Federal Noxious Weed List or any noxious weed that is not native to the ~~State, state,~~ not currently known to occur in the ~~State, state,~~ and poses a serious threat to the ~~State; state;~~
- (5) Class B. Any noxious weed that is not native to the ~~State, state,~~ is of limited distribution statewide, and poses a serious threat to the ~~State; state;~~
- (6) Class C. Any other ~~designated~~ noxious weed; weed for which the Commissioner has determined that eradication is not feasible;
- (7) Commissioner. The Commissioner of the North Carolina Department of Agriculture and Consumer Services or his authorized representative;
- (8) Compliance Agreement. A written agreement between a person engaged in growing, handling, or moving regulated articles, and the North Carolina Department of ~~Agriculture, Agriculture and Consumer Services,~~ Plant Industry Division, wherein the former agrees to comply with the requirements of the compliance agreement;
- (9) Infestation. The presence of a noxious weed in any stage of development;
- (10) Noxious Weed. Any plant in any stage of development, including parasitic plants whose presence whether direct or indirect, is detrimental to crops or other desirable plants, livestock, land, or other property, or is

- (11) injurious to the public health; Limited Permit. A document issued by a specialist to allow the movement of noncertified regulated articles to a specified destination for special handling, utilization, or processing, or for treatment;
- (12) Regulated Article. Any noxious weed or any article described in these Rules which is capable of carrying a noxious weed;
- (13) Regulated Area. Any state or territory or any portion thereof of the United States described in these Rules which is infested with a noxious weed;
- (14) Scientific Permit. A document issued by the Administrator to authorize the movement of regulated articles to a specified destination for scientific purposes;
- (15) Specialist. Any authorized employee of the North Carolina Department of ~~Agriculture~~, Agriculture and Consumer Services, Plant Industry Division, or any other person authorized by the Commissioner of Agriculture to enforce the provisions of this Section.

- (7) Madison, Randolph, Rowan, Rutherford; The movement of Plumeless Thistle (*Carduus acanthoides* L.) or any regulated article infested with Plumeless Thistle from the following counties is prohibited: Haywood, Jackson, Madison, Watauga;
- (8) The movement of Puncturevine (*Tribulus terrestris* L.) or any regulated article infested with Puncturevine from the following counties is prohibited: Durham, New Hanover;
- (9) The movement of any Lythrum species not native to North Carolina or any regulated article infested with any ~~non-native~~ nonnative Lythrum species from the following counties is prohibited: Forsyth, Watauga;
- (10) The movement of Uruguay Waterprimrose [*Ludwigia hexapetala* (Hook & Arn.) Zardini, Gu & Raven] or any regulated article infested with Uruguay Waterprimrose from the following counties is prohibited: Bladen, Brunswick, Columbus, Durham, Granville, Hyde, New Hanover, Orange, Rowan, Wake, Warren;
- (11) The movement of Yellow Fieldcress [*Rorippa sylvestris* (L.) Bess.] or any regulated article infested with Yellow Fieldcress from the following county is prohibited: Orange;
- (12) The movement of Oriental Bittersweet (*Celastrus orbiculatus* Thunb.) or any regulated article infested with Oriental Bittersweet from the following counties is prohibited: Alleghany, Ashe, Avery, Buncombe, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, Mitchell, Swain, Transylvania, Watauga, Wilkes, Yancy;
- ~~(12)~~(13) The sale or distribution of any Class A, B, A or C-B noxious weed-~~weed~~;
- (14) The sale or distribution of any Class C noxious weed outside a regulated area.

Authority G.S. 106-420.

02 NCAC 48A .1703 REGULATED AREAS

(a) Except as permitted in 02 NCAC 48A .1705 and .1706, the following is prohibited:

- (1) The movement of Canada Thistle [*Cirsium arvense* (L.) Scop.] or any regulated article infested with Canada Thistle from the following counties is prohibited: Ashe, Avery, Haywood, Mitchell, Northampton, Yancey;
- (2) The movement of Class A, B, or C noxious weeds or any regulated article infested with Class A, B, or C noxious weeds into North Carolina is prohibited;
- (3) The movement of a Class A noxious weed or any regulated article infested with any Class A noxious weed is prohibited throughout the ~~State~~; state;
- (4) The movement of Eurasian Watermilfoil (*Myriophyllum spicatum* L.) or any regulated article infested with Eurasian Watermilfoil from the following counties is prohibited: Halifax, Northampton, Perquimans, Tyrrell, Warren;
- (5) The movement of Florida Betony (*Stachys floridana* Shuttlew.) or any regulated article infested with Florida Betony from the following counties is prohibited: Bladen, Brunswick, Cumberland, Forsyth, Hoke, New Hanover, Onslow, Wake;
- (6) The movement of Musk Thistle (*Carduus nutans* L.) or any regulated article infested with Musk Thistle from the following counties is prohibited: Buncombe, Cleveland, Chatham, Gaston, Henderson, Lincoln,

(b) Other regulated areas. The Commissioner may take appropriate action as authorized under G.S. 106-421 to designate as a regulated area any state or portion of a state in which there is reasonable cause to believe that a noxious weed exists, and there is an immediate need to prevent its introduction, spread or dissemination in North Carolina.

Authority G.S. 106-420; 106-421.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Plant Conservation Board intends to amend the rule cited as 02 NCAC 48F .0304.

Proposed Effective Date: November 1, 2004

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rule by submitting a

request in writing no later than July 30, 2004, to Marj Boyer, Secretary, NC Plant Conservation Board, 1060 Mail Service Center, Raleigh, NC 27699-1060.

Reason for Proposed Action: *The proposed rule would remove a plant from the Special Concern list since it no longer needs protection.*

Procedure by which a person can object to the agency on a proposed rule: *Any person may object to the proposed rule by submitting a written statement of objection(s) to Marj Boyer, Secretary, NC Plant Conservation Board, 1060 Mail Service Center, Raleigh, NC 27699-1060.*

Written comments may be submitted to: *Marj Boyer, Secretary, NC Plant Conservation Board, 1060 Mail Service Center, Raleigh, NC 27699-1060, phone (919) 733-3610 – x250, fax (919) 733-1041, and email marj.boyer@ncmail.net.*

Comment period ends: *September 13, 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 48 – PLANT INDUSTRY

SUBCHAPTER 48F – PLANT CONSERVATION

**SECTION .0300 - ENDANGERED PLANT SPECIES LIST:
THREATENED PLANT SPECIES LIST: LIST OF
SPECIES OF SPECIAL CONCERN**

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)~~(7) *Lilium pyrophilum* -- Skinner & Sorrie
Sandhills bog lily;
- ~~(9)~~(8) *Pellaea wrightiana* -- Hooker
Wright's Cliff-brake Fern;
- ~~(10)~~(9) *Rhus michauxii* -- Sargent
Michaux's Sumac;
- ~~(11)~~(10) *Sarracenia jonesii* -- Wherry
Mountain Sweet Pitcher Plant;
- ~~(12)~~(11) *Sarracenia oreophila* -- (Kearney) Wherry
Green Pitcher Plant;
- ~~(13)~~(12) *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 resinatum* -- 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.

Authority G.S. 106-202.15.

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for MH/DD/SAS intends to repeal the rules cited as 10A NCAC 26B .0207, .0303.

Proposed Effective Date: January 1, 2005

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rules by submitting a request in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, by July 31, 2004.

Reason for Proposed Action: The proposed repeals are necessary to more closely reflect the federal Health Insurance Portability and Accountability Act (HIPAA) privacy regulations (45 C.F.R. Part 164).

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018.

Written comments may be submitted to: Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, phone (919) 733-7011, fax (919) 733-9455, and email cindy.kornegay@ncmail.net.

Comment period ends: September 13, 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 26 - MENTAL HEALTH, GENERAL

SUBCHAPTER 26B - CONFIDENTIALITY RULES

SECTION .0200 - RELEASE OF CONFIDENTIAL INFORMATION WITH CONSENT

10A NCAC 26B .0207 DOCUMENTATION OF RELEASE

Whenever confidential information is released with consent, a delegated employee shall ensure that documentation of the release is placed in the client record. Such documentation shall include the consent form, the date the information was released and signature of the delegated employee releasing the information.

Authority G.S. 122C-52; 122C-53; 131E-67; 143B-147(a)(6).

SECTION .0300 - DISCLOSURE OF CONFIDENTIAL INFORMATION WITHOUT CONSENT

10A NCAC 26B .0303 DOCUMENTATION OF DISCLOSURE

(a) With the exception of disclosure of confidential information pursuant to G.S. 122C-54(b), (c), 122C-55(h), or 122C-56, a delegated employee shall ensure that documentation of the disclosure is recorded in the client record containing the following:

- (1) name of recipient;
(2) extent of information disclosed;
(3) specific reasons for disclosure;
(4) date; and
(5) full and legible signature of the individual who disclosed the information and his title.

(b) Whenever an area or state facility makes repeated disclosures to a provider of support services concerning the same client, the disclosing facility may document such disclosures one time in the client record.

(c) Whenever confidential information is disclosed in accordance with G.S. 122C-55(e), the reason written consent could not be obtained shall be documented in the client's record.

Authority G.S. 122C-52; 122C-55; 131E-67; 143B-147.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rule cited as 10A NCAC 41A .0401.

Proposed Effective Date: January 1, 2005

Public Hearing:

Date: August 19, 2004

Time: 2:00 p.m.

Location: Room G1A, 1330 St. Mary's St., Raleigh, NC

Reason for Proposed Action: During the October 15-16, 2003 Advisory Committee on Immunization Practices (ACIP) meeting, the Committee voted to change the minimum age at which the last dose of Hepatitis B vaccine (either third or fourth dose) can be give to 24 weeks of age. The change from 6 months to 24 weeks highlights the minimum age for completion of the Hepatitis B vaccination series that has been previously published in Vaccines For Children Resolutions for Hepatitis B vaccine. The recommendation for a minimum age of 24 weeks is a change from the minimum age of 6 months published in the

ACIP and AAFP General Recommendations on Immunization (MMWR 2202 51 (RR02); 1-36). The purpose of this resolution is to correct unintentional inconsistencies between VFC Resolution (02/03-1) and current ACIP recommendations for the use of Hepatitis B vaccines.

Procedure by which a person can object to the agency on a proposed rule: Objections may be submitted in writing to Chris G. Hoke, JD, Rule-making Coordinator, during the public comment period. Additionally, objections may be made verbally and in writing at the public hearing for this Rule.

Written comments may be submitted to: Chris G. Hoke, JD, 1915 Mail Service Center, Raleigh, NC 27699-1915, phone (919) 715-4168 and email chris.hoke@ncmail.net.

Comment period ends: September 13, 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 – HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41A – COMMUNICABLE DISEASE CONTROL

SECTION .0400 – IMMUNIZATION

10A NCAC 41A .0401 DOSAGE AND AGE REQUIREMENTS FOR IMMUNIZATION

(a) Every individual in North Carolina required to be immunized pursuant to G.S. 130A-152 through 130A-157 shall be immunized against the following diseases by receiving the specified minimum doses of vaccines by the specified ages:

- (1) Diphtheria, tetanus, and whooping cough vaccine -- five doses: three doses by age seven months and two booster doses, one by age 19 months and the second on or after the fourth birthday and before enrolling in school (K-1) for the first time. However:

- (A) An individual who has attained his or her seventh birthday without having been immunized against whooping cough shall not be required to be immunized with a vaccine preparation containing whooping cough antigen;
 - (B) Individuals who receive the first booster dose of diphtheria, tetanus, and whooping cough vaccine on or after the fourth birthday shall not be required to have a second booster dose;
 - (C) Individuals attending school, college or university or who began their tetanus/diphtheria toxoid series on or after the age of seven years shall be required to have three doses of tetanus/diphtheria toxoid of which one must have been within the last 10 years;
 - (D) The requirements for booster doses of diphtheria, tetanus, and whooping cough vaccine shall not apply to individuals who enrolled for the first time in the first grade before July 1, 1987.
- (2) Poliomyelitis vaccine--four doses: two doses of trivalent type by age five months; a third dose trivalent type before age 19 months, and a booster dose of trivalent type on or after the fourth birthday and before enrolling in school (K-1) for the first time. However:
- (A) An individual attending school who has attained his or her 18th birthday shall not be required to receive polio vaccine;
 - (B) Individuals who receive the third dose of poliomyelitis vaccine on or after the fourth birthday shall not be required to receive a fourth dose;
 - (C) The requirements for booster doses of poliomyelitis vaccine shall not apply to individuals who enrolled for the first time in the first grade before July 1, 1987.
- (3) Measles (rubeola) vaccine--two doses of live, attenuated vaccine administered at least 28 days apart: one dose on or after age 12 months and before age 16 months and a second dose before enrolling in school (K-1) for the first time. However:
- (A) An individual who has been documented by serological testing to have a protective antibody titer against measles shall not be required to receive measles vaccine;
 - (B) An individual who has been diagnosed prior to January 1, 1994, by a physician licensed to practice

- medicine as having measles (rubeola) disease shall not be required to receive measles vaccine;
- (C) An individual born prior to 1957 shall not be required to receive measles vaccine;
- (D) The requirement for a second dose of measles vaccine shall not apply to individuals who enroll in school (K-1) or in college or university for the first time before July 1, 1994.
- (4) Rubella vaccine--one dose of live, attenuated vaccine on or after age 12 months and before age 16 months. However:
- (A) An individual who has been documented by serologic testing to have a protective antibody titer against rubella shall not be required to receive rubella vaccine;
- (B) An individual who has attained his or her fiftieth birthday shall not be required to receive rubella vaccine except in outbreak situations;
- (C) An individual who entered a college or university after his or her thirtieth birthday and before February 1, 1989 shall not be required to meet the requirement for rubella vaccine except in outbreak situations.
- (5) Mumps vaccine--one dose of live, attenuated vaccine administered on or after age 12 months and before age 16 months. However:
- (A) An individual born prior to 1957 shall not be required to receive mumps vaccine;
- (B) The requirements for mumps vaccine shall not apply to individuals who enrolled for the first time in the first grade before July 1, 1987 or in college or university before July 1, 1994.
- (C) An individual who has been documented by serological testing to have a protective antibody titer against mumps shall not be required to receive mumps vaccine.
- (6) Haemophilus influenzae, b, conjugate vaccine--three doses of HbOC or PRP-T or two doses of PRP-OMP before age seven months and a booster dose of any type on or after age 12 months and by age 16 months. However:
- (A) Individuals born before October 1, 1988 shall not be required to be vaccinated against Haemophilus influenzae, b;
- (B) Individuals who receive the first dose of Haemophilus influenzae, b, vaccine on or after 12 months of age and before 15 months of age shall be required to have only two doses of HbOC, PRP-T or PRP-OMP;
- (C) Individuals who receive the first dose of Haemophilus influenzae, b, vaccine on or after 15 months of age shall be required to have only one dose of any of the Haemophilus influenzae conjugate vaccines, including PRP-D;
- (D) No individual who has passed their fifth birthday shall be required to be vaccinated against Haemophilus influenzae, b.
- (7) Hepatitis B vaccine--three doses: one dose by age three months, a second dose before age five months and a third dose by age 19 months. However:
- (A) The ~~third last~~ dose of the hepatitis B vaccine series shall not be administered prior to ~~6 months~~ 24 weeks of age;
- (B) Individuals born before July 1, 1994 shall not be required to be vaccinated against hepatitis B.
- (8) Varicella vaccine--1 dose administered on or after age 12 months and before age 19 months. However:
- (A) An individual with a laboratory test indicating immunity or with a history of varicella disease, documented by a health care provider, parent, guardian or person in loco parentis shall not be required to receive varicella vaccine. Serologic proof of immunity or documentation of previous illness must be presented whenever a certificate of immunization is required by North Carolina General Statute. The documentation shall include the name of the individual with a history of varicella disease and the approximate date or age of infection. Previous illness shall be documented by:
- (i) a written statement from a health care provider documented on or attached to the lifetime immunization card or certificate of immunization; or
- (i) a written statement from the individual's parent, guardian or person in loco parentis attached to the lifetime immunization card or certificate of immunization.
- (B) An individual born prior to April 1, 2001 shall not be required to receive varicella vaccine.

(8) The healthcare provider shall administer immunizations in accordance with this rule. However, if a healthcare provider administers vaccine up to and including the fourth day prior to the required minimum age, the individual dose will not be required to be repeated. Doses administered more than four days prior to the requirements are considered invalid doses and shall be repeated.

(b) The State Health Director may suspend temporarily any portion of the requirements of these immunization rules due to emergency conditions, such as the unavailability of vaccine. The Department shall give notice in writing to all local health departments and other providers currently receiving vaccine from the Department when the suspension takes effect and when the suspension is lifted. When any vaccine series is disrupted by such a suspension, the next dose shall be required to be administered within 90 days of the lifting of the suspension and the series resumed in accordance with intervals determined by the most recent recommendations of the Advisory Committee on Immunization Practices.

Authority G.S. 130A-152(c); 130A-155.1.

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Private Protective Services Board intends to amend the rule cited as 12 NCAC 07D .0807.

Proposed Effective Date: November 1, 2004

Public Hearing:

Date: July 30, 2004

Time: 2:00 p.m.

Location: PPSB Conference Room, 1631 Midtown Place, Ste. 104, Raleigh, NC

Reason for Proposed Action: The board has determined that it is in the public interest to require all applicants for a firearm registration permit to first complete the basic four hour unarmed security guard training course forth in 12 NCAC 07D .0707.

Procedure by which a person can object to the agency on a proposed rule: Written objections should be filed with Wayne Woodard, Director, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.

Written comments may be submitted to: W. Wayne Woodard, Director, 1631 Midtown Place, Suite 104, Raleigh, NC 27609

Comment period ends: September 13, 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 7 – PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 07D – PRIVATE PROTECTIVE SERVICES BOARD

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

(a) Applicants for an armed security guard firearm registration permit shall first complete the basic unarmed security guard training course set forth in 12 NCAC 07D .0707. Private Investigator Licensees applying for an armed security guard firearm registration permit shall first complete a four hour training course consisting of blocks of instruction "The Security Officer in North Carolina" and "Legal Issues for Security Officers" as set forth in 12 NCAC 7D .0707(a). Private Investigator Licensees applying for an armed security guard firearm registration permit shall not be required to complete the following training blocks found in the basic training course referenced in 12 NCAC 07D .0707(a): "Emergency Response", "Communications", "Patrol Procedures", "Note Taking and Report Writing", and "Department". A Private Investigator Licensee applying for an armed security guard firearm registration permit shall be required to meet all additional training requirements set forth in 12 NCAC 07D .0707 as well as the training requirements set forth in this Rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

Authority G.S. 74C-5; 74C-13.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards

Commission intends to adopt the rules cited as 12 NCAC 09A .0207; 09B .0241; 09G .0507 and amend the rule cited as 12 NCAC 09B .0203.

Proposed Effective Date: December 1, 2004

Public Hearing:

Date: August 12, 2004

Time: 1:00 p.m.

Location: North Carolina Justice Academy – West Campus, 3971 Chimney Rock Rd., Hendersonville, NC

Reason for Proposed Action:

12 NCAC 09A .0207; 09G .0507 – These new rules grant the Probable Cause Committee of the North Carolina Criminal Justice Education and Training Standards Commission authority to issue sanctions for violations of 12 NCAC 9.

12 NCAC 09B .0203 – Amended to require that education and experience requirements for criminal justice instructor applicants be met within 60 days of course completion.

12 NCAC 09B .0241 – This new rule establishes standards for the Department of Juvenile Justice and Delinquency Prevention's Specialized Instructor Training for Restraint, Control and Defense Techniques.

Procedure by which a person can object to the agency on a proposed rule:

The objection, reasons for the objections, and the clearly identified portion of the rule to which the objection pertains, must be submitted in writing to Teresa Marrella, Department of Justice, Criminal Justice Standards Division, 114 W. Edenton St., Raleigh, NC 27602.

Written comments may be submitted to: Teresa Marrella, Department of Justice, Criminal Justice Standards Division, 114 W. Edenton St., Raleigh, NC 27602, phone (919) 716-6475, fax (919) 716-6752, and email tmarrella@ncdoj.com.

Comment period ends: September 13, 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 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09A - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .0200 - ENFORCEMENT OF RULES

12 NCAC 09A .0207 AUTHORITY OF THE PROBABLE CAUSE COMMITTEE TO ISSUE SANCTIONS FOR VIOLATIONS BY INDIVIDUALS

(a) Notwithstanding 12 NCAC 09A .0201 and 09A .0203, when any person certified by the Commission is found by the Probable Cause Committee to have knowingly and willfully violated any provision or requirement of the rules contained in Title 12, Chapter 09 which allows for a sanction which is less than permanent which could be lessened or reduced by the Commission, the Probable Cause Committee may take action to correct the violation and to ensure that the violation does not re-occur, including:

- (1) issuing an oral warning and request for compliance;
- (2) issuing a written warning and request for compliance; and
- (3) issuing an official written reprimand.

(b) Such action by the Probable Cause Committee may only be taken with the consent of the person certified by the Commission. Such person shall enter a consent agreement accepting the sanction and waiving his or her right to appeal pursuant to G.S. 150B.

Authority G.S. 17C-6; GS. 17C-10.

SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING

SECTION .0200 – MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION

12 NCAC 09B .0203 ADMISSION OF TRAINEES

(a) The school director shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who is not a citizen of the United States.

(b) The school shall not admit any individual younger than 20 years of age as a trainee in any non-academic basic criminal justice training course. Individuals under 20 years of age may be granted authorization for early enrollment as trainees in a presentation of the Basic Law Enforcement Training Course with prior written approval from the Director of the Standards Division. The Director shall approve early enrollment as long as the individual turns 20 years of age prior to the date of the State Comprehensive Examination for the course.

(c) The school shall give priority admission in certified criminal justice training courses to individuals holding full-time employment with criminal justice agencies.

(d) The school may not admit any individual as a trainee in a presentation of the "Criminal Justice Instructor Training Course" who does not meet the education and experience requirements for instructor certification under Rule .0302(1) of this Subchapter within ~~three months~~ 60 days of successful completion of the Instructor Training State Comprehensive Examination.

(e) The school shall administer the reading component of a standardized test which reports a grade level for each trainee participating in the Basic Law Enforcement Training Course. The specific type of test instrument shall be determined by the School Director and shall be administered no later than by the end of the first two weeks of a presentation of the Basic Law Enforcement Training Course.

(f) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual has provided to the School Director a medical examination report, properly completed by a physician licensed to practice medicine in North Carolina, a physician's assistant, or a nurse practitioner, to determine the individual's fitness to perform the essential job functions of a criminal justice officer. The Director of the Standards Division may grant an exception to this standard for a period of time not to exceed the commencement of the physical fitness topical area when failure to timely receive the medical examination report is not due to neglect on the part of the trainee.

(g) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual is a high school graduate or has passed the General Educational Development Test indicating high school equivalency. High school diplomas earned through correspondence enrollment are not recognized toward the educational requirements.

(h) The school shall not admit any individual trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual has provided the certified School Director a certified criminal record check for local and state records for the time period since the trainee has become an adult and from all locations where the trainee has resided since becoming an adult. An Administrative Office of the Courts criminal record check or a comparable out-of-state criminal record check will satisfy this requirement.

(i) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who has been convicted of the following:

- (1) a felony; or
- (2) a crime for which the punishment could have been imprisonment for more than two years; or
- (3) a crime or unlawful act defined as a "Class B Misdemeanor" within the five year period prior to the date of application for employment unless the individual intends to seek certification through the North Carolina Sheriffs' Education and Training Standards Commission; or
- (4) four or more crimes or unlawful acts as defined as "Class B Misdemeanors" regardless of the date of conviction; or
- (5) four or more crimes or unlawful acts defined as "Class A Misdemeanors" except the trainee

may be enrolled if the last conviction occurred more than two years prior to the date of enrollment; or

- (6) a combination of four or more "Class A Misdemeanors" or "Class B Misdemeanors" regardless of the date of conviction unless the individual intends to seek certification through the North Carolina Criminal Justice Education and Training Standards Commission.

(j) Individuals charged with crimes as specified in Paragraph (i) of this Rule, and such offenses were dismissed or the person was found not guilty, may be admitted into the Basic Law Enforcement Training Course but completion of the Basic Law Enforcement Training Course will not ensure that certification as a law enforcement officer or justice officer through the North Carolina Criminal Justice Education and Training Standards Commission will be issued. Every individual who is admitted as a trainee in a presentation of the Basic Law Enforcement Training Course shall notify the School Director of all criminal offenses which the trainee is arrested for or charged with, pleads no contest to, pleads guilty to or is found guilty of, and notify the School Director of all Domestic Violence Orders (G.S. 50B) which are issued by a judicial official that provide an opportunity for both parties to be present. This shall include all criminal offenses except minor traffic offenses and shall specifically include any offense of Driving Under the Influence (DUI) or Driving While Impaired (DWI). A minor traffic offense is defined, for the purposes of this Paragraph, as an offense where the maximum punishment allowable by law is 60 days or less. Other offenses under G.S. 20 (Motor Vehicles) or other similar laws of other jurisdictions which shall be reported to the School Director expressly include G.S. 20-139 (persons under influence of drugs), G.S. 20-28 (driving while license permanently revoked or permanently suspended), G.S. 20-30(5) (fictitious name or address in application for license or learner's permit), G.S. 20-37.8 (fraudulent use of a fictitious name for a special identification card), G.S. 20-102.1 (false report of theft or conversion of a motor vehicle), G.S. 20-111(5) (fictitious name or address in application for registration), G.S. 20-130.1 (unlawful use of red or blue lights), G.S. 20-137.2 (operation of vehicles resembling law enforcement vehicles), G.S. 20-141.3 (unlawful racing on streets and highways), G.S. 20-141.5 (speeding to elude arrest), and G.S. 20-166 (duty to stop in event of accident). The notifications required under this Paragraph must be in writing, must specify the nature of the offense, the court in which the case was handled, the date of the arrest or criminal charge, the date of issuance of the Domestic Violence Order (G.S. 50B), the final disposition, and the date thereof. The notifications required under this Paragraph must be received by the School Director within 30 days of the date the case was disposed of in court. The requirements of this Paragraph shall be applicable at all times during which the trainee is enrolled in a Basic Law Enforcement Training Course. The requirements of this Paragraph are in addition to the notifications required under 12 NCAC 10B .0301 and 12 NCAC 09B .0101(8).

Authority G.S. 17C-6; 17C-10.

12 NCAC 09B .0241 DJJDP SPECIALIZED INSTRUCTOR TRAINING – RESTRAINT, CONTROL

AND DEFENSE TECHNIQUES

(a) The instructor training course requirement for the Department of Juvenile Justice and Delinquency Prevention (DJJDP) specialized Restraint, Control and Defense Techniques Instructor certification shall consist of 70 hours of instruction presented during a continuous period of two weeks.

(b) Each DJJDP specialized Restraint, Control and Defense Techniques Instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice Restraint, Control and Defense Techniques Instructor in the "Basic Training for Juvenile Justice Officers" course and the "Basic Training for Juvenile and Chief Court Counselors" courses, as well as in-service training courses for juvenile justice officers and juvenile and chief court counselors.

(c) Each applicant for specialized Restraint, Control and Defense Techniques Instructor training shall:

- (1) Have completed the criminal justice general instructor training course; and
- (2) Possess a valid CPR certification that includes cognitive and skills testing.

(d) Each DJJDP specialized Restraint, Control and Defense Techniques Instructor training course shall include the following identified topical areas and minimum instructional hours for each area:

<u>(1) Orientation</u>	<u>1 Hour</u>
<u>(2) Skills Pre-Test</u>	<u>1 Hour</u>
<u>(3) Physical Assessment</u>	<u>4 Hours</u>
<u>(4) Safety Guidelines</u>	<u>2 Hours</u>
<u>(5) Physical Fitness and Conducting Safe Warm-Up Exercises</u>	<u>12 Hours</u>
<u>(6) Fundamentals of Professional Liability for Criminal Justice Instructors</u>	<u>4 Hours</u>
<u>(7) Restraint, Control and Defense Techniques Instructor Guidelines</u>	<u>2 Hours</u>
<u>(8) Restraint, Control and Defense Techniques Practical Skills and Instructional Methods</u>	<u>28 Hours</u>
<u>(9) Practical Skills Enhancement</u>	<u>4 Hours</u>
<u>(10) RCDT Instructional Practicum</u>	<u>4 Hours</u>
<u>(11) Practical Skills Evaluation</u>	<u>4 Hours</u>
<u>(12) Comprehensive Examination/Course Closing</u>	<u>2 Hours</u>

(e) Commission-certified schools that are certified to offer the DJJDP "Specialized Restraint, Control and Defense Techniques Instructor" course are: The Staff Development and Training Unit of the North Carolina Department of Juvenile Justice and Delinquency Prevention.

Authority G.S. 17C-2; 17C-6; 17C-10.

SUBCHAPTER 09G - STANDARDS FOR CORRECTIONS EMPLOYMENT, TRAINING, AND CERTIFICATION

SECTION .0500 - ENFORCEMENT OF RULES

12 NCAC 09G .0507 AUTHORITY OF THE PROBABLE CAUSE COMMITTEE TO ISSUE SANCTIONS FOR VIOLATIONS BY INDIVIDUALS

(a) Notwithstanding 12 NCAC 09G .0501 and 09G .0503, when any person certified by the Commission is found by the Probable Cause Committee to have knowingly and willfully violated any provision or requirement of the rules contained in Title 12, Chapter 09 which allows for a sanction which is less than permanent which could be lessened or reduced by the Commission, the Probable Cause Committee may take action to correct the violation and to ensure that the violation does not re-occur, including

- (1) issuing an oral warning and request for compliance;
- (2) issuing a written warning and request for compliance; and
- (3) issuing an official written reprimand.

(b) Such action by the Probable Cause Committee may only be taken with the consent of the person certified by the Commission. Such person shall enter a consent agreement accepting the sanction and waiving his or her right to appeal pursuant to G.S. 150B.

Authority G.S. 17C-6; 17C-10.

TITLE 15A – DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to adopt the rules cited as 15A NCAC 02Q .0901-.0902, amend the rules cited as 15A NCAC 02D .0519, .0521, .0530-.0531, .0606, .0608, .0801, .1208, .1210; .1404, 02Q .0102, .0603, .0605, .0701, .0709, .0711; and repeal the rule cited as 15A NCAC 02D .0803.

Proposed Effective Date: January 1, 2005

Public Hearing:

Date: August 5, 2004

Time: 7:00 p.m.

Location: Charlotte-Mecklenburg Government Center, Room 267, 600 East 4th Street, Charlotte, NC

Date: August 12, 2004

Time: 7:00 p.m.

Location: Parker Lincoln Building, Air Quality Training Room, 2728 Capital Boulevard, Raleigh, NC

Reason for Proposed Action:

15A NCAC 02D .0519 is proposed to be amended to correct a cross-reference.

15A NCAC 02D .0521 is proposed to be amended to change the number of times that an opacity may exceed the limit when continuous opacity monitors are used to measure opacity.

15A NCAC 02D .0530 is proposed for amendment to incorporate recent changes in the federal rules on applicability for prevention of significant deterioration.

*Three options for the prevention of significant deterioration rule are offered for comment. Option 1 is keeping the current rules. The text for the current rule can be found at [*r02enviro/default.htm. Option 2 is adopting recently adopted EPA language by reference without any changes. Option 3 is incorporating the recently adopted EPA language with some modifications.*](http://ncrules.state.nc.us/ncadministrativ/title15aenviron/chapte</i></p>
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15A NCAC 02D .0531 is proposed for amendment to incorporate recent changes in the federal rules on applicability for nonattainment area major new source review.

Three options for the nonattainment area major new source review rule are offered for comment. Option 1 is keeping the current rules. The text for the current rule can be found at <http://ncrules.state.nc.us/ncadministrativ/title15aenviron/chapte> r02enviro/default.htm. Option 2 is adopting recently adopted EPA language by reference without any changes. Option 3 is incorporating the recently adopted EPA language with some modifications.

15A NCAC 02D .0606 and .0608 is proposed to be amended to allow different monitoring procedures.

15A NCAC 02D .0801 is proposed to be amended to clarify that the transportation facility rules apply only to carbon monoxide.

15A NCAC 02D .0803 is proposed to be repealed as unnecessary.

15A NCAC 02D .1208 is proposed to be amended to correct cross-reference.

15A NCAC 02D .1210 is proposed to be amended to correct cross-references and date by when the performance test is to be conducted.

15A NCAC 02D .1404 is proposed to be amended to allow using a different methodology to satisfy missing monitoring data requirements.

15A NCAC 02Q .0102 is proposed to be amended to revise several permit exemptions.

15A NCAC 02Q .0603 and .0605 are proposed to be amended to clarify that the transportation facility rules apply only to carbon monoxide

15A NCAC 02Q .0701 and .0709 are proposed to be amended to explain when to change conditions in the air toxic portion of a permit because of a change in an acceptable ambient air level of a toxic air pollutant.

15A NCAC 02Q .0711 is proposed to be amended to change how one determines if a facility is exempted from modeling for several acute irritants.

15A NCAC 2Q .0901 and .0902 are proposed for adoption to exempt from permitting certain portable rock crushers.

Procedure by which a person can object to the agency on a proposed rule: *If you have any objections to the proposed rules, please mail a letter indicating your specific reasons to: Thomas Allen, Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641.*

Written comments may be submitted to: *Thomas Allen, Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641, Phone (919)733-1489, Fax (919)715-7476, email thom.allen@ncmail.net.*

Comment period ends: September 13, 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 2D - AIR POLLUTION CONTROL REQUIREMENTS

SECTION .0500 - EMISSION CONTROL STANDARDS

15A NCAC 02D .0519 CONTROL OF NITROGEN DIOXIDE AND NITROGEN OXIDES EMISSIONS

- (a) The emissions of nitrogen dioxide shall not exceed:
- (1) 5.8 pounds per ton of acid produced from any nitric acid manufacturing plants;
 - (2) 5.8 pounds per ton of acid produced from any sulfuric acid manufacturing plant.
- (b) The emissions of nitrogen oxides shall not exceed:
- (1) 0.8 pounds per million BTU of heat input from any oil or gas-fired boiler with a capacity of 250 million BTU per hour or more;
 - (2) 1.8 pounds per million BTU of heat input from any coal-fired boiler with a capacity of 250 million BTU per hour or more.
- (c) The emission limit for a boiler that burns both coal and oil or gas in combination shall be calculated by the equation $E = [(Ec)(Qc) + (Eo)(Qo)] / Qt$.
- (1) E = the emission limit for combination in lb/million BTU.
 - (2) Ec = emission limit for coal only as determined by Paragraph ~~(a)~~ (b) of this Rule in lb/million BTU.
 - (3) Eo = emission limit for oil or gas as determined by Paragraph ~~(a)~~ (b) of this Rule in lb/million BTU.
 - (4) Qc = the actual coal heat input to the combination in BTU/hr.
 - (5) Qo = the actual oil and gas heat input to the combination in BTU/hr.
 - (6) Qt = Qc + Qo and is the actual total heat input to the combination in BTU/hr.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5).

15A NCAC 02D .0521 CONTROL OF VISIBLE

EMISSIONS

(a) Purpose. The intent of this Rule is to prevent, abate and control emissions generated from fuel burning operations and industrial processes where an emission can reasonably be expected to occur, except during startup, shutdowns, and malfunctions approved according to procedures set out in Rule .0535 of this Section.

(b) Scope. This Rule shall apply to all fuel burning sources and to other processes that may have a visible emission. However, sources subject to a visible emission standard in Rules .0506, .0508, .0524, .0543, .0544, .1110, .1111, .1205, .1206, or .1210 of this Subchapter shall meet that standard instead of the standard contained in this Rule. This Rule does not apply to engine maintenance, rebuild, and testing activities where controls are infeasible, except it does apply to the testing of peak shaving and emergency generators. (In deciding if controls are infeasible, the Director shall consider emissions, capital cost of compliance, annual incremental compliance cost, and environmental and health impacts.)

(c) For sources manufactured as of July 1, 1971, visible emissions shall not be more than 40 percent opacity when averaged over a six-minute period. However, except for sources required to comply with Paragraph (g) of this Rule, six-minute averaging periods may exceed 40 percent opacity if:

- (1) No six-minute period exceeds 90 percent opacity;
- (2) No more than one six-minute period exceeds 40 percent opacity in any hour; and
- (3) No more than four six-minute periods exceed 40 percent opacity in any 24-hour period.

(d) For sources manufactured after July 1, 1971, visible emissions shall not be more than 20 percent opacity when averaged over a six-minute period. However, except for sources required to comply with Paragraph (g) of this Rule, six-minute averaging periods may exceed 20 percent opacity if:

- (1) No six-minute period exceeds 87 percent opacity;
- (2) No more than one six-minute period exceeds 20 percent opacity in any hour; and
- (3) No more than four six-minute periods exceed 20 percent opacity in any 24-hour period.

(e) Where the presence of uncombined water is the only reason for failure of an emission to meet the limitations of Paragraph (c) or (d) of this Rule, those requirements shall not apply.

(f) Exception from Opacity Standard in Paragraph (d) of this Rule. Sources subject to Paragraph (d) of this Rule may be allowed to comply with Paragraph (c) of this Rule if:

- (1) The owner or operator of the source demonstrates compliance with applicable particulate mass emissions standards; and
- (2) The owner or operator of the source submits data necessary to show that emissions up to those allowed by Paragraph (c) of this Rule shall not violate any national ambient air quality standard.

The burden of proving these conditions shall be on the owner or operator of the source and shall be approached in the following manner. The owner or operator of a source seeking an exception shall apply to the Director requesting this modification in its permit. The applicant shall submit the results of a source test

within 90 days of application. Source testing shall be by the appropriate procedure as designated by rules in this Subchapter. During this 90-day period the applicant shall submit data necessary to show that emissions up to those allowed by Paragraph (c) of this Rule will not contravene ambient air quality standards. This evidence shall include, as a minimum, an inventory of past and projected emissions from the facility. In its review of ambient air quality, the Division may require additional information that it considers necessary to assess the resulting ambient air quality. If the applicant can thus show that it will be in compliance both with particulate mass emissions standards and ambient air quality standards, the Director shall modify the permit to allow emissions up to those allowed by Paragraph (c) of this Rule.

(g) For sources required to install, operate, and maintain continuous opacity monitoring systems (COMS), compliance with the numerical opacity limits in this Rule shall be determined as follows excluding startups, shutdowns, maintenance periods when fuel is not being combusted, and malfunctions approved as such according to procedures approved under Rule .0535 of this Section:

- (1) No more than ~~40~~ **four** [NOTE: the EMC seeks comments on numbers between 4 and 10] six-minute periods shall exceed the opacity standard in any one day; and
- (2) The percent of excess emissions (defined as the percentage of monitored operating time in a calendar quarter above the opacity limit) shall not exceed 0.8 percent of the total operating hours. If a source operates less than 500 hours during a calendar quarter, the percent of excess emissions shall be calculated by including hours operated immediately previous to this quarter until 500 operational hours are obtained.

In no instance shall excess emissions exempted under this Paragraph cause or contribute to a violation of any emission standard in this Subchapter or 40 CFR Part 60, 61, or 63 or any ambient air quality standard in Section 15A NCAC 2D .0400 or 40 CFR Part 50.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5).

OPTION 2

15A NCAC 02D .0530 PREVENTION OF SIGNIFICANT DETERIORATION

(a) The purpose of the Rule is to implement a program for the prevention of significant deterioration of air quality as required by 40 CFR 51.166 as amended December 31, 2002. ~~March 15, 1996~~.

(b) For the purposes of this Rule the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply. The reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years. The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.

(c) All areas of the State shall be classified as Class II except that the following areas are Class I:

- (1) Great Smoky Mountains National Park;

- (2) Joyce Kilmer Slickrock National Wilderness Area;
- (3) Linville Gorge National Wilderness Area;
- (4) Shining Rock National Wilderness Area;
- (5) Swanquarter National Wilderness Area.

(d) Redesignations of areas to Class I or II may be submitted as state proposals to the Administrator of the Environmental Protection Agency (EPA), if the requirements of 40 CFR 51.166(g)(2) are met. Areas may be proposed to be redesignated as Class III, if the requirements of 40 CFR 51.166(g)(3) are met. Redesignations may not, however, be proposed which would violate the restrictions of 40 CFR 51.166(e). Lands within the boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body.

(e) In areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be limited to the values set forth in 40 CFR 51.166(c). However, concentration of the pollutant shall not exceed standards set forth in 40 CFR 51.166(d).

(f) Concentrations attributable to the conditions described in 40 CFR 51.166(f)(1) shall be excluded in determining compliance with a maximum allowable increase. However, the exclusions referred to in 40 CFR 51.166(f)(1)(i) or (ii) shall be limited to five years as described in 40 CFR 51.166(f)(2).

(g) Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through ~~(a), (o), (r), (v), and (w)~~. The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).

(h) The owner or operator of a major stationary sources that meets the requirements for using the clean unit provisions in 40 CFR 51.166(t) may use the provisions in 40 CFR 51.166(t) by following the procedures in 40 CFR 51.166(t). The Director shall modify the source's permit according to the provisions in 40 CFR 51.166(t).

(i) If a sources does not qualify as a clean unit under 40 CFR 51.166(t), but does qualify to use the provisions in 40 CFR 51.166(u), the owner or operator of the source may use the provisions in 40 CFR 51.155(u) by following the procedures in 40 CFR 51.166(u). The Director shall modify the source's permit according to the provisions in 40 CFR 51.166(u).

~~(h)~~ (j) 15A NCAC 2Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 2Q .0300 or .0500.

~~(k)~~ When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

~~(j)~~ (l) Volatile organic compounds exempted from coverage in 40 CFR 51.100(s) Subparagraph (c)(5) of Rule .0531 of this Section shall also be exempted when calculating source applicability and control requirements under this Rule.

~~(k)~~ (m) The degree of emission limitation required for control of any air pollutant under this Rule shall not be affected in any manner by:

- (1) that amount of a stack height, not in existence before December 31, 1970, that exceeds good engineering practice; or
- (2) any other dispersion technique not implemented before then.

~~(n)~~ (n) A substitution or modification of a model as provided for in 40 CFR 51.166(l) shall be subject to public comment procedures in accordance with the requirements of 40 CFR 51.102.

~~(m)~~ (o) Permits may be issued on the basis of innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

~~(p)~~ (p) If a source to which this Rule applies impacts an area designated Class I by requirements of 40 CFR 51.166(e), notice to EPA will be provided as set forth in 40 CFR 51.166(p)(1). If the Federal Land Manager presents a demonstration described in 40 CFR 51.166(p)(3) during the public comment period or public hearing to the Director and if the Director concurs with this demonstration, the permit application shall be denied. Permits may be issued on the basis that the requirements for variances as set forth in 40 CFR 51.166(p)(4), (p)(5) and (p)(7), or (p)(6) and (p)(7) have been satisfied.

~~(q)~~ (q) A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants will be notified if the application is complete as to initial information submitted. Commencement of construction before full prevention of significant deterioration approval is obtained constitutes a violation of this Rule.

~~(r)~~ (r) Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply fully with applicable provisions of other rules of this ~~Chapter~~ Subchapter or Subchapter 2Q of this Title and any other requirements under local, state, or federal law.

~~(s)~~ (s) When a source or modification subject to this Rule may affect the visibility of a Class I area named in Paragraph (c) of this Rule, the following procedures shall apply:

- (1) The Director shall provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or within 30 days of receiving advance notification of an application. The notification

shall be at least 30 days prior to the publication of notice for public comment on the application. The notification shall include a copy of all information relevant to the permit application including an analysis provided by the source of the potential impact of the proposed source on visibility.

- (2) The Director shall consider any analysis concerning visibility impairment performed by the Federal Land Manager if the analysis is received within 30 days of notification. If the Director finds that the analysis of the Federal Land Manager fails to demonstrate to his satisfaction that an adverse impact on visibility will result in the Class I area, the Director shall provide in the notice of public hearing on the application, an explanation of his decision or notice as to where the explanation can be obtained.

- (3) The Director may require monitoring of visibility in or around any Class I area by the proposed new source or modification when the visibility impact analysis indicates possible visibility impairment.

~~(r) Revisions of the North Carolina State Implementation Plan for Air Quality shall comply with the requirements contained in 40 CFR 51.166(a)(2).~~

~~(s)~~ (t) The version of the Code of Federal Regulations incorporated in this Rule is that as of December 31, 2002, March 15, 1996, and does not include any subsequent amendments or editions to the referenced material.

OPTION 3

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7).

15A NCAC 02D .0530 PREVENTION OF SIGNIFICANT DETERIORATION

(a) The purpose of the Rule is to implement a program for the prevention of significant deterioration of air quality as required by 40 CFR 51.166 as amended December 31, 2002, March 15, 1996.

(b) For the purposes of this Rule the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall ~~apply~~ apply except the definitions of "baseline actual emissions," "pollution control projects," and "projected actual emissions."

OPTION A

(1) "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated new source review (NSR) pollutant, as determined in accordance with Parts (A) through (C) of this Subparagraph.

(A) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected

by the owner or operator within the 5-year period immediately preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years immediately preceding the date that a complete permit application is received by the Division, upon determination that it is more representative of normal source operation.

- (i) The average rate shall include fugitive emissions to the extent quantifiable and any authorized emissions associated with startup and shutdown;
- (ii) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period.
- (iii) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.
- (iv) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.
- (v) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per

year, and for adjusting this amount if required by Subparts (ii) and (iii) of this Part.

- (B) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.
- (C) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Part (A) of this Subparagraph, and for a new emissions unit in accordance with the procedures contained in Part (B) of this Subparagraph.

OPTION B

(1) "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated new source review (NSR) pollutant, as determined in accordance with Parts (A) through (C) of this Subparagraph.

- (A) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years immediately preceding the date that a complete permit application is received by the Division, upon determination that it is more representative of normal source operation. The same 24-month period shall be used for all pollutants.
 - (i) The average rate shall include fugitive emissions to the extent quantifiable and any authorized emissions associated with startup and shutdown;
 - (ii) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any

emission limitation that was legally enforceable during the consecutive 24-month period.

(iii) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(iv) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for all the emissions units being changed. The same consecutive 24-month period can be used for each regulated NSR pollutant.

(v) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Subparts (ii) and (iii) of this Part.

(B) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(C) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Part (A) of this Subparagraph, and for a new emissions unit in accordance with the procedures contained in Part (B) of this Subparagraph.

OPTION A

(2) "Pollution control project" (PCP) means, at an existing emissions unit, any activity, set of

work practices, or project (including pollution prevention as defined under 40 CFR 51.166(b)(38)), the purpose of which is to reduce emissions of air pollutants from such unit. Such qualifying activities or projects may include the replacement or upgrade of an existing emissions control technology with a more effective unit. Other changes that may occur at the source are not considered part of the PCP if they are not necessary to reduce emissions through the PCP. Projects listed in Parts (A) through (F) of this Subparagraph carry the rebuttable presumption during the permitting process that they are environmentally beneficial pursuant to 40 CFR 51.166(v)(2)(i), and, using the criteria in 40 CFR 51.166(v)(2), the Director may rebut such presumption and determine that the project is not environmentally beneficial and the project does not qualify as a PCP. Projects not listed in Parts (A) through (F) may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.166(v)(2) and (v)(5).

(A) Conventional or advanced flue gas desulfurization or sorbent injection for control of SO₂

(B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for control of particulate matter or other pollutants.

(C) Flue gas recirculation, low-NO_x burners or combustors, selective non-catalytic reduction, selective catalytic reduction, low emission combustion (for internal combustion engines), and oxidation-absorption catalyst for control of NO_x

(D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, hydrocarbon combustion flares, biofiltration, absorbers and adsorbers, and floating roofs for storage vessels for control of volatile organic compounds or hazardous air pollutants. For the purpose of this section, "hydrocarbon combustion flare" means either a flare used to comply with an applicable NSPS or MACT standard (including uses of flares during startup, shutdown, or malfunction permitted under such a standard), or a flare that serves to control emissions of waste streams comprised predominately of hydrocarbons and containing no more than 230 mg/dscm hydrogen sulfide. The installation of thermal controls in NO_x limited non-attainment areas

- shall only be considered on a case-by-case basis.
- (E) Activities or projects undertaken to accommodate switching (or partially switching) to an inherently less polluting fuel, to be limited to the following fuel switches:
- (i) Switching from a heavier grade of fuel oil to a lighter fuel oil, or any grade of oil to 0.05 percent sulfur diesel (i.e., from a higher sulfur content #2 fuel or from #6 fuel, to CA 0.05 percent sulfur diesel);
 - (ii) Switching from coal, wood, oil, or any other solid fuel to natural gas, propane, gasified coal, or gasified wood;
 - (iii) Switching from coal to wood, excluding construction or demolition waste, chemical or pesticide treated wood, and other forms of "unclean" wood;
 - (iv) Switching from coal to #2 fuel oil (0.5 percent maximum sulfur content); and
 - (v) Switching from high sulfur coal to low sulfur coal (maximum 1.2 percent sulfur content).
- (F) Activities or projects undertaken to accommodate switching from the use of one ozone depleting substance (ODS) to the use of a substance with a lower or zero ozone depletion potential (ODP,) including changes to equipment needed to accommodate the activity or project, that meet the following requirements:
- (i) The productive capacity of the equipment is not increased as a result of the activity or project.
 - (ii) The projected usage of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS. To make this determination, the following procedure shall be used:
 - (I) Determine the ODP of the substances by consulting 40 CFR part 82, subpart A, appendices A and B.

- (II) Calculate the replaced ODP-weighted amount by multiplying the baseline actual usage (using the annualized average of any 24 consecutive months of usage within the past 10 years) by the ODP of the replaced ODS.
- (III) Calculate the projected ODP-weighted amount by multiplying the projected actual usage of the new substance by its ODP.
- (IV) If the value calculated in Sub-Subpart (II) of this Subpart is more than the value calculated in Sub-Subpart (III) of this Subpart, then the projected use of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS.

OPTION B

- (2) "Pollution control project" (PCP) means, at an existing emissions unit, any activity, set of work practices, or project (including pollution prevention as defined under 40 CFR 51.166(b)(38)), the purpose of which is to reduce emissions of air pollutants from such unit. Such qualifying activities or projects may include the replacement or upgrade of an existing emissions control technology with a more effective unit. Other changes that may occur at the source are not considered part of the PCP if they are not necessary to reduce emissions through the PCP. Projects listed in Parts (A) through (F) of this Subparagraph are presumption to be environmentally beneficial pursuant to 40 CFR 51.166(v)(2)(i). Projects not listed in Parts (A) through (F) may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.166(v)(2) and (v)(5).
- (A) Conventional or advanced flue gas desulfurization or sorbent injection for control of SO₂

- (B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for control of particulate matter or other pollutants.
- (C) Flue gas recirculation, low-NO_x burners or combustors, selective non-catalytic reduction, selective catalytic reduction, low emission combustion (for internal combustion engines), and oxidation-absorption catalyst for control of NO_x
- (D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, hydrocarbon combustion flares, biofiltration, absorbers and adsorbers, and floating roofs for storage vessels for control of volatile organic compounds or hazardous air pollutants. For the purpose of this section, "hydrocarbon combustion flare" means either a flare used to comply with an applicable NSPS or MACT standard (including uses of flares during startup, shutdown, or malfunction permitted under such a standard), or a flare that serves to control emissions of waste streams comprised predominately of hydrocarbons and containing no more than 230 mg/dscm hydrogen sulfide. The installation of thermal controls in NO_x limited non-attainment areas shall only be considered on a case-by-case basis.
- (E) Activities or projects undertaken to accommodate switching (or partially switching) to an inherently less polluting fuel, to be limited to the following fuel switches:
- (i) Switching from a heavier grade of fuel oil to a lighter fuel oil, or any grade of oil to 0.05 percent sulfur diesel (i.e., from a higher sulfur content #2 fuel or from #6 fuel, to CA 0.05 percent sulfur diesel);
- (ii) Switching from coal, wood, oil, or any other solid fuel to natural gas, propane, gasified coal, or gasified wood;
- (iii) Switching from coal to wood, excluding construction or demolition waste, chemical or pesticide treated wood, and other forms of "unclean" wood;
- (iv) Switching from coal to #2 fuel oil (0.5 percent maximum sulfur content); and
- (v) Switching from high sulfur coal to low sulfur coal (maximum 1.2 percent sulfur content).
- (F) Activities or projects undertaken to accommodate switching from the use of one ozone depleting substance (ODS) to the use of a substance with a lower or zero ozone depletion potential (ODP,) including changes to equipment needed to accommodate the activity or project, that meet the following requirements:
- (i) The productive capacity of the equipment is not increased as a result of the activity or project.
- (ii) The projected usage of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS. To make this determination, the following procedure shall be used:
- (I) Determine the ODP of the substances by consulting 40 CFR part 82, subpart A, appendices A and B.
- (II) Calculate the replaced ODP-weighted amount by multiplying the baseline actual usage (using the annualized average of any 24 consecutive months of usage within the past 10 years) by the ODP of the replaced ODS.
- (III) Calculate the projected ODP-weighted amount by multiplying the projected actual usage of the new substance by its ODP.
- (IV) If the value calculated in Sub-Subpart (II) of this Subpart is more than the value calculated in Sub-Subpart (III) of this

Subpart, then the projected use of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS.

OPTION C

(2) "Pollution control project" (PCP) means, at an existing emissions unit, any activity, set of work practices, or project (including pollution prevention as defined under 40 CFR 51.166(b)(38)), the purpose of which is to reduce emissions of air pollutants from such unit. Such qualifying activities or projects may include the replacement or upgrade of an existing emissions control technology with a more effective unit. Other changes that may occur at the source are not considered part of the PCP if they are not necessary to reduce emissions through the PCP. Projects listed in Parts (A) through (F) of this Subparagraph carry the rebuttable presumption during the permitting process that they are environmentally beneficial pursuant to 40 CFR 51.166(v)(2)(i), and, using the criteria in Paragraph (x) of this Rule, the Director may rebut such presumption and determine that the project is not environmentally beneficial and the project does not qualify as a PCP. Projects not listed in Parts (A) through (F) may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.166(v)(2) and (v)(5).

(A) Conventional or advanced flue gas desulfurization or sorbent injection for control of SO₂

(B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for control of particulate matter or other pollutants.

(C) Flue gas recirculation, low-NO_x burners or combustors, selective non-catalytic reduction, selective catalytic reduction, low emission combustion (for internal combustion engines), and oxidation-absorption catalyst for control of NO_x

(D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, hydrocarbon combustion flares, biofiltration, absorbers and adsorbers, and floating roofs for storage vessels for control of volatile organic compounds or hazardous air pollutants. For the purpose of this section, "hydrocarbon combustion flare" means either a flare used to comply with an applicable

NSPS or MACT standard (including uses of flares during startup, shutdown, or malfunction permitted under such a standard), or a flare that serves to control emissions of waste streams comprised predominately of hydrocarbons and containing no more than 230 mg/dscm hydrogen sulfide. The installation of thermal controls in NO_x limited non-attainment areas shall only be considered on a case-by-case basis.

(E) Activities or projects undertaken to accommodate switching (or partially switching) to an inherently less polluting fuel, to be limited to the following fuel switches:

(i) Switching from a heavier grade of fuel oil to a lighter fuel oil, or any grade of oil to 0.05 percent sulfur diesel (i.e., from a higher sulfur content #2 fuel or from #6 fuel, to CA 0.05 percent sulfur diesel);

(ii) Switching from coal, wood, oil, or any other solid fuel to natural gas, propane, gasified coal, or gasified wood;

(iii) Switching from coal to wood, excluding construction or demolition waste, chemical or pesticide treated wood, and other forms of "unclean" wood;

(iv) Switching from coal to #2 fuel oil (0.5 percent maximum sulfur content); and

(v) Switching from high sulfur coal to low sulfur coal (maximum 1.2 percent sulfur content).

(F) Activities or projects undertaken to accommodate switching from the use of one ozone depleting substance (ODS) to the use of a substance with a lower or zero ozone depletion potential (ODP,) including changes to equipment needed to accommodate the activity or project, that meet the following requirements:

(i) The productive capacity of the equipment is not increased as a result of the activity or project.

(ii) The projected usage of the new substance is lower, on an ODP-weighted basis, than

the baseline usage of the replaced ODS. To make this determination, the following procedure shall be used:

- (I) Determine the ODP of the substances by consulting 40 CFR part 82, subpart A, appendices A and B.
- (II) Calculate the replaced ODP-weighted amount by multiplying the baseline actual usage (using the annualized average of any 24 consecutive months of usage within the past 10 years) by the ODP of the replaced ODS.
- (III) Calculate the projected ODP-weighted amount by multiplying the projected actual usage of the new substance by its ODP.
- (IV) If the value calculated in Sub-Subpart (II) of this Subpart is more than the value calculated in Sub-Subpart (III) of this Subpart, then the projected use of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS

OPTION A

- (3) "Projected actual emissions" means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the five or 10 years (12-month period) following the date that the unit resumes regular operation after the project in accordance with Paragraph (w) of this Rule. In determining the projected actual emissions under this Subparagraph (before beginning actual construction), the owner or operator of the major stationary source shall:

- (A) consider all relevant information, including historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the federally approved State Implementation Plan;
- (B) include fugitive emissions to the extent quantifiable and emissions associated with startups and shutdowns;
- (C) include the emissions resulting from increased utilization because of product demand growth that the unit could not have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph; and
- (D) exclude the emissions, including any increased utilization because of product demand growth, that a unit could have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph that are unrelated to the particular project.

In lieu of using the method set out in Parts (A) through (C) of this Subparagraph, the owner or operators may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph 40 CFR 51.166(b)(4).

OPTION B

- (3) "Projected actual emissions" means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the five or 10 years (12-month period) following the date that the unit resumes regular operation after the project in accordance with Paragraph (w) of this Rule. In determining the projected actual emissions under this Subparagraph (before beginning actual construction), the owner or operator of the major stationary source shall:
 - (A) consider all relevant information, including historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the federally approved State Implementation Plan;

(B) include fugitive emissions to the extent quantifiable and emissions associated with startups and shutdowns;

(C) include the emissions resulting from increased utilization because of product demand growth that the unit could not have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph; and

(D) include the emissions, including any increased utilization because of product demand growth, that a unit could have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph that are unrelated to the particular project.

In lieu of using the method set out in Parts (A) through (C) of this Subparagraph, the owner or operators may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph 40 CFR 51.166(b)(4).

(4) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years.

(5) The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.

(c) All areas of the State shall be classified as Class II except that the following areas are Class I:

- (1) Great Smoky Mountains National Park;
- (2) Joyce Kilmer Slickrock National Wilderness Area;
- (3) Linville Gorge National Wilderness Area;
- (4) Shining Rock National Wilderness Area;
- (5) Swanquarter National Wilderness Area.

(d) Redesignations of areas to Class I or II may be submitted as state proposals to the Administrator of the Environmental Protection Agency (EPA), if the requirements of 40 CFR 51.166(g)(2) are met. Areas may be proposed to be redesignated as Class III, if the requirements of 40 CFR 51.166(g)(3) are met. Redesignations may not, however, be proposed which would violate the restrictions of 40 CFR 51.166(e). Lands within the boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body.

(e) In areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be limited to the values set forth in 40 CFR 51.166(c). However, concentration of the pollutant shall not exceed standards set forth in 40 CFR 51.166(d).

(f) Concentrations attributable to the conditions described in 40 CFR 51.166(f)(1) shall be excluded in determining compliance with a maximum allowable increase. However, the exclusions referred to in 40 CFR 51.166(f)(1)(i) or (ii) shall be limited to five years as described in 40 CFR 51.166(f)(2).

OPTION A

(g) Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through ~~(o)~~, (r), (v), and (w). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).

OPTION B

(g) Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through ~~(o)~~, (r), (v), and (w). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2). 40 CFR 51.166(f) is not incorporated by reference.

(h) 40 CFR 51.166(w)(10)(iv)(a) is changed to read: "If the emissions level calculated in accordance with paragraph (w)(6) of this section is equal to or greater than 80 percent of the PAL level, the Director shall renew the PAL [plant wide applicability limit] at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

(i) The owner or operator of a major stationary sources that meets the requirements for using the clean unit provisions in 40 CFR 51.166(t) may use the provisions in 40 CFR 51.166(t) by following the procedures in 40 CFR 51.166(t). The Director shall modify the source's permit according to the provisions in 40 CFR 51.166(t). 40 CFR 51.166(t)(3)(i) is changed to read as follows: "Permitting requirement. The emissions unit shall have received a major NSR permit within the last five years. The owner or operator shall maintain and be able to provide information that would demonstrate that this permitting requirement is met."

(j) If a source does not qualify as a clean unit under 40 CFR 51.166(t), but does qualify to use the provisions in 40 CFR 51.166(u), the owner or operator of the source may use the provisions in 40 CFR 51.155(u) by following the procedures in 40 CFR 51.166(u). The Director shall modify the source's permit according to the provisions in 40 CFR 51.166(u). A BACT analysis shall be used to determine if the unit qualifies for a clean unit exemption.

~~(h)~~ (k) 15A NCAC 2Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 2Q .0300 or .0500.

~~(g)~~ (l) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

~~(j)~~ (m) Volatile organic compounds exempted from coverage in 40 CFR 51.100(s) ~~Subparagraph (c)(5) of Rule .0531 of this Section~~ shall also be exempted when calculating source applicability and control requirements under this Rule.

~~(k)~~ (n) The degree of emission limitation required for control of any air pollutant under this Rule shall not be affected in any manner by:

- (1) that amount of a stack height, not in existence before December 31, 1970, that exceeds good engineering practice; or
- (2) any other dispersion technique not implemented before then.

~~(h)~~ (o) A substitution or modification of a model as provided for in 40 CFR 51.166(l) shall be subject to public comment procedures in accordance with the requirements of 40 CFR 51.102.

~~(m)~~ (p) Permits may be issued on the basis of innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

~~(h)~~ (q) If a source to which this Rule applies impacts an area designated Class I by requirements of 40 CFR 51.166(e), notice to EPA will be provided as set forth in 40 CFR 51.166(p)(1). If the Federal Land Manager presents a demonstration described in 40 CFR 51.166(p)(3) during the public comment period or public hearing to the Director and if the Director concurs with this demonstration, the permit application shall be denied. Permits may be issued on the basis that the requirements for variances as set forth in 40 CFR 51.166(p)(4), (p)(5) and (p)(7), or (p)(6) and (p)(7) have been satisfied.

~~(g)~~ (r) A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants will be notified if the application is complete as to initial information submitted. Commencement of construction before full prevention of significant deterioration approval is obtained constitutes a violation of this Rule.

~~(h)~~ (s) Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator

of the responsibility to comply fully with applicable provisions of other rules of this Chapter Subchapter or Subchapter 02Q of this Title and any other requirements under local, state, or federal law.

~~(g)~~ (t) When a source or modification subject to this Rule may affect the visibility of a Class I area named in Paragraph (c) of this Rule, the following procedures shall apply:

- (1) The Director shall provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or within 30 days of receiving advance notification of an application. The notification shall be at least 30 days prior to the publication of notice for public comment on the application. The notification shall include a copy of all information relevant to the permit application including an analysis provided by the source of the potential impact of the proposed source on visibility.
- (2) The Director shall consider any analysis concerning visibility impairment performed by the Federal Land Manager if the analysis is received within 30 days of notification. If the Director finds that the analysis of the Federal Land Manager fails to demonstrate to his satisfaction that an adverse impact on visibility will result in the Class I area, the Director shall provide in the notice of public hearing on the application, an explanation of his decision or notice as to where the explanation can be obtained.
- (3) The Director may require monitoring of visibility in or around any Class I area by the proposed new source or modification when the visibility impact analysis indicates possible visibility impairment.

~~(r)~~ ~~Revisions of the North Carolina State Implementation Plan for Air Quality shall comply with the requirements contained in 40 CFR 51.166(a)(2).~~

(u) The Director shall put in the facility's permit conditions for monitoring, recordkeeping, and reporting necessary to determine compliance with the requirements and provisions of this Rule according to 15A NCAC 2D .0605 and 15A NCAC 2Q .0508.

(v) The owner or operator of a source shall maintain a copy of all information used to establish the source's baseline actual emissions for 10 years following the date that the permit is issued if the project involves increasing the emission unit's design capacity or its potential to emit the regulated NSR pollutant by a significant amount, as defined at 40 CFR 51.166(b)(23)(i), when compared to the pre-modification potential to emit; otherwise the owner or operator shall maintain a copy of all information used to establish the source's baseline actual emissions for five years following the date that the permit is issued

(w) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the Director shall include the projected actual emissions plus the emissions excluded under Part (b)(3)(D) of this Rule in tons per year in the source's permit as an emission limit. This limitation shall remain in the permit

for 10 years if the project involves increasing the emissions unit's design capacity or its potential to emit the regulated NSR pollutant by a significant amount, as defined at 40 CFR 51.166(b)(23)(i), when compared to the pre-modification potential to emit; otherwise the limitation shall remain in the permit for five years. The owner or operator shall submit a permit application documenting the projected actual emissions and emissions increases for the project and requesting a change in the permit to include the aforementioned emission limitation. The owner or operator shall not commence construction on the project prior to receiving the revised permit.

PART OF OPTION C FOR PCP

(x) In deciding whether to rebut a pollution control project, the criteria that the Director shall consider shall include:

- (1) the type and design specification of the control devices,
- (2) types and quantities of emissions, and
- (3) impacts on ambient air quality.

~~(y)~~ (y) The version of the Code of Federal Regulations incorporated in this Rule is that as of December 31, 2002, March 15, 1996, and does not include any subsequent amendments or editions to the referenced material.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.108(b); 150B-21.6.

OPTION 2

15A NCAC 02D .0531 SOURCES IN NONATTAINMENT AREAS

(a) Applicability.

- (1) Ozone Nonattainment Areas. This Rule applies to major stationary sources and major modifications of sources of volatile organic compounds or nitrogen oxides for which construction commences after the area in which the source is located is designated according to Part (A) or (B) of this Subparagraph and that are located in:
 - (A) areas designated in 40 CFR 81.334 as nonattainment for ozone, or
 - (B) any of the following areas and in that area only when the Director notices in the North Carolina Register that the area is in violation of the ambient air quality standard for ozone:
 - (i) Charlotte/Gastonia, consisting of Mecklenburg and Gaston Counties; with the exception allowed under Paragraph (k) of this Rule;
 - (ii) Greensboro/Winston-Salem/High Point, consisting of Davidson, Forsyth, and Guilford Counties and that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway

- 801, Fulton Creek and back to Yadkin River; or
- (iii) Raleigh/Durham, consisting of Durham and Wake Counties and Dutchville Township in Granville County.

Violations of the ambient air quality standard for ozone shall be determined according to 40 CFR 50.9.

- (2) Carbon Monoxide Nonattainment Areas. This Rule applies to major stationary sources and major modifications of sources of carbon monoxide located in areas designated in 40 CFR 81.334 as nonattainment for carbon monoxide and for which construction commences after the area in which the source is located is listed in 40 CFR 81.334 as nonattainment for carbon monoxide.
- (3) Redesignation to Attainment. If any county or part of a county to which this Rule applies is later designated in 40 CFR 81.334 as attainment for ozone or carbon monoxide, all sources in that county subject to this Rule before the redesignation date shall continue to comply with this Rule.

(b) For the purpose of this Rule the definitions contained in 40 CFR 51.165(a)(1) and 40 CFR 51.301 shall apply the reasonable period specified in 40 CFR 51.165(a)(1)(vi)(C)(1) shall be seven years.

(c) This Rule is not applicable to:

- (1) complex sources of air pollution regulated only under Section .0800 of this Subchapter and not under any other rule in this Subchapter;
- (2) emission of pollutants at the new major stationary source or major modification located in the nonattainment area that are pollutants other than the pollutant or pollutants for which the area is nonattainment. (A major stationary source or major modification that is major for volatile organic compounds or nitrogen oxides is also major for ozone.);
- (3) emission of pollutants for which the source or modification is not major;
- (4) a new source or modification that qualifies for exemption under the provision of 40 CFR 51.165(a)(4); and
- (5) emission of compounds listed under 40 CFR 51.100(s) as having been determined to have negligible photochemical reactivity except carbon monoxide.

(d) 15A NCAC 2Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the source shall apply for and receive a permit as required in 15A NCAC 2Q .0300 or .0500.

(e) To issue a permit to a source to which this Rule applies, the Director shall determine that the source will meet the following requirements:

- (1) The new major stationary source or major modification will emit the nonattainment pollutant at a rate no more than the lowest achievable emission rate;
- (2) The owner or operator of the proposed new ~~or modified~~ major stationary source or major modification has demonstrated that all major stationary sources in the State that are owned or operated by this person (or any entity controlling, controlled by, or under common control with this person) are subject to emission limitations and are in compliance, or on a schedule for compliance that is federally enforceable or contained in a court decree, with all applicable emission limitations and standards of this Subchapter that EPA has authority to approve as elements of the North Carolina State Implementation Plan for Air Quality;
- (3) The owner or operator of the proposed new major stationary source or major modification will obtain sufficient emission reductions of the nonattainment pollutant from other sources in the nonattainment area so that the emissions from the new major source and associated new minor sources will be less than the emissions reductions by a ratio of at least 1.00 to 1.15 for volatile organic compounds and nitrogen oxides and by a ratio of lesser than one to one for carbon monoxide. The baseline for this emission offset shall be the actual emissions of the source from which offset credit is obtained. Emission reductions shall not include any reductions resulting from compliance (or scheduled compliance) with applicable rules in effect before the application. The difference between the emissions from the new major source and associated new minor sources of carbon monoxide and the emission reductions shall be sufficient to represent reasonable further progress toward attaining the Ambient Air Quality Standards. The emissions reduction credits shall also conform to the provisions of 40 CFR 51.165(a)(3)(ii)(A) through (J) (G); and
- (4) The North Carolina State Implementation Plan for Air Quality is being carried out for the nonattainment area in which the proposed source is located.

(f) The owner or operator of a major stationary sources that meets the requirements for using the clean unit provisions in 40 CFR 51.165(c) may use the provisions in 40 CFR 51.165(c) by following the procedures in 40 CFR 51.165(c). The Director shall modify the source's permit according to the provisions in 40 CFR 51.165(c). information that would demonstrate that this permitting requirement is met."

(g) If a source does not qualify as a clean unit under 40 CFR 51.165(c), but does qualify to use the provisions in 40 CFR 51.165(d), the owner or operator of the source may use the provisions in 40 CFR 51.155(d) by following the procedures in

40 CFR 51.165(d). The Director shall modify the source's permit according to the provisions in 40 CFR 51.165(d).

~~(h)~~ (h) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

~~(i)~~ (i) To issue a permit to a source of a nonattainment pollutant, the Director shall determine, in addition to the other requirements of this Rule, that an analysis (produced by the permit applicant) of alternative sites, sizes, production processes, and environmental control techniques for source demonstrates that the benefits of the source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

~~(j)~~ (j) Approval of an application regarding the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply fully with applicable provisions of other rules of this Chapter and any other requirements under local, state, or federal law.

~~(k)~~ (k) When a source or modification subject to this Rule may affect the visibility of a Class I area named in Paragraph (c) of Rule .0530 of this Section, the following procedures shall be followed:

- (1) The owner or operator of the source shall provide an analysis of the impairment to visibility that would occur because of the source or modification and general commercial, industrial and other growth associated with the source or modification;
- (2) The Director shall provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or within 30 days of receiving advance notification of an application. The notification shall be at least 30 days before the publication of the notice for public comment on the application. The notification shall include a copy of all information relevant to the permit application including an analysis provided by the source of the potential impact of the proposed source on visibility;
- (3) The Director shall consider any analysis concerning visibility impairment performed by the Federal Land Manager if the analysis is received within 30 days of notification. If the Director finds that the analysis of the Federal Land Manager fails to demonstrate to his satisfaction that an adverse impact on visibility will result in the Class I area, the Director shall provide in the notice of public hearing on the application, an explanation of his decision or notice where the explanation can be obtained;
- (4) The Director shall only issue permits to those sources whose emissions will be consistent with making reasonable progress toward the national goal of preventing any future, and

remediating any existing, impairment of visibility in mandatory Class I areas when the impairment results from manmade air pollution. In making the decision to issue a permit, the Director shall consider the cost of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source; and

- (5) The Director may require monitoring of visibility in or around any Class I area by the proposed new source or modification when the visibility impact analysis indicates possible visibility impairment.

The requirements of this Paragraph shall not apply to nonprofit health or nonprofit educational institutions.

~~(j) The version of the Code of Federal Regulations incorporated in this Rule is that as of January 1, 1989, and does not include any subsequent amendments or editions to the referenced material.~~

~~(k)(1)~~ Paragraphs (e) and ~~(g)~~ (i) of this Rule shall not apply to a new major stationary source or a major modification of a source of volatile organic compounds or nitrogen oxides for which construction commences after the area in which the source is located has been designated according to Part (a)(1)(B) of this Rule and before the area is designated in 40 CFR 81.334 as nonattainment for ozone if the owner or operator of the source demonstrates, using the Urban Airshed Model (UAM), that the new source or modification will not contribute to or cause a violation. The model used shall be that maintained by the Division. The Division shall only run the model after the permit application has been submitted. The permit application shall be incomplete until the modeling analysis is completed. The owner or operator of the source shall apply such degree of control and obtain such offsets necessary to demonstrate the new source or modified source will not cause or contribute to a violation.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); 143-215.108(b).

OPTION 3

15A NCAC 02D .0531 SOURCES IN NONATTAINMENT AREAS

(a) Applicability.

- (1) Ozone Nonattainment Areas. This Rule applies to major stationary sources and major modifications of sources of volatile organic compounds or nitrogen oxides for which construction commences after the area in which the source is located is designated according to Part (A) or (B) of this Subparagraph and that are located in:
 - (A) areas designated in 40 CFR 81.334 as nonattainment for ozone, or
 - (B) any of the following areas and in that area only when the Director notices in the North Carolina Register that the area is in violation of the ambient air quality standard for ozone:

- (i) Charlotte/Gastonia, consisting of Mecklenburg and Gaston Counties; with the exception allowed under Paragraph (k) of this Rule;
- (ii) Greensboro/Winston-Salem/High Point, consisting of Davidson, Forsyth, and Guilford Counties and that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek and back to Yadkin River; or
- (iii) Raleigh/Durham, consisting of Durham and Wake Counties and Dutchville Township in Granville County.

Violations of the ambient air quality standard for ozone shall be determined according to 40 CFR 50.9.

- (2) Carbon Monoxide Nonattainment Areas. This Rule applies to major stationary sources and major modifications of sources of carbon monoxide located in areas designated in 40 CFR 81.334 as nonattainment for carbon monoxide and for which construction commences after the area in which the source is located is listed in 40 CFR 81.334 as nonattainment for carbon monoxide.
- (3) Redesignation to Attainment. If any county or part of a county to which this Rule applies is later designated in 40 CFR 81.334 as attainment for ozone or carbon monoxide, all sources in that county subject to this Rule before the redesignation date shall continue to comply with this Rule.

(b) For the purpose of this Rule the definitions contained in 40 CFR 51.165(a)(1) and 40 CFR 51.301 shall ~~apply.~~ apply except the definitions of "baseline actual emissions," "pollution control projects," and "projected actual emissions."

OPTION A

- (1) "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated new source review (NSR) pollutant, as determined in accordance with Parts (A) through (C) of this Subparagraph.
 - (A) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding the date that a complete permit application is received by the Division for a permit required under

this Rule. The Director shall allow a different time period, not to exceed 10 years immediately preceding the date that a complete permit application is received by the Division, upon determination that it is more representative of normal source operation.

(i) The average rate shall include fugitive emissions to the extent quantifiable and any authorized emissions associated with startup and shutdown;

(ii) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period.

(iii) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(iv) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.

(v) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Subparts (ii) and (iii) of this Part.

(B) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(C) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Part (A) of this Subparagraph, and for a new emissions unit in accordance with the procedures contained in Part (B) of this Subparagraph.

OPTION B

(1) "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated new source review (NSR) pollutant, as determined in accordance with Parts (A) through (C) of this Subparagraph.

(A) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period immediately preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years immediately preceding the date that a complete permit application is received by the Division, upon determination that it is more representative of normal source operation. The same 24-month period shall be used for all pollutants.

(i) The average rate shall include fugitive emissions to the extent quantifiable and any authorized emissions associated with startup and shutdown;

(ii) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period.

- (iii) The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.
- (iv) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period must be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period can be used for each regulated NSR pollutant.
- (v) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Subparts (ii) and (iii) of this Part.
- (B) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.
- (C) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Part (A) of this Subparagraph, and for a new emissions unit in accordance with the procedures contained in Part (B) of this Subparagraph.

OPTION A

- (2) "Pollution control project" (PCP) means, at an existing emissions unit, any activity, set of work practices, or project (including pollution prevention as defined under 40 CFR 51.165(a)(1)(xxvi)), the purpose of which is to reduce emissions of air pollutants from such

unit. Such qualifying activities or projects may include the replacement or upgrade of an existing emissions control technology with a more effective unit. Other changes that may occur at the source are not considered part of the PCP if they are not necessary to reduce emissions through the PCP. Projects listed in Parts (A) through (F) of this Subparagraph carry the rebuttable presumption during the permitting process that they are environmentally beneficial pursuant to 40 CFR 51.165(e)(2)(i) and, using the criteria in 40 CFR 51.165(e)(2), the Director may rebut such presumption and determine that the project is not environmentally beneficial and the project does not qualify as a PCP. Projects not listed in Parts (A) through (F) may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.165(e)(2) and (e)(5)

- (A) Conventional or advanced flue gas desulfurization or sorbent injection for control of SO₂
- (B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for control of particulate matter or other pollutants.
- (C) Flue gas recirculation, low-NO_x burners or combustors, selective non-catalytic reduction, selective catalytic reduction, low emission combustion (for internal combustion engines), and oxidation-absorption catalyst for control of NO_x
- (D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, hydrocarbon combustion flares, biofiltration, absorbers and adsorbers, and floating roofs for storage vessels for control of volatile organic compounds or hazardous air pollutants. For the purpose of this section, "hydrocarbon combustion flare" means either a flare used to comply with an applicable NSPS or MACT standard (including uses of flares during startup, shutdown, or malfunction permitted under such a standard), or a flare that serves to control emissions of waste streams comprised predominately of hydrocarbons and containing no more than 230 mg/dscm hydrogen sulfide. The installation of thermal controls in NO_x limited non-attainment areas shall only be considered on a case-by-case basis.
- (E) Activities or projects undertaken to accommodate switching (or partially switching) to an inherently less

polluting fuel, to be limited to the following fuel switches:

- (i) Switching from a heavier grade of fuel oil to a lighter fuel oil, or any grade of oil to 0.05 percent sulfur diesel (i.e., from a higher sulfur content #2 fuel or from #6 fuel, to CA 0.05 percent sulfur diesel);
- (ii) Switching from coal, wood, oil, or any other solid fuel to natural gas, propane, gasified coal, or gasified wood;
- (iii) Switching from coal to wood, excluding construction or demolition waste, chemical or pesticide treated wood, and other forms of "unclean" wood;
- (iv) Switching from coal to #2 fuel oil (0.5 percent maximum sulfur content); and
- (v) Switching from high sulfur coal to low sulfur coal (maximum 1.2 percent sulfur content).

(F) Activities or projects undertaken to accommodate switching from the use of one ozone depleting substance (ODS) to the use of a substance with a lower or zero ozone depletion potential (ODP), including changes to equipment needed to accommodate the activity or project, that meet the following requirements:

- (i) The productive capacity of the equipment is not increased as a result of the activity or project.
- (ii) The projected usage of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS. To make this determination, the following procedure shall be used:
 - (I) Determine the ODP of the substances by consulting 40 CFR part 82, subpart A, appendices A and B.
 - (II) Calculate the replaced ODP-weighted amount by multiplying the baseline actual

usage (using the annualized average of any 24 consecutive months of usage within the past 10 years) by the ODP of the replaced ODS.

- (III) Calculate the projected ODP-weighted amount by multiplying the projected actual usage of the new substance by its ODP.
- (IV) If the value calculated in Sub-Subpart (II) of this Subpart is more than the value calculated in Sub-Subpart (III) of this Subpart, then the projected use of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS.

OPTION B

- (2) "Pollution control project" (PCP) means, at an existing emissions unit, any activity, set of work practices, or project (including pollution prevention as defined under 40 CFR 51.165(a)(1)(xxvi)), the purpose of which is to reduce emissions of air pollutants from such unit. Such qualifying activities or projects may include the replacement or upgrade of an existing emissions control technology with a more effective unit. Other changes that may occur at the source are not considered part of the PCP if they are not necessary to reduce emissions through the PCP. Projects listed in Parts (A) through (F) of this Subparagraph are presumed to be environmentally beneficial pursuant to 40 CFR 51.165(e)(2)(i). Projects not listed in Parts (A) through (F) may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.165(e)(2) and (e)(5).
 - (A) Conventional or advanced flue gas desulfurization or sorbent injection for control of SO₂
 - (B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for control of particulate matter or other pollutants.

- (C) Flue gas recirculation, low-NO_x burners or combustors, selective non-catalytic reduction, selective catalytic reduction, low emission combustion (for internal combustion engines), and oxidation-absorption catalyst for control of NO_x
- (D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, hydrocarbon combustion flares, biofiltration, absorbers and adsorbers, and floating roofs for storage vessels for control of volatile organic compounds or hazardous air pollutants. For the purpose of this section, "hydrocarbon combustion flare" means either a flare used to comply with an applicable NSPS or MACT standard (including uses of flares during startup, shutdown, or malfunction permitted under such a standard), or a flare that serves to control emissions of waste streams comprised predominately of hydrocarbons and containing no more than 230 mg/dscm hydrogen sulfide. The installation of thermal controls in NO_x limited non-attainment areas shall only be considered on a case-by-case basis.
- (E) Activities or projects undertaken to accommodate switching (or partially switching) to an inherently less polluting fuel, to be limited to the following fuel switches:
- (i) Switching from a heavier grade of fuel oil to a lighter fuel oil, or any grade of oil to 0.05 percent sulfur diesel (i.e., from a higher sulfur content #2 fuel or from #6 fuel, to CA 0.05 percent sulfur diesel);
 - (ii) Switching from coal, wood, oil, or any other solid fuel to natural gas, propane, gasified coal, or gasified wood;
 - (iii) Switching from coal to wood, excluding construction or demolition waste, chemical or pesticide treated wood, and other forms of "unclean" wood;
 - (iv) Switching from coal to #2 fuel oil (0.5 percent maximum sulfur content); and
 - (v) Switching from high sulfur coal to low sulfur coal
- (maximum 1.2 percent sulfur content).
- (F) Activities or projects undertaken to accommodate switching from the use of one ozone depleting substance (ODS) to the use of a substance with a lower or zero ozone depletion potential (ODP,) including changes to equipment needed to accommodate the activity or project, that meet the following requirements:
- (i) The productive capacity of the equipment is not increased as a result of the activity or project.
 - (ii) The projected usage of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS. To make this determination, the following procedure shall be used:
 - (I) Determine the ODP of the substances by consulting 40 CFR part 82, subpart A, appendices A and B.
 - (II) Calculate the replaced ODP-weighted amount by multiplying the baseline actual usage (using the annualized average of any 24 consecutive months of usage within the past 10 years) by the ODP of the replaced ODS.
 - (III) Calculate the projected ODP-weighted amount by multiplying the projected actual usage of the new substance by its ODP.
 - (IV) If the value calculated in Sub-Subpart (II) of this Subpart is more than the value calculated in Sub-Subpart (III) of this Subpart, then the projected use of the new substance is lower, on an ODP-

weighted basis, than the baseline usage of the replaced ODS.

OPTION C

(2) "Pollution control project" (PCP) means, at an existing emissions unit, any activity, set of work practices, or project (including pollution prevention as defined under 40 CFR 51.165(a)(1)(xxvi)), the purpose of which is to reduce emissions of air pollutants from such unit. Such qualifying activities or projects may include the replacement or upgrade of an existing emissions control technology with a more effective unit. Other changes that may occur at the source are not considered part of the PCP if they are not necessary to reduce emissions through the PCP. Projects listed in Parts (A) through (F) of this Subparagraph carry the rebuttable presumption during the permitting process that they are environmentally beneficial pursuant to 40 CFR 51.165(e)(2)(i) and, using the criteria in Paragraph (q) of this Rule, the Director may rebut such presumption and determine that the project is not environmentally beneficial and the project does not qualify as a PCP. Projects not listed in Parts (A) through (F) may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.165(e)(2) and (e)(5)

(A) Conventional or advanced flue gas desulfurization or sorbent injection for control of SO₂

(B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for control of particulate matter or other pollutants.

(C) Flue gas recirculation, low-NO_x burners or combustors, selective non-catalytic reduction, selective catalytic reduction (for internal combustion engines), and oxidation-absorption catalyst for control of NO_x

(D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, hydrocarbon combustion flares, biofiltration, absorbers and adsorbers, and floating roofs for storage vessels for control of volatile organic compounds or hazardous air pollutants. For the purpose of this section, "hydrocarbon combustion flare" means either a flare used to comply with an applicable NSPS or MACT standard (including uses of flares during startup, shutdown, or malfunction permitted under such a standard), or a flare that

serves to control emissions of waste streams comprised predominately of hydrocarbons and containing no more than 230 mg/dscm hydrogen sulfide. The installation of thermal controls in NO_x limited non-attainment areas shall only be considered on a case-by-case basis.

(E) Activities or projects undertaken to accommodate switching (or partially switching) to an inherently less polluting fuel, to be limited to the following fuel switches:

(i) Switching from a heavier grade of fuel oil to a lighter fuel oil, or any grade of oil to 0.05 percent sulfur diesel (i.e., from a higher sulfur content #2 fuel or from #6 fuel, to CA 0.05 percent sulfur diesel);

(ii) Switching from coal, wood, oil, or any other solid fuel to natural gas, propane, gasified coal, or gasified wood;

(iii) Switching from coal to wood, excluding construction or demolition waste, chemical or pesticide treated wood, and other forms of "unclean" wood;

(iv) Switching from coal to #2 fuel oil (0.5 percent maximum sulfur content); and

(v) Switching from high sulfur coal to low sulfur coal (maximum 1.2 percent sulfur content).

(F) Activities or projects undertaken to accommodate switching from the use of one ozone depleting substance (ODS) to the use of a substance with a lower or zero ozone depletion potential (ODP,) including changes to equipment needed to accommodate the activity or project, that meet the following requirements:

(i) The productive capacity of the equipment is not increased as a result of the activity or project.

(ii) The projected usage of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS. To make this determination, the following procedure shall be used:

- (I) Determine the ODP of the substances by consulting 40 CFR part 82, subpart A, appendices A and B.
- (II) Calculate the replaced ODP-weighted amount by multiplying the baseline actual usage (using the annualized average of any 24 consecutive months of usage within the past 10 years) by the ODP of the replaced ODS.
- (III) Calculate the projected ODP-weighted amount by multiplying the projected actual usage of the new substance by its ODP.
- (IV) If the value calculated in Sub-Subpart (II) of this Subpart is more than the value calculated in Sub-Subpart (III) of this Subpart, then the projected use of the new substance is lower, on an ODP-weighted basis, than the baseline usage of the replaced ODS.

OPTION A

- (3) "Projected actual emissions" means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the five or 10 years (12-month period) following the date that the unit resumes regular operation after the project in accordance with Paragraph (p) of this Rule. In determining the projected actual emissions under this Subparagraph (before beginning actual construction), the owner or operator of the major stationary source shall:
 - (A) consider all relevant information, including historical operational data, the company's own representations, the company's expected business activity and the company's highest

- projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the federally approved State Implementation Plan;
- (B) include fugitive emissions to the extent quantifiable and emissions associated with startups and shutdowns;
- (C) include the emissions resulting from increased utilization because of product demand growth that the unit could not have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph; and
- (D) exclude the emissions, including any increased utilization because of product demand growth, that a unit could have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph that are unrelated to the particular project.

In lieu of using the method set out in Parts (A) through (C) of this Subparagraph, the owner or operators may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph 40 CFR 51.165(a)(1)(iii).

OPTION B

- (3) "Projected actual emissions" means the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the five or 10 years (12-month period) following the date that the unit resumes regular operation after the project in accordance with Paragraph (p) of this Rule. In determining the projected actual emissions under this Subparagraph (before beginning actual construction), the owner or operator of the major stationary source shall:
 - (A) consider all relevant information, including historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the federally approved State Implementation Plan;
 - (B) include fugitive emissions to the extent quantifiable and emissions associated with startups and shutdowns;
 - (C) include the emissions resulting from increased utilization because of

product demand growth that the unit could not have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph; and

(D) include the emissions, including any increased utilization because of product demand growth, that a unit could have achieved during the consecutive 24-month period used to establish the base line actual emissions under this Subparagraph that are unrelated to the particular project.

In lieu of using the method set out in Parts (A) through (C) of this Subparagraph, the owner or operators may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph 40 CFR 51.165(a)(1)(iii).

(4) In the definition of "net emissions increase," the The reasonable period specified in 40 CFR 51.165(a)(1)(vi)(C)(1) shall be seven years.

(c) This Rule is not applicable to:

- (1) complex sources of air pollution regulated only under Section .0800 of this Subchapter and not under any other rule in this Subchapter;
- (2) emission of pollutants at the new major stationary source or major modification located in the nonattainment area that are pollutants other than the pollutant or pollutants for which the area is nonattainment. (A major stationary source or major modification that is major for volatile organic compounds or nitrogen oxides is also major for ozone.);
- (3) emission of pollutants for which the source or modification is not major;
- (4) a new source or modification that qualifies for exemption under the provision of 40 CFR 51.165(a)(4); and
- (5) emission of compounds listed under 40 CFR 51.100(s) as having been determined to have negligible photochemical reactivity except carbon monoxide.

(d) 15A NCAC 2Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the source shall apply for and receive a permit as required in 15A NCAC 2Q .0300 or .0500.

(e) To issue a permit to a source to which this Rule applies, the Director shall determine that the source will meet the following requirements:

- (1) The new major stationary source or major modification will emit the nonattainment pollutant at a rate no more than the lowest achievable emission rate;
- (2) The owner or operator of the proposed new or modified major stationary source or major

modification has demonstrated that all major stationary sources in the State that are owned or operated by this person (or any entity controlling, controlled by, or under common control with this person) are subject to emission limitations and are in compliance, or on a schedule for compliance that is federally enforceable or contained in a court decree, with all applicable emission limitations and standards of this Subchapter that EPA has authority to approve as elements of the North Carolina State Implementation Plan for Air Quality;

(3) The owner or operator of the proposed new major stationary source or major modification will obtain sufficient emission reductions of the nonattainment pollutant from other sources in the nonattainment area so that the emissions from the new major source and associated new minor sources will be less than the emissions reductions by a ratio of at least 1.00 to 1.15 for volatile organic compounds and nitrogen oxides and by a ratio of lesser than one to one for carbon monoxide. The baseline for this emission offset shall be the actual emissions of the source from which offset credit is obtained. Emission reductions shall not include any reductions resulting from compliance (or scheduled compliance) with applicable rules in effect before the application. The difference between the emissions from the new major source and associated new minor sources of carbon monoxide and ~~the~~ emission reductions shall be sufficient to represent reasonable further progress toward attaining the Ambient Air Quality Standards. The emissions reduction credits shall also conform to the provisions of 40 CFR 51.165(a)(3)(ii)(A) through (J) ~~(G)~~; and

(4) The North Carolina State Implementation Plan for Air Quality is being carried out for the nonattainment area in which the proposed source is located.

(f) 40 CFR 51.165(f)(10)(iv)(A) is changed to read: "If the emissions level calculated in accordance with paragraph (f)(6) of this section is equal to or greater than 80 percent of the PAL level, the Director shall renew the PAL at the same level." 40 CFR 51.165(f)(10)(iv)(B) is not incorporated by reference.

(g) The owner or operator of a major stationary sources that meets the requirements for using the clean unit provisions in 40 CFR 51.165(c) may use the provisions in 40 CFR 51.165(c) by following the procedures in 40 CFR 51.165(c). The Director shall modify the source's permit according to the provisions in 40 CFR 51.165(c). 40 CFR 51.165(c)(3)(i) is changed to read as follows: "Permitting requirement. The emissions unit shall have received a major NSR permit within the last five years. The owner or operator shall maintain and be able to provide information that would demonstrate that this permitting requirement is met."

OPTION A

(h) If a source does not qualify as a clean unit under 40 CFR 51.165(c), but does qualify to use the provisions in 40 CFR 51.165(d), the owner or operator of the source may use the provisions in 40 CFR 51.155(d) by following the procedures in 40 CFR 51.165(d). The Director shall modify the source's permit according to the provisions in 40 CFR 51.165(d). A LAER analysis shall be used to determine if the unit qualifies for a clean unit exemption.

OPTION B

(h) If a source does not qualify as a clean unit under 40 CFR 51.165(c), but does qualify to use the provisions in 40 CFR 51.165(d), the owner or operator of the source may use the provisions in 40 CFR 51.155(d) by following the procedures in 40 CFR 51.165(d). The Director shall modify the source's permit according to the provisions in 40 CFR 51.165(d). A LAER analysis shall be used to determine if the unit qualifies for a clean unit exemption. The word "comparable" in 40 CFR 51.165(d) is changed to the word "equal."

~~(i)~~ (i) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

~~(j)~~ (j) To issue a permit to a source of a nonattainment pollutant, the Director shall determine, in addition to the other requirements of this Rule, that an analysis (produced by the permit applicant) of alternative sites, sizes, production processes, and environmental control techniques for source demonstrates that the benefits of the source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

~~(k)~~ (k) Approval of an application regarding the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply fully with applicable provisions of other rules of this Chapter and any other requirements under local, state, or federal law.

~~(l)~~ (l) When a source or modification subject to this Rule may affect the visibility of a Class I area named in Paragraph (c) of Rule .0530 of this Section, the following procedures shall be followed:

- (1) The owner or operator of the source shall provide an analysis of the impairment to visibility that would occur because of the source or modification and general

- (2) commercial, industrial and other growth associated with the source or modification;
The Director shall provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or within 30 days of receiving advance notification of an application. The notification shall be at least 30 days before the publication of the notice for public comment on the application. The notification shall include a copy of all information relevant to the permit application including an analysis provided by the source of the potential impact of the proposed source on visibility;
- (3) The Director shall consider any analysis concerning visibility impairment performed by the Federal Land Manager if the analysis is received within 30 days of notification. If the Director finds that the analysis of the Federal Land Manager fails to demonstrate to his satisfaction that an adverse impact on visibility will result in the Class I area, the Director shall provide in the notice of public hearing on the application, an explanation of his decision or notice where the explanation can be obtained;
- (4) The Director shall only issue permits to those sources whose emissions will be consistent with making reasonable progress toward the national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory Class I areas when the impairment results from manmade air pollution. In making the decision to issue a permit, the Director shall consider the cost of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source; and
- (5) The Director may require monitoring of visibility in or around any Class I area by the proposed new source or modification when the visibility impact analysis indicates possible visibility impairment.

The requirements of this Paragraph shall not apply to nonprofit health or nonprofit educational institutions.

~~(j) The version of the Code of Federal Regulations incorporated in this Rule is that as of January 1, 1989, and does not include any subsequent amendments or editions to the referenced material.~~

~~(k)~~ (m) Paragraphs (e) and ~~(g)~~ (j) of this Rule shall not apply to a new major stationary source or a major modification of a source of volatile organic compounds or nitrogen oxides for which construction commences after the area in which the source is located has been designated according to Part (a)(1)(B) of this Rule and before the area is designated in 40 CFR 81.334 as nonattainment for ozone if the owner or operator of the source demonstrates, using the Urban Airshed Model (UAM), that the new source or modification will not contribute to or cause a violation. The model used shall be that maintained by the Division. The Division shall only run the model after the permit

application has been submitted. The permit application shall be incomplete until the modeling analysis is completed. The owner or operator of the source shall apply such degree of control and obtain such offsets necessary to demonstrate the new source or modified source will not cause or contribute to a violation.

(n) The Director shall include in the facility's permit conditions for monitoring, recordkeeping, and reporting necessary to determine compliance with the requirements and provisions of this Rule according to 15A NCAC 2D .0605 and 15A NCAC 2Q .0508.

(o) The owner or operator of a source shall maintain a copy of all information used to establish the source's baseline actual emissions for 10 years following the date that the permit is issued if the project involves increasing the emissions unit's design capacity or its potential to emit the regulated NSR pollutant by a significant amount, as defined at 40 CFR 51.165(a)(1)(x), when compared to the pre-modification potential to emit; otherwise the owner or operator shall maintain a copy of all information used to establish the source's baseline actual emissions for five years following the date that the permit is issued

(p) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the Director shall include the projected actual emissions plus the emissions excluded under Part (b)(3)(D) of this Rule in tons per year in the source's permit as an emission limit. This limitation shall remain in the permit for 10 years if the project involves increasing the emission unit's design capacity or its potential to emit the regulated NSR pollutant by a significant amount, as defined at 40 CFR 51.165(a)(1)(x), when compared to the pre-modification potential to emit; otherwise the limitation shall remain in the permit for five years. The owner or operator shall submit a permit application documenting the projected actual emissions and emissions increases for the project and requesting a change in the permit to include the aforementioned emission limitation. The owner or operator shall not commence construction on the project prior to receiving the revised permit

PART OF OPTION C FOR PCP

(q) In deciding whether to rebut a pollution control project, the criteria that the Director shall consider shall include:

- (1) the type and design specification of the control devices,
- (2) types and quantities of emissions, and
- (3) impacts on ambient air quality.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); 143-215.108(b).

SECTION .0600 - MONITORING: RECORDKEEPING: REPORTING

15A NCAC 02D .0606 SOURCES COVERED BY APPENDIX P OF 40 CFR PART 51

(a) The following sources shall be monitored as described in Paragraph 2 of Appendix P of 40 CFR Part 51:

- (1) fossil fuel-fired steam generators,
- (2) nitric acid plants,
- (3) sulfuric acid plants, and
- (4) petroleum refineries.

Sources covered by Rule .0524 of this Subchapter are exempt from this Rule.

(b) The monitoring systems required under Paragraph (a) of this Rule shall meet the minimum specifications described in Paragraphs 3.3 through 3.8 of Appendix P of 40 CFR Part 51.

(c) The excess emissions recorded by the monitoring systems required to be installed under this Rule shall be reported no later than 30 days after the end of the quarter to the Division in the manner described in Paragraphs 4 and 5.1 through 5.3.3 of Appendix P of 40 CFR Part 51 except that a six-minute time period shall be deemed as an appropriate alternative opacity averaging period as described in Paragraph 4.2 of Appendix P of 40 CFR Part 51. The owner or operators of any sources subject to this Rule that are required to monitor emissions of sulfur dioxide or nitrogen oxides under any other state or federal rule with continuous emission monitoring systems shall monitor compliance with the sulfur dioxide emission standard in Rule .0516 of this Subchapter and the nitrogen oxide emission standard in Rule .0519 or Section .1400 of this Subchapter with a continuous emission monitoring system. Compliance with sulfur dioxide and nitrogen oxide emission standards shall be determined by averaging hourly continuous emission monitoring system values over a 24-hour block period beginning at midnight. To compute the 24-hour block average, the average hourly values shall be summed, and the sum shall be divided by 24. A minimum of four data points, equally spaced, is required to determine a valid hour value unless the continuous emission monitoring system is installed to meet the provisions of 40 CFR Part 75. If a continuous emission monitoring system is installed to meet the provisions of 40 CFR Part 75, the minimum number of data points shall be determined by 40 CFR Part 75.

(d) For emissions of sulfur dioxide, fuel analysis may be used in place of a continuous emissions monitoring system if the source is not required to monitor emissions of sulfur dioxide using a continuous emissions monitoring system under another state or federal rule. If fuel analysis is used as an alternative method to determine emissions of sulfur dioxide, the test methods described in Parts (c)(4)(A) and (B) of Rule .0501 of this Subchapter shall be used except that gross or composite samples, gross caloric value, moisture content, and sulfur content shall be determined per shipment. Alternatively, gross or composite samples, gross caloric value, moisture content, and sulfur content may be determined sampling the fuel as fired if the owner or operator demonstrates to the Director that sampling as fired provides a more accurate estimation of sulfur dioxide emissions than sampling each shipment. If sulfur dioxide emissions are determined sampling fuel as fired, then a fuel sample shall be taken every four hours. These four-hour samples shall be composited into a daily sample, and the daily sample shall be composited into a weekly sample. This weekly sample shall be analyzed using the procedures in Parts (c)(4)(A) and (B) of Rule .0501 of this Subchapter. The sulfur dioxide emission rate shall also be determined using fuel analysis data. Sulfur retention credit shall be granted and used for computing sulfur dioxide emission rates if a source, on a case-by-case basis, quantitatively and empirically demonstrates the sulfur retention.

(e) Wherever the language of the referenced portion of Appendix P of 40 CFR Part 51 speaks of the "state" or "state plan", the requirements described therein shall apply to those sources to which the requirements pertain.

(f) The owner or operator of the source shall conduct a daily zero and span check of the continuous opacity monitoring system following the manufacturer's recommendations and shall comply with the requirements of Rule .0613 of this Section.

(g) The owner or operator of the source may request to use a different procedure or methodology than that required by this Rule if one of the conditions identified in 40 CFR Part 51, Appendix P, Section 3.9 exists. The person requesting to use a different procedure or methodology shall submit the request to the Director along with a description of the different procedure or methodology proposed to be used, an explanation of why the procedure or methodology required by this Rule will not work, and a showing that the proposed procedure or methodology is equivalent to the procedure or methodology being replaced. The Director shall approve the use of this procedure or methodology if he finds that one of the conditions identified in 40 CFR Part 51, Appendix P, Section 3.9 exists, that the procedure or methodology required by this Rule will not work, and that the proposed procedure or methodology is equivalent to the procedure or methodology that it will replace.

~~(g)~~(h) The owner or operator of the source shall report to the Director no later than 30 days following the end of the quarter the following information:

- (1) for fuel analysis per shipment:
 - (A) the quantity and type of fuels burned,
 - (B) the BTU value,
 - (C) the sulfur content in percent by weight, and
 - (D) the calculated sulfur dioxide emission rates expressed in the same units as the applicable standard.
- (2) for continuous monitoring of emissions:
 - (A) the daily calculated sulfur dioxide and nitrogen oxide emission rates expressed in the same units as the applicable standard for each day, and
 - (B) other information required under Appendix P of 40 CFR Part 51.

~~(h)~~(i) If emission testing for compliance with the sulfur dioxide emission standard is required, the testing shall be done according to 40 CFR Part 60, Appendix A, Method 6.

~~(i)~~(j) If emission testing for compliance with the nitrogen oxide emission standard is required, the testing shall be done according to 40 CFR Part 60, Appendix A, Method 7.

Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(4).

15A NCAC 02D .0608 OTHER LARGE COAL OR RESIDUAL OIL BURNERS

(a) The owner or operator of any fuel burning unit shall determine sulfur dioxide emissions into the ambient air if the unit:

- (1) burns coal or residual oil;
- (2) is not required to monitor sulfur dioxide emissions by Rules .0524 or .0606 of this Subchapter.
- (3) has a total heat input of more than 250 million BTU per hour from coal and residual oil; and

(4) has an annual average capacity factor greater than 30 percent as determined from the three most recent calendar year reports to the Federal Power Commission or as otherwise demonstrated to the Director by the owner or operator. (If the unit has not been in existence for three calendar years, its three-calendar-year average capacity factor shall be determined by estimating its annual capacity factors for enough future years to allow a three-calendar-year average capacity factor to be computed. If this three-calendar-year average capacity factor exceeds 30 percent, the unit shall be monitored. If this three-calendar-year average capacity factor does not exceed 30 percent, the unit need not be monitored.)

(b) Once the unit is being monitored in accordance with Paragraph (a) of this Rule, it shall continue to be monitored until its most recent three-calendar-year average capacity factor does not exceed 25 percent. Once the unit is not being monitored in accordance with Subparagraph (a) of this Rule, it need not be monitored until its most recent three-calendar-year average capacity factor exceeds 35 percent.

(c) If units required to be monitored have a common exhaust or if units required to be monitored have a common exhaust with units not required to be monitored, then the common exhaust may be monitored, and the sulfur dioxide emissions need not be apportioned among the units with the common exhaust.

(d) The owner or operator of the source shall determine sulfur dioxide emissions by:

- (1) an instrument for continuous monitoring and recording of sulfur dioxide emissions, or
- (2) analyses of representative samples of fuels to determine BTU value and percent sulfur content.

(e) The owner or operators of any sources subject to this Rule that are required to monitor emissions of sulfur dioxide under any other state or federal rule with continuous emission monitoring systems shall monitor compliance with the sulfur dioxide emission standard in Rule .0516 of this Subchapter with a continuous emission monitoring system. Compliance with sulfur dioxide emission standards shall be determined by averaging hourly continuous emission monitoring system values over a 24-hour block period beginning at midnight. To compute the 24-hour block average, the average hourly values shall be summed, and the sum shall be divided by 24. A minimum of four data points, equally spaced, is required to determine a valid hour value unless the continuous emission monitoring system is installed to meet the provisions of 40 CFR Part 75. If a continuous emission monitoring system is installed to meet the provisions of 40 CFR Part 75, the minimum number of data points shall be determined by 40 CFR Part 75.

(f) For emissions of sulfur dioxide, fuel analysis may be used in place of a continuous emissions monitoring system if the source is not required to monitor emissions of sulfur dioxide using a continuous emissions monitoring system under another state or federal rule. If fuel analysis is used as an alternative method to determine emissions of sulfur dioxide, then:

- (1) for coal, the test methods described in Rule 2D .0501(c)(4)(A) of this Subchapter shall be used

except that gross or composite samples, gross caloric value, moisture content, and sulfur content shall be determined per shipment. Alternatively, gross or composite samples, gross caloric value, moisture content, and sulfur content may be determined sampling the fuel as fired if the owner or operator demonstrates to the Director that sampling as fired provides a more accurate estimation of sulfur dioxide emissions than sampling each shipment. If sulfur dioxide emissions are determined sampling fuel as fired, then a fuel sample shall be taken every four hours. These four-hour samples shall be composited into a daily sample, and the daily sample shall be composited into a weekly sample. This weekly sample shall be analyzed using the procedures in Parts (c)(4)(A) and (B) of Rule .0501 of this Subchapter. The sulfur dioxide emission rate shall also be determined using fuel analysis data. Sulfur retention credit shall be granted and used for computing sulfur dioxide emission rates if a source, on a case-by-case basis, quantitatively and empirically demonstrates the sulfur retention.

- (2) for residual oil, the test methods described in Rule .0501(c)(4)(B) of this Subchapter shall be used except that sulfur content shall be determined per shipment. Alternatively, gross or composite samples, gross caloric value, moisture content, and sulfur content may be determined sampling the fuel as fired if the owner or operator demonstrates to the Director that sampling as fired provides a more accurate estimation of sulfur dioxide emissions than sampling each shipment. If sulfur dioxide emissions are determined sampling fuel as fired, then a fuel sample shall be taken every four hours. These four-hour samples shall be composited into a daily sample, and the daily sample shall be composited into a weekly sample. This weekly sample shall be analyzed using the procedures in Parts (c)(4)(A) and (B) of Rule .0501 of this Subchapter. Residual oil shall be collected in accordance with ASTM D4177 or D4057.

(g) The owner or operator of the source may request to use a different procedure or methodology than that required by this Rule if one of the conditions identified in 40 CFR Part 51, Appendix P, Section 3.9 exists. The person requesting to use a different procedure or methodology shall submit the request to the Director along with a description of the different procedure or methodology proposed to be used, an explanation of why the procedure or methodology required by this Rule will not work, and a showing that the proposed procedure or methodology is equivalent to the procedure or methodology being replaced. The Director shall approve the use of this procedure or methodology if he finds that one of the conditions identified in 40 CFR Part 51, Appendix P, Section 3.9 exists, that the procedure or methodology required by this Rule will not work, and that the

proposed procedure or methodology is equivalent to the procedure or methodology that it will replace.

~~(g)~~(h) The owner or operator of the source shall report to the Director no later than 30 days following the end of the quarter the following information:

- (1) for fuel analysis per shipment:
 - (A) the quantity and type of fuels burned,
 - (B) the BTU value,
 - (C) the sulfur content in percent by weight, and
 - (D) the calculated sulfur dioxide emission rates expressed in the same units as the applicable standard.
- (2) for continuous monitoring of emissions:
 - (A) the daily calculated sulfur dioxide emission rates expressed in the same units as the applicable standard for each day, and
 - (B) other information required under Appendix P of 40 CFR Part 51.

~~(h)~~(i) The owner or operator of the source shall conduct a daily zero and span check of the continuous emission monitoring system following the manufacturer's recommendations and shall comply with the requirements of Rule .0613 of this Section.

~~(i)~~(j) If emission testing for compliance with the sulfur dioxide emission standard is required, the testing shall be done according to 40 CFR Part 60, Appendix A, Method 6.

Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(4).

SECTION .0800 - COMPLEX SOURCES

15A NCAC 02D .0801 PURPOSE AND SCOPE

(a) The purpose of this Section is to set forth requirements of the Commission relating to construction or modification of a transportation facility which may result in an ambient air quality standard for carbon monoxide being exceeded.

(b) For purposes of this Section any transportation facility that was under construction or was the subject of a contract for construction prior to November 15, 1973, shall not be considered to be a new air pollution source.

(c) Approval to construct or modify a transportation facility shall not relieve any owner or developer of the transportation facility of the responsibility to comply with the state control strategy and all local and state regulations which are part of the North Carolina State Implementation Plan for Air Quality.

Authority G.S. 143-215.3(a)(1); 143-215.109.

15A NCAC 02D .0803 HIGHWAY PROJECTS

~~Environmental assessments regarding highway projects shall be reviewed in accordance with the National Environmental Policy Act and the North Carolina Environmental Policy Act. If there is no assessment, or if an assessment shows that there may be a problem in complying with an ambient air quality standard, or if the environmental impact assessment fails to show that the highway project will not result in violations of applicable portions of the control strategy, and will not interfere with~~

~~attainment or maintenance of a national standard, then the following regulatory provisions shall apply:~~

- ~~(1) A person shall not construct or modify any highway if that highway will result in a contravention of ambient air quality standards;~~
- ~~(2) Before construction or modification of any highway with an expected maximum traffic volume of 2,000 vehicles per hour or more within 10 years, a person shall apply for and have received a permit as described in 15A NCAC 2Q .0600, and shall comply with any terms and conditions therein.~~

Authority G.S. 143-215.3(a)(1); 143-215.109.

SECTION .1200 - CONTROL OF EMISSIONS FROM INCINERATORS

15A NCAC 02D .1208 OTHER INCINERATORS

(a) Applicability.

- (1) This Rule applies to any incinerator not covered under Rules .1203 through .1207 or .1210 of this Section.
- (2) If any incinerator subject to this Rule:
 - (A) is used solely to cremate pets; or
 - (B) if the emissions of all toxic air pollutants from an incinerator subject to this Rule and associated waste handling and storage are less than the levels listed in 15A NCAC 02Q .0711;

the incinerator shall be exempt from Subparagraphs (b)(6) through (b)(9) and Paragraph (c) of this Rule.

(b) Emission Standards.

- (1) The emission standards in this Rule apply to any incinerator subject to this Rule except where Rules ~~.0525~~, .0524, 1110, or .1111 of this Subchapter applies. However, when Subparagraphs (8) or (9) of this Paragraph and Rules .0524, .1110, or .1111 of this Subchapter regulate the same pollutant, the more restrictive provision for each pollutant shall apply, notwithstanding provisions of Rules .0524, .1110, or .1111 of this Subchapter to the contrary.
- (2) Particulate Matter. Any incinerator subject to this Rule shall comply with one of the following emission standards for particulate matter:
 - (A) For refuse charge rates between 100 and 2000 pounds per hour, the allowable emissions rate for particulate matter from any stack or chimney of any incinerator subject to this Rule shall not exceed the level calculated with the equation $E=0.002P$ calculated to two significant figures, where "E" equals the allowable emission rate for

particulate matter in pounds per hour and "P" equals the refuse charge rate in pounds per hour. For refuse charge rates of 0 to 100 pounds per hour the allowable emission rate in 0.2 pounds per hour. For refuse charge rates of 2000 pounds per hour or greater the allowable emission rate shall be 4.0 pounds per hour. Compliance with this Part shall be determined by averaging emissions over a three-hour block period.

(B) Instead of meeting the standards in Part (A) of this Subparagraph, the owner or operator of any incinerator subject to this Rule may choose to limit particulate emissions from the incinerator to 0.08 grains per dry standard cubic foot corrected to 12 percent carbon dioxide. In order to choose this option, the owner or operator of the incinerator shall demonstrate that the particulate ambient air quality standards will not be violated. To correct to 12 percent carbon dioxide, the measured concentration of particulate matter is multiplied by 12 and divided by the measured percent carbon dioxide. Compliance with this Part shall be determined by averaging emissions over a three-hour block period.

- (3) Visible Emissions. Any incinerator subject to this Rule shall comply with Rule .0521 of this Subchapter for the control of visible emissions.
- (4) Sulfur Dioxide. Any incinerator subject to this Rule shall comply with Rule .0516 of this Subchapter for the control of sulfur dioxide emissions.
- (5) Odorous Emissions. Any incinerator subject to this Rule shall comply with Rule .1806 of this Subchapter for the control of odorous emissions.
- (6) Hydrogen Chloride. Any incinerator subject to this Rule shall control emissions of hydrogen chloride such that they do not exceed four pounds per hour unless they are reduced by at least 90 percent by weight or to no more than 50 parts per million by volume corrected to seven percent oxygen (dry basis). Compliance with this Subparagraph shall be determined by averaging emissions over a one-hour period.
- (7) Mercury Emissions. Emissions of mercury and mercury compounds from the stack or chimney of any incinerator subject to this Rule shall not exceed 0.032 pounds per hour. Compliance with this Subparagraph shall be determined by averaging emissions over a one-hour period.

- (8) Toxic Emissions. The owner or operator of any incinerator subject to this Rule shall demonstrate compliance with Section .1100 of this Subchapter according to 15A NCAC 02Q .0700.
- (9) Ambient Standards.
- (A) In addition to the ambient air quality standards in Section .0400 of this Subchapter, the following ambient air quality standards, which are an annual average, in milligrams per cubic meter at 77 degrees F (25 degrees C) and 29.92 inches (760 mm) of mercury pressure, and which are increments above background concentrations, shall apply aggregately to all incinerators at a facility subject to this Rule:
- (i) arsenic and its compounds
2.3x10-7
 - (ii) beryllium and its compounds
4.1x10-6
 - (iii) cadmium and its compounds
5.5x10-6
 - (iv) chromium (VI) and its compounds
8.3x10-8
- (B) The owner or operator of a facility with incinerators subject to this Rule shall demonstrate compliance with the ambient standards in Subparts (i) through (iv) of Part (A) of this Subparagraph by following the procedures set out in Rule .1106 of this Subchapter. Modeling demonstrations shall comply with the requirements of Rule .0533 of this Subchapter.
- (C) The emission rates computed or used under Part (B) of this Subparagraph that demonstrate compliance with the ambient standards under Part (A) of this Subparagraph shall be specified as a permit condition for the facility with incinerators subject to this Rule as their allowable emission limits unless Rule .0524, .1110 or .1111 of this Subchapter requires more restrictive rates.
- (c) Operational Standards.
- (1) The operational standards in this Rule do not apply to any incinerator subject to this Rule when applicable operational standards in Rule .0524, .1110, or .1111 of this Subchapter apply.
 - (2) Crematory Incinerators. Gases generated by the combustion shall be subjected to a minimum temperature of 1600 degrees F for a period of not less than one second.
 - (3) Other Incinerators. All incinerators not subject to any other rule in this Section shall meet the following requirement: Gases generated by the combustion shall be subjected to a minimum temperature of 1800 degrees F for a period of not less than one second. The temperature of 1800 degrees F shall be maintained at least 55 minutes out of each 60-minute period, but at no time shall the temperature go below 1600 degrees F.
- (4) Except during start-up where the procedure has been approved according to Rule .0535(g) of this Subchapter, waste material shall not be loaded into any incinerator subject to this Rule when the temperature is below the minimum required temperature. Start-up procedures may be determined on a case-by-case basis according to Rule .0535(g) of this Subchapter. Any incinerator subject to this Rule shall have automatic auxiliary burners that are capable of maintaining the required minimum temperature in the secondary chamber excluding the heat content of the wastes.
- (d) Test Methods and Procedures.
- (1) The test methods and procedures described in Rule .0501 of this Subchapter and in 40 CFR Part 60 Appendix A and 40 CFR Part 61 Appendix B shall be used to determine compliance with emission rates. Method 29 of 40 CFR Part 60 shall be used to determine emission rates for metals. However, Method 29 shall be used to sample for chromium (VI), and SW 846 Method 0060 shall be used for the analysis.
 - (2) The Director may require the owner or operator to test his incinerator to demonstrate compliance with the emission standards listed in Paragraph (b) of this Rule.
- (e) Monitoring, Recordkeeping, and Reporting.
- (1) The owner or operator of an incinerator subject to the requirements of this Rule shall comply with the monitoring, recordkeeping, and reporting requirements in Section .0600 of this Subchapter.
 - (2) The owner or operator of an incinerator, except an incinerator meeting the requirements of Parts .1201(c)(4)(A) through (D) of this Section, shall maintain and operate a continuous temperature monitoring and recording device for the primary chamber and, where there is a secondary chamber, for the secondary chamber. The Director may require a temperature monitoring device for incinerators meeting the requirements of Parts .1201(c)(4)(A) through (D) of this Section. The owner or operator of an incinerator that has installed air pollution abatement equipment to reduce emissions of hydrogen chloride shall install, operate, and maintain continuous monitoring equipment to measure pH for wet scrubber systems and rate of alkaline injection for dry scrubber systems.

The Director shall require the owner or operator of an incinerator with a permitted charge rate of 750 pounds per hour or more to install, operate, and maintain continuous monitors for oxygen or for carbon monoxide or both as necessary to determine proper operation of the incinerator. The Director may require the owner or operator of an incinerator with a permitted charge rate of less than 750 pounds per hour to install, operate, and maintain monitors for oxygen or for carbon monoxide or both as necessary to determine proper operation of the incinerator.

(f) Excess Emissions and Start-up and Shut-down. Any incinerator subject to this Rule shall comply with Rule .0535, Excess Emissions Reporting and Malfunctions, of this Subchapter.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10).

15A NCAC 02D .1210 COMMERCIAL AND INDUSTRIAL SOLID WASTE INCINERATION UNITS

(a) Applicability. With the exceptions in Paragraph (b) of this Rule, this Rule applies to the commercial and industrial solid waste incinerators (CISWI).

(b) Exemptions. The following types of incineration units are exempted from this Rule:

- (1) incineration units covered under Rules .1203 through .1206 of this Section;
- (2) units, burning 90 percent or more by weight on a calendar-quarter basis, excluding the weight of auxiliary fuel and combustion air, of agricultural waste, pathological waste, low-level radioactive waste, or chemotherapeutic waste, if the owner or operator of the unit:
 - (A) notifies the Director that the unit qualifies for this exemption; and
 - (B) keeps records on a calendar-quarter basis of the weight of agricultural waste, pathological waste, low level radioactive waste, or chemotherapeutic waste burned, and the weight of all other fuels and wastes burned in the unit;
- (3) small power production or cogeneration units if:
 - (A) the unit qualifies as a small power-production facility under Section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) or as a cogeneration facility under section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B));
 - (B) the unit burns homogeneous waste (not including refuse-derived fuel) to produce electricity; and
 - (C) the owner or operator of the unit notifies the Director that the unit qualifies for this exemption;

- (4) units that combust waste for the primary purpose of recovering metals;
- (5) cyclonic barrel burners;
- (6) rack, part, and drum reclamation units that burn the coatings off racks used to hold small items for application of a coating;
- (7) cement kilns;
- (8) chemical recovery units burning materials to recover chemical constituents or to produce chemical compounds as listed in 40 CFR 60.2555(n)(1) through (7);
- (9) laboratory analysis units that burn samples of materials for the purpose of chemical or physical analysis;
- (10) air curtain burners covered under Rule .1904 of this Subchapter;

(c) The owner or operator of a chemical recovery unit not listed under 40 CFR 60.2555(n) may petition the Director to be exempted. The petition shall include all the information specified under 40 CFR ~~60.2559(a)~~ ~~60.2558(a)~~. The Director shall approve the exemption if he finds that all the requirements of 40 CFR 60.2555(n) are satisfied and that the unit burns materials to recover chemical constituents or to produce chemical compounds where there is an existing market for such recovered chemical constituents or compounds.

(d) Definitions. For the purpose of this Rule, the definitions contained in 40 CFR 60.2875 shall apply in addition to the definitions in Rule .1202 of this Section.

(e) Emission Standards. The emission standards in this Rule apply to all incinerators subject to this Rule except where Rules .0524, .1110, or .1111 of this Subchapter applies. When Subparagraphs (12) or (13) and Rules .0524, .1110, or .1111 of this Subchapter regulate the same pollutant, the more restrictive provision for each pollutant shall apply, notwithstanding provisions of Rules .0524, .1110, or .1111 of this Subchapter to the contrary.

- (1) Particulate Matter. Emissions of particulate matter from a CISWI unit shall not exceed 70 milligrams per dry standard cubic meter corrected to seven percent oxygen (dry basis).
- (2) Opacity. Visible emissions from the stack of a CISWI unit shall not exceed 10 percent opacity (6-minute block average).
- (3) Sulfur Dioxide. Emissions of sulfur dioxide from a CISWI unit shall not exceed 20 parts per million by volume corrected to seven percent oxygen (dry basis).
- (4) Nitrogen Oxides. Emissions of nitrogen oxides from a CISWI unit shall not exceed 368 parts per million by volume corrected to seven percent oxygen (dry basis).
- (5) Carbon Monoxide. Emissions of carbon monoxide from a CIWI unit shall not exceed 157 parts per million by volume, corrected to seven percent oxygen (dry basis).
- (6) Odorous Emissions. Any incinerator subject to this Rule shall comply with Rule .1806 of this Subchapter for the control of odorous emissions.

- (7) Hydrogen Chloride. Emissions of hydrogen chloride from a CISWI unit shall not exceed 62 parts per million by volume, corrected to seven percent oxygen (dry basis).
 - (8) Mercury Emissions. Emissions of mercury from a CISWI unit shall not exceed 0.47 milligrams per dry standard cubic meter, corrected to seven percent oxygen.
 - (9) Lead Emissions. Emissions of lead from a CISWI unit shall not exceed 0.04 milligrams per dry standard cubic meter, corrected to seven percent oxygen.
 - (10) Cadmium Emissions. Emissions of cadmium from a CISWI unit shall not exceed 0.004 milligrams per dry standard cubic meter, corrected to seven percent oxygen.
 - (11) Dioxins and Furans. Emissions of dioxins and furans from a CISWI unit shall not exceed 0.41 nanograms per dry standard cubic meter (toxic equivalency basis), corrected to seven percent oxygen. Toxic equivalency is given in Table 4 of 40 CFR part 60, Subpart DDDD.
 - (12) Toxic Emissions. The owner or operator of any incinerator subject to this Rule shall demonstrate compliance with Section .1100 of this Subchapter according to 15A NCAC 02Q .0700.
 - (13) Ambient Standards.
 - (A) In addition to the ambient air quality standards in Section .0400 of this Subchapter, the following ambient air quality standards, which are an annual average, in milligrams per cubic meter at 77 degrees F (25 degrees C) and 29.92 inches (760 mm) of mercury pressure, and which are increments above background concentrations, shall apply aggregately to all incinerators at a facility subject to this Rule:
 - (i) arsenic and its compounds
2.3x10-7
 - (ii) beryllium and its compounds
4.1x10-6
 - (iii) cadmium and its compounds
5.5x10-6
 - (iv) chromium (VI) and its compounds
8.3x10-8
 - (B) The owner or operator of a facility with incinerators subject to this Rule shall demonstrate compliance with the ambient standards in Subparts (i) through (iv) of Part (A) of this Subparagraph by following the procedures set out in Rule .1106 of this Subchapter. Modeling demonstrations shall comply with the requirements of Rule .0533 of this Subchapter.
- (C) The emission rates computed or used under Part (B) of this Subparagraph that demonstrate compliance with the ambient standards under Part (A) of this Subparagraph shall be specified as a permit condition for the facility with incinerators as their allowable emission limits unless Rules .0524, .1110, or .1111 of this Subchapter requires more restrictive rates.
 - (f) Operational Standards.
 - (1) The operational standards in this Rule do not apply to any incinerator subject to this Rule when applicable operational standards in Rules .0524, .1110, or .1111 of this Subchapter apply.
 - (2) If a wet scrubber is used to comply with emission limitations:
 - (A) operating limits for the following operating parameters shall be established:
 - (i) maximum charge rate, which shall be measured continuously, recorded every hour, and calculated using one of the following procedures:
 - (I) for continuous and intermittent units, the maximum charge rate is 110 percent of the average charge rate measured during the most recent compliance test demonstrating compliance with all applicable emission limitations; or
 - (II) for batch units, the maximum charge rate is 110 percent of the daily charge rate measured during the most recent compliance test demonstrating compliance with all applicable emission limitations;
 - (ii) minimum pressure drop across the wet scrubber, which shall be measured continuously, recorded every 15 minutes, and calculated as 90 percent of:
 - (I) the average pressure drop across the wet

- (ii) scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations, or
 - (II) the average amperage to the wet scrubber measured during the most recent performance test demonstrating compliance with the particulate matter emission limitations;
 - (iii) minimum scrubber liquor flow rate, which shall be measured continuously, recorded every 15 minutes, and calculated as 90 percent of the average liquor flow rate at the inlet to the wet scrubber measured during the most recent compliance test demonstrating compliance with all applicable emission limitations; and
 - (iv) minimum scrubber liquor pH, which shall be measured continuously, recorded every 15 minutes, and calculated as 90 percent of the average liquor pH at the inlet to the wet scrubber measured during the most recent compliance test demonstrating compliance with all applicable emission limitations.
- (B) A three hour rolling average shall be used to determine if operating parameters in Subparts (A)(i) through (A)(iv) of this Subparagraph have been met.
- (C) The owner or operator of the CISWI unit shall meet the operating limits established during the initial performance test on the date the initial performance test is required or completed.
- (3) If a fabric filter is used to comply with the emission limitations, then it shall be operated as specified in 40 CFR 60.2675(c);
- (4) If an air pollution control device other than a wet scrubber is used or if emissions are limited in some other manner to comply with the

emission standards of Paragraph (e) of this Rule, the owner or operator shall petition the Director for specific operating limits that shall be established during the initial performance test and continuously monitored thereafter. The initial performance test shall not be conducted until after the Director approves the petition. The petition shall include:

- (A) identification of the specific parameters to be used as additional operating limits;
- (B) explanation of the relationship between these parameters and emissions of regulated pollutants, identifying how emissions of regulated pollutants change with changes in these parameters, and how limits on these parameters will serve to limit emissions of regulated pollutants;
- (C) explanation of establishing the upper and lower limits for these parameters, which will establish the operating limits on these parameters;
- (D) explanation of the methods and instruments used to measure and monitor these parameters, as well as the relative accuracy and precision of these methods and instruments;
- (E) identification of the frequency and methods for recalibrating the instruments used for monitoring these parameters.

The Director shall approve the petition if he finds that the requirements of this Subparagraph have been satisfied and that the proposed operating limits will ensure compliance with the emission standards in Paragraph (e) of this Rule.

(g) Test Methods and Procedures.

- (1) For the purposes of this Paragraph, "Administrator" in 40 CFR 60.8 means "Director".
- (2) The test methods and procedures described in Rule .0501 of this Subchapter, in 40 CFR Part 60 Appendix A, 40 CFR Part 61 Appendix B, and 40 CFR 60.2690 shall be used to determine compliance with emission standards in Paragraph (e) this Rule. Method 29 of 40 CFR Part 60 shall be used to determine emission standards for metals. However, Method 29 shall be used to sample for chromium (VI), and SW 846 Method 0060 shall be used for the analysis.
- (3) All performance tests shall consist of a minimum of three test runs conducted under conditions representative of normal operations. Compliance with emissions standards under Subparagraph (e)(1), (3) through (5), and (7) through (11) of this Rule shall be determined

- by averaging three one-hour emission tests. These tests shall be conducted within 12 months following the initial performance test and within every twelve month following the previous annual performance test after that.
- (4) The owner or operator of CISWI shall conduct an initial performance test as specified in 40 CFR 60.8 to determine compliance with the emission standards in Paragraph (e) of this Rule and to establish operating standards using the procedure in Paragraph (f) of this Rule. The initial performance test must be conducted no later than ~~July 1, 2006~~ June 1, 2006.
- (5) The owner or operator of the CISWI unit shall conduct an annual performance test for particulate matter, hydrogen chloride, and opacity as specified in 40 CFR 60.8 to determine compliance with the emission standards for the pollutants in Paragraph (e) of this Rule.
- (6) If the owner or operator of CISWI unit has shown, using performance tests, compliance with particulate matter, hydrogen chloride, and opacity for three consecutive years, the Director may allow the owner or operator of CISWI unit to conduct performance tests for these three pollutants every third year. However, each test shall be within 36 months of the previous performance test. If the CISWI unit continues to meet the emission standards for these three pollutants the Director may allow the owner or operator of CISWI unit to continue to conduct performance tests for these three pollutants every three years.
- (7) If a performance test shows a deviation from the emission standards for particulate matter, hydrogen chloride, or opacity, the owner or operator of the CISWI unit shall conduct annual performance tests for these three pollutants until all performance tests for three consecutive years show compliance for particulate matter, hydrogen chloride, or opacity.
- (8) The owner or operator of CISWI unit may conduct a repeat performance test at any time to establish new values for the operating limits.
- (9) The owner or operator of the CISWI unit shall repeat the performance test if the feed stream is different than the feed streams used during any performance test used to demonstrate compliance.
- (10) If the Director has evidence that an incinerator is violating a standard in Paragraph (e) or (f) of this Rule or that the feed stream or other operating conditions have changed since the last performance test, the Director may require the owner or operator to test the incinerator to demonstrate compliance with the emission standards listed in Paragraph (e) of this Rule at any time.
- (h) Monitoring.
- (1) The owner or operator of an incinerator subject to the requirements of this Rule shall comply with the monitoring, recordkeeping, and reporting requirements in Section .0600 of this Subchapter.
- (2) The owner or operator of an incinerator subject to the requirements of this Rule shall establish, install, calibrate to manufacturers specifications, maintain, and operate;
- (A) devices or methods for continuous temperature monitoring and recording for the primary chamber and, where there is a secondary chamber, for the secondary chamber;
- (B) devices or methods for monitoring the value of the operating parameters used to determine compliance with the operating parameters established under Paragraph (f)(2) of this Rule;
- (C) a bag leak detection system that meets the requirements of 40 CFR 60.2730(b) if a fabric filter is used to comply with the requirements of the emission standards in Paragraph (e) of this Rule; and
- (D) Equipment necessary to monitor compliance with the cite-specific operating parameters established under Paragraph (f)(4) of this Rule.
- (3) The Director shall require the owner or operator of a CISWI unit with a permitted charge rate of 750 pounds per hour or more to install, operate, and maintain continuous monitors for oxygen or for carbon monoxide or both as necessary to determine proper operation of the CISWI unit.
- (4) The Director may require the owner or operator of a CISWI unit with a permitted charge rate of 750 pounds per hour or less to install, operate, and maintain continuous monitors for oxygen or for carbon monoxide or both as necessary to determine proper operation of the CISWI unit.
- (5) The owner or operator of the CISWI unit shall conduct all monitoring at all times the CISWI unit is operating, except;
- (A) malfunctions and associated repairs;
- (B) required quality assurance or quality control activities including calibrations checks and required zero and span adjustments of the monitoring system.
- (6) The data recorded during monitoring malfunctions, associated repairs, and required quality assurance or quality control activities shall not be used in assessing compliance with

the operating standards in Paragraph (f) of this Rule.

(i) Recordkeeping, and Reporting.

- (1) The owner or operator of CISWI unit shall maintain records required by this Rule on site in either paper copy or electronic format that can be printed upon request for a period of at least five years.
- (2) The owner or operator of CISWI unit shall maintain all records required under 40 CFR 60.2740.
- (3) The owner or operator of CISWI unit shall submit as specified in Table 5 of 40 CFR 60, Subpart DDDD the following reports:
 - (A) Waste management Plan;
 - (B) initial test report, as specified in 40 CFR 60.2760;
 - (C) annual report as specified in 40 CFR 60.2770;
 - (D) emission limitation or operating limit deviation report as specified in 40 CFR 60.2780;
 - (E) qualified operator deviation notification as specified in 40 CFR 60.2785(a)(1);
 - (F) qualified operator deviation status report, as specified in 40 CFR 60.2785(a)(2);
 - (G) qualified operator deviation notification of resuming operation as specified in 40 CFR 60.2785(b).
- (4) The owner or operator of the CISWI unit shall submit a deviation report if:
 - (A) any recorded three-hour average parameter level is above the maximum operating limit or below the minimum operating limit established under Paragraph (f) of this Rule;
 - (B) the bag leak detection system alarm sounds for more than five percent of the operating time for the six-month reporting period; or
 - (C) a performance test was conducted that deviated from any emission standards in Paragraph (e) of this Rule.

The deviation report shall be submitted by August 1 of the year for data collected during the first half of the calendar year (January 1 to June 30), and by February 1 of the following year for data collected during the second half of the calendar year (July 1 to December 31).
- (5) The owner or operator of the CISWI unit may request changing semiannual or annual reporting dates as specified in this Paragraph, and the Director may approve the request change using the procedures specified in 40 CFR 60.19(c).
- (6) Reports required under this Rule shall be submitted electronically or in paper format,

postmarked on or before the submittal due dates.

(7)

If the CISWI unit has been shut down by the Director under the provisions of 40 CFR 60.2665(b)(2), due to failure to provide an accessible qualified operator, the owner or operator shall notify the Director that the operations are resumed once a qualified operator is accessible.

(j) Excess Emissions and Start-up and Shut-down. All incinerators subject to this Rule shall comply with 15A NCAC 2D .0535, Excess Emissions Reporting and Malfunctions, of this Subchapter.

(k) Operator Training and Certification.

- (1) The owner or operator of the CISWI unit shall not allow the CISWI unit to operate at any time unless a fully trained and qualified CISWI unit operator is accessible, either at the facility or available within one hour. The trained and qualified CISWI unit operator may operate the CISWI unit directly or be the direct supervisor of one or more CISWI unit operators.
- (2) Operator training and qualification shall be obtained by completing the requirements of 40 CFR 60.2635(c) by the later of:
 - (A) December 1, 2005;
 - (B) six month after CISWI unit startup; or
 - (C) six month after an employee assumes responsibility for operating the CISWI unit or assumes responsibility for supervising the operation of the CISWI unit.
- (3) Operator qualification shall be valid from the date on which the training course is completed and the operator successfully passes the examination required in 40 CFR 60.2635(c)(2).
- (4) Operator qualification shall be maintained by completing an annual review or refresher course covering, at a minimum:
 - (A) update of regulations;
 - (B) incinerator operation, including startup and shutdown procedures, waste charging, and ash handling;
 - (C) inspection and maintenance;
 - (D) responses to malfunctions or conditions that may lead to malfunction;
 - (E) discussion of operating problems encountered by attendees.
- (5) Lapsed operator qualification shall be renewed by:
 - (A) completing a standard annual refresher course as specified in Subparagraph (4) of this Paragraph for a lapse less than three years, and
 - (B) repeating the initial qualification requirements as specified in

- (6) Subparagraph (2) of this Paragraph for a lapse of three years or more.
- (6) The owner or operator of the CISWI unit shall:
- (A) have documentation specified in 40 CFR 60.2660(a)(1) through (10) and (c)(1) through (c)(3) available at the facility and accessible for all CISWI unit operators and are suitable for inspection upon request;
- (B) establish a program for reviewing the documentation specified in Part (A) of this Subparagraph with each CISWI unit operator:
- (i) the initial review of the documentation specified in Part (A) of this Subparagraph shall be conducted by the later of the three dates:
- (I) December 1, 2005;
- (II) six month after CISWI unit startup; or
- (III) six month after an employee assumes responsibility for operating the CISWI unit or assumes responsibility for supervising the operation of the CISWI unit; and
- (ii) subsequent annual reviews of the documentation specified in Part (A) of this Subparagraph shall be conducted no later than twelve month following the previous review
- (7) The owner or operator of the CISWI unit shall meet one of the two criteria specified in 40 CFR 60.2665(a) and (b), depending on the length of time, if all qualified operators are temporarily not at the facility and not able to be at the facility within one hour.

(1) Prohibited waste. The owner or operator of a CISIW shall not incinerate any of the wastes listed in G.S. 130A-309.10(f1).

~~(4)~~(m) Waste Management Plan.

- (1) The owner or operator of the CISWI unit shall submit a waste management plan that identifies in writing the feasibility and the methods used to reduce or separate certain components of solid waste from the waste stream in order to reduce or eliminate toxic emissions from incinerated waste. A waste management plan shall be submitted to the Director before December 1, 2003.
- (2) The waste management plan shall include:

- (A) consideration of the reduction or separation of waste-stream elements such as paper, cardboard, plastics, glass, batteries, or metals; and the use of recyclable materials;
- (B) identification of any additional waste management measures; and
- (C) implementation of those measures considered practical and feasible, based on the effectiveness of waste management measures already in place, the costs of additional measures and the emissions reductions expected to be achieved and the environmental or energy impacts that the measures may have.
- ~~(m)~~(n) Compliance Schedule.
- (1) The owner or operator of the CISWI unit, which plans to achieve compliance after November 30, 2003, shall submit before December 1, 2003, along with the permit application, the final control plan for the CISWI unit. The final compliance shall be achieved no later than December 1, 2005.
- (2) The final control plan shall contain the information specified in 40 CFR 60.2600(a)(1) 60(a)(1) through (5), and a copy shall be maintained on site.
- (3) The owner or operator of the CISWI unit shall notify the Director within five days after the CISWI unit is to be in final compliance whether the final compliance have been achieved. The final compliance is achieved by completing all process changes and retrofitting construction of control devices, as specified in the final control plan, so that, if the affected CISWI unit is brought on line, all necessary process changes and air pollution control devices would operate as designed. If the final compliance has not been achieved, the owner or operator of the CISWI unit shall submit a notification informing the Director that the final compliance has not been met and submit reports each subsequent calendar month until the final compliance is achieved.
- (4) The owner or operator of the CISWI unit, that closes the CISWI unit and restarts it:
- (A) before December 1, 2005, shall submit along with the permit application, the final control plan for the CISWI unit, and the final compliance shall be achieved by December 1, 2005.
- (B) after December 1, 2005 shall complete emission control retrofits and meet the emission limitations and operating limits on the date the CISWI unit restarts operation.
- (5) The owner or operator of the CISWI unit that plans to close it rather than comply with the

requirements of this Rule shall submit a closure notification including the date of closure to the Director by December 1, 2003, and shall cease operation by December 1, 2005.

Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(4),(5); 40 CFR 60.215(a)(4).

SECTION .1400 – NITROGEN OXIDES

15A NCAC 02D .1404 RECORDKEEPING: REPORTING: MONITORING:

(a) General requirements. The owner or operator of any source shall comply with the monitoring, recordkeeping and reporting requirements in Section .0600 of this Subchapter and shall maintain all records necessary for determining compliance with all applicable limitations and standards of this Section for five years.

(b) Submittal of information to show compliance status. The owner or operator of any source shall maintain and, when requested by the Director, submit any information required by these rules to determine the compliance status of an affected source.

(c) Excess emissions reporting. The owner or operator shall report excess emissions following the procedures under Rule .0535 of this Subchapter.

(d) Continuous emissions monitors.

(1) The owner or operator shall install, operate, and maintain a continuous emission monitoring system according to 40 CFR Part 75, Subpart H, with such exceptions as may be allowed under 40 CFR Part 75, Subpart H or 40 CFR Part 96 if:

(A) a source is covered under Rules .1416, .1417, or .1418 of this Section except internal combustion engines, or

(B) any source that opts into the nitrogen oxide budget trading program under Rule .1419 of this Section .

(2) The owner or operator of a source that is subject to the requirements of this Section but not covered under Subparagraph (1) of this Paragraph and that uses a continuous emissions monitoring system to measure emissions of nitrogen oxides shall operate and maintain the continuous emission monitoring system according to 40 CFR Part 60, Appendix B, Specification 2, and Appendix F or Part 75, Subpart H. If diluent monitoring is required, 40 CFR Part 60, Appendix B, Specification 3, shall be used. If flow monitoring is required, 40 CFR Part 60, Appendix B, Specification 6, shall be used.

(3) The owner or operator of the following sources shall not be required to use continuous emission monitors unless the Director determines that a continuous emission monitor is necessary under Rule .0611 of this

Subchapter to show compliance with the rules of this Section:

(A) a boiler or indirect-fired process heater covered under Rule .1407 of this Section with a maximum heat input less than or equal to 250 million Btu per hour;

(B) stationary internal combustion engines covered under Rule .1409 of this Section except for engines covered under Rules .1409(b) and .1418 of this Section.

(e) Missing data.

(1) If data from continuous emission monitoring systems required to meet the requirements of 40 CFR Part 75 are not available at a time that the source is operated, the procedures in 40 CFR Part 75 shall be used to supply the missing data.

(2) For continuous emissions monitors not covered under Subparagraph (1) of this Paragraph, data shall be available for at least 95 percent of the emission sources operating hours for the applicable averaging period, where four equally spaced readings constitute a valid hour. If data from continuous emission monitoring systems are not available for at least 95 percent of the time that the source is ~~operated~~, operated, the owner or operator of the monitor shall:

(A) use the procedures in 40 CFR 75.33 through 75.37 ~~shall be used~~ to supply the missing ~~data~~; or data-

(B) document that the combustion source or process equipment and the control device were being properly operated (acceptable operating and maintenance procedures are being used, such as, compliance with permit conditions, operating and maintenance procedures, and preventative maintenance program, and monitoring results and compliance history) when the monitoring measurements were missing.

(f) Quality assurance for continuous emissions monitors.

(1) The owner or operator of a continuous emission monitor required to meet 40 CFR Part 75, Subpart H, shall follow the quality assurance and quality control requirements of 40 CFR Part 75, Subpart H.

(2) For a continuous emissions monitor not covered under Subparagraph (1) of this Paragraph, the owner or operator of the continuous emissions monitor shall follow the quality assurance and quality control requirements of 40 CFR Part 60, Appendix F, if the monitor is required to be operated annually under another rule. If the continuous

emissions monitor is being operated only to satisfy the requirements of this Section, then the quality assurance and quality control requirements of 40 CFR Part 60, Appendix F, shall apply except that:

- (A) A relative accuracy test audit shall be conducted after January 1 and before May 1 of each year;
- (B) One of the following shall be conducted at least once between May 1 and September 30 of each year:
 - (i) a linearity test, according to 40 CFR Part 75, Appendix A, Section 3.2, 6.2, and 7.1;
 - (ii) a relative accuracy audit, according to 40 CFR Part 60, Appendix F, Section 5 and 6; or
 - (iii) a cylinder gas audit according to 40 CFR Part 60, Appendix F, Section 5 and 6; and
- (C) A daily calibration drift test shall be conducted according to 40 CFR Part 60, Appendix F, Section 4.0.

(g) Interim reporting for large sources. The owner or operator of a source covered under Rules .1416, .1417, or .1418 of this Section shall report to the Director no later than July 30 the tons of nitrogen oxides emitted during the previous May and June. No later than October 30, the owner or operator shall report to the Director the tons of nitrogen oxides emitted during the previous ozone season. The Division of Air Quality shall make this information publicly available.

(h) Recordkeeping and reporting requirements for large sources. The owner or operator of a source covered under Rules .1416, .1417, or .1418 of this Section shall comply with the recordkeeping and reporting requirements of 40 CFR Part 96, Budget Trading Program for State Implementation Plans.

(i) Averaging time for continuous emissions monitors. When compliance with a limitation established for a source subject to the requirements of this Section is determined using a continuous emissions monitoring system, a 24-hour block average as described under Rule .0606 of this Subchapter shall be recorded for each day beginning May 1 through September 30 unless a specific rule requires a different averaging time or procedure. Sources covered under Rules .1416, .1417, or .1418 of this Section shall comply with the averaging time requirements of 40 CFR Part 75. A 24-hour block average described in Rule .0606 of this Subchapter shall be used when a continuous emissions monitoring system is used to determine compliance with a short-term pounds-per-million-Btu standard in Rule .1418 of this Section.

(j) Heat input. Heat input shall be determined:

- (1) for sources required to use a monitoring system meeting the requirements of 40 CFR Part 75, using the procedures in 40 CFR Part 75; or
- (2) for sources not required to use a monitoring system meeting the requirements of 40 CFR Part 75 using:

- (A) 40 CFR Part 75;
- ~~(A)(B)~~ a method in 15A NCAC 2D .0501; or
- ~~(B)(C)~~ the best available heat input data, data if approved by the Director (the Director shall grant approval if he finds that the heat input data is the best available).

(k) Source testing. When compliance with a limitation established for a source subject to the requirements of this Section is determined using source testing, the source testing shall follow the procedures of Rule .1415 of this Section.

(l) Alternative monitoring and reporting procedures. The owner or operator of a source covered under this Rule, except for sources covered under Rule .1419 of this Section, may request alternative monitoring or reporting procedures under Rule .0612, Alternative Monitoring and Reporting Procedures.

Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(5), (7), (10).

15A NCAC 02Q .0102 ACTIVITIES EXEMPTED FROM PERMIT REQUIREMENTS

(a) This Rule does not apply to facilities required to have a permit under Section .0500 of this Subchapter. This Rule applies only to permits issued under Section .0300 of this Subchapter.

(b) If a source is subject to any of the following rules, then the source is not exempted from permit requirements, and the exemptions in Paragraph (c) of this Rule do not apply:

- (1) new source performance standards under 15A NCAC 2D .0524 or 40 CFR Part 60, except when the following activities are eligible for exemption under Paragraph (c) of this Rule:
 - (A) 40 CFR Part 60, Subpart Dc, industrial, commercial, and institutional steam generating units;
 - (B) 40 CFR Part 60, Subparts K, Ka, or Kb, volatile organic liquid storage vessels;
 - (C) 40 CFR Part 60, Subpart AAA, new residential wood heaters; or
 - ~~(D)~~ 40 CFR Part 60, Subpart JJJ, petroleum dry cleaners; or
 - ~~(D)(E)~~ 40 CFR Part 60, Subpart WWW, municipal solid waste landfills;
- (2) national emission standards for hazardous air pollutants under 15A NCAC 2D .1110 or 40 CFR Part 61, except asbestos demolition and renovation activities, which are eligible for exemption under Paragraph (c) of this Rule;
- (3) prevention of significant deterioration under 15A NCAC 2D .0530;
- (4) new source review under 15A NCAC 2D .0531 or .0532;
- (5) sources of volatile organic compounds subject to the requirements of 15A NCAC 2D .0900 that are located in Mecklenburg County according to 15A NCAC 2D ~~.0902(c); 0902;~~
- (6) sources required to apply maximum achievable control technology (MACT) for hazardous air pollutants under 15A NCAC 2D

.1109, .1111, .1112, or 40 CFR Part 63 that are required to have a permit under Section .0500 of this Subchapter;

- (7) sources at facilities subject to 15A NCAC 2D .1100. (If a source does not emit a toxic air pollutant for which the facility at which it is located has been modeled, it shall be exempted from needing a permit if it qualifies for one of the exemptions in Paragraph (c) of this Rule).

(c) The following activities do not need a permit or permit modification under Section .0300 of this Subchapter; however, the Director may require the owner or operator of these activities to register them under 15A NCAC 2D .0200:

- (1) activities exempted because of category:
- (A) maintenance, upkeep, and replacement:
- (i) maintenance, structural changes, or repairs which do not change the capacity of such process, fuel-burning, refuse-burning, or control equipment, and do not involve any change in quality or nature or increase in quantity of emission of regulated air pollutants;
- (ii) housekeeping activities or building maintenance procedures, including painting buildings, resurfacing floors, roof repair, washing, portable vacuum cleaners, sweeping, use and associated storage of janitorial products, or insulation removal;
- (iii) use of office supplies, supplies to maintain copying equipment, or blueprint machines;
- (iv) use of fire fighting equipment;
- (v) paving parking lots; or
- (vi) replacement of existing equipment with equipment of the same size, type, and function that does not result in an increase to the actual or potential emission of regulated air pollutants and that does not affect the compliance status, and with replacement equipment that fits the description of the existing equipment in the permit, including the application, such that the replacement equipment can be operated under that

- permit without any changes in the permit;
- (B) air conditioning or ventilation: comfort air conditioning or comfort ventilating systems ~~that which~~ do not transport, remove, or exhaust regulated air pollutants to the atmosphere;
- (C) laboratory activities:
- (i) bench-scale, on-site equipment used exclusively for chemical or physical analysis for quality control purposes, staff instruction, water or wastewater analyses, or non-production environmental compliance assessments;
- (ii) bench-scale experimentation, chemical or physical analyses, training or instruction from not-for-profit, non-production educational laboratories;
- (iii) bench-scale experimentation, chemical or physical analyses, training or instruction from hospitals or health laboratories pursuant to the determination or diagnoses of illness; or
- (iv) research and development laboratory activities provided the activity produces no commercial product or feedstock material;
- (D) storage tanks:
- (i) storage tanks used solely to store fuel oils, kerosene, diesel, crude oil, used motor oil, lubricants, cooling oils, natural gas or liquefied petroleum gas;
- (ii) storage tanks used to store gasoline for which there are no applicable requirements except Stage I controls under 15A NCAC 2D .0928;
- (iii) storage tanks used solely to store inorganic liquids; or
- (iv) storage tanks or vessels used for the temporary containment of materials resulting from an emergency response to an unanticipated release of hazardous materials;
- (E) combustion and heat transfer equipment:

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| <p>(i) space heaters burning distillate oil, kerosene, natural gas, or liquefied petroleum gas operating by direct heat transfer and used solely for comfort heat;</p> <p>(ii) residential wood stoves, heaters, or fireplaces;</p> <p>(iii) hot water heaters which are used for domestic purposes only and are not used to heat process water;</p> <p>(F) wastewater treatment processes: industrial wastewater treatment processes or municipal wastewater treatment processes for which there are no applicable requirements;</p> <p>(G) gasoline distribution: gasoline service stations or gasoline dispensing facilities;</p> <p>(H) dispensing equipment: equipment used solely to dispense diesel fuel, kerosene, lubricants or cooling oils;</p> <p>(I) solvent recycling: portable solvent distillation systems used for on-site solvent recycling if:</p> <p style="padding-left: 20px;">(i) The portable solvent distillation system is not:</p> <p style="padding-left: 40px;">(I) owned by the facility, and</p> <p style="padding-left: 40px;">(II) operated at the facility for more than seven consecutive days; and</p> <p style="padding-left: 20px;">(ii) The material recycled is recycled at the site of origin;</p> <p>(J) processes:</p> <p style="padding-left: 20px;">(i) electric motor burn-out ovens with secondary combustion chambers or afterburners;</p> <p style="padding-left: 20px;">(ii) electric motor bake-on ovens;</p> <p style="padding-left: 20px;">(iii) burn-off ovens for paint-line hangers with afterburners;</p> <p style="padding-left: 20px;">(iv) hosiery knitting machines and associated lint screens, hosiery dryers and associated lint screens, and hosiery dyeing processes where bleach or solvent dyes are not used;</p> <p style="padding-left: 20px;">(v) blade wood planers planing only green wood;</p> <p>(K) solid waste landfills: municipal solid waste landfills (This Part does not apply to flares and other sources of combustion at solid waste landfills; these flares and other combustion</p> | <p>sources are required to be permitted under 15A NCAC 2Q .0300 unless they qualify for another exemption under this Paragraph.);</p> <p>(L) miscellaneous:</p> <p style="padding-left: 20px;">(i) motor vehicles, aircraft, marine vessels, locomotives, tractors or other self-propelled vehicles with internal combustion engines;</p> <p style="padding-left: 20px;">(ii) non-self-propelled non-road engines, except generators, regulated by rules adopted under Title II of the Federal Clean Air Act (Generators are required to be permitted under 15A NCAC 02Q .0300 unless they qualify for another exemption under this Paragraph.);</p> <p style="padding-left: 20px;">(iii) equipment used for the preparation of food for direct on-site human consumption;</p> <p style="padding-left: 20px;">(iv) a source whose emissions are regulated only under Section 112(r) or Title VI of the Federal Clean Air Act;</p> <p style="padding-left: 20px;">(v) exit gases from in-line process analyzers;</p> <p style="padding-left: 20px;">(vi) stacks or vents to prevent escape of sewer gases from domestic waste through plumbing traps;</p> <p style="padding-left: 20px;">(vii) refrigeration equipment that is consistent with Section 601 through 618 of Title VI (Stratospheric Ozone Protection) of the Federal Clean Air Act, 40 CFR Part 82, and any other regulations promulgated by EPA under Title VI for stratospheric ozone protection, except those units used as or in conjunction with air pollution control equipment (A unit used as or in conjunction with air pollution control equipment is required to be permitted under 15A NCAC 02Q .0300 unless it qualifies for another exemption under this Paragraph);</p> <p style="padding-left: 20px;">(viii) equipment not vented to the outdoor atmosphere with the exception of equipment that emits volatile organic compounds (Equipment that emits volatile organic</p> |
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- compounds is required to be permitted under 15A NCAC 2Q .0300 unless it qualifies for another exemption under this Paragraph);
- (ix) equipment that does not emit any regulated air pollutants;
 - (x) facilities subject only to a requirement under 40 CFR Part 63 (This Subpart does not apply when a control device is used to meet a MACT or GACT emission standard; a control device used to meet a MACT or GACT emission standard is required to be permitted under 15A NCAC 02Q .0300 unless it qualifies for another exemption under this Paragraph);
 - (xi) sources for which there are no applicable requirements;
 - (xii) animal operations not required to have control technology under 15A NCAC 2D .1800 (If an animal operation is required to have control technology, it shall be required to have a permit under this Subchapter).
- (2) activities exempted because of size or production rate:
- (A) storage tanks:
 - (i) above-ground storage tanks with a storage capacity of no more than 1100 gallons storing organic liquids with a true vapor pressure of no more than 10.8 pounds per square inch absolute at 70° F; or
 - (ii) underground storage tanks with a storage capacity of no more than 2500 gallons storing organic liquids with a true vapor pressure of no more than 10.8 psi absolute at 70° F;
 - (B) combustion and heat transfer equipment:
 - (i) fuel combustion equipment, except for internal combustion engines, firing exclusively kerosene, No. 1 fuel oil, No. 2 fuel oil, equivalent unadulterated fuels, or a mixture of these fuels or one or more of these fuels mixed with natural gas or liquefied petroleum gas with a heat input of less than:
 - (I) 10 million Btu per hour for which construction, modification, or reconstruction commenced after June 9, 1989; or
 - (II) 30 million Btu per hour for which construction, modification, or reconstruction commenced before June 10, 1989;
 (Internal combustion engines are required to be permitted under 15A NCAC 02Q .0300 unless they qualify for another exemption under this Paragraph);
 - (ii) fuel combustion equipment, except for internal combustion engines, firing exclusively natural gas or liquefied petroleum gas or a mixture of these fuels with a heat input rating less than 65 million Btu per hour (Internal combustion engines are required to be permitted under 15A NCAC 02Q .0300 unless they qualify for another exemption under this Paragraph);
 - (iii) space heaters burning waste oil if:
 - (I) The heater burns only oil that the owner or operator generates or used oil from do-it-yourself oil changers who generate used oil as household wastes;
 - (II) The heater is designed to have a maximum capacity of not more than 500,000 Btu per hour; and
 - (III) The combustion gases from the heater are vented to the ambient air;

- (iv) fuel combustion equipment, except space heaters burning waste oil or internal combustion engines, with a heat input rating less than 10 million Btu per hour that is used solely for space heating;
 - ~~(iv)~~(v) emergency use generators and other internal combustion engines not regulated by rules adopted under Title II of the federal Clean Air Act, except self-propelled vehicles, that have a rated capacity of no more than:

 - (I) ~~340~~ 680 kilowatts (electric) or ~~460~~ 1000 horsepower for natural gas-fired engines;
 - (II) ~~830~~ 1800 kilowatts (electric) or ~~1150~~ 2510 horsepower for liquefied petroleum gas-fired engines;
 - (III) ~~270~~ 590 kilowatts (electric) or ~~440~~ 900 horsepower for diesel-fired or kerosene-fired engines; or
 - (IV) 21 kilowatts (electric) or 31 horsepower for gasoline-fired engines;

(Self-propelled vehicles with internal combustion engines are exempted under Subpart (1)(c)(L)(i) of this Paragraph.)
 - ~~(v)~~(vi) portable generators and other portable equipment with internal combustion engines not regulated by rules adopted under Title II of the federal Clean Air Act, except self-propelled vehicles, that operate at the facility no more than a combined 350 hours for any 365-day period provided the generators or engines have a rated capacity of no more than 750 kilowatt (electric) or 1100 horsepower each and provided records are
- ~~(vi)~~(vii) peak shaving generators that produce no more than 325,000 kilowatt-hours of electrical energy for any 12-month period provided records are maintained to verify the energy production on a monthly basis and on a 12-month basis;
 - (C) gasoline distribution: bulk gasoline plants with an average daily throughput of less than 4000 gallons;
 - (D) processes:

 - (i) graphic arts operations, paint spray booths or other painting or coating operations without air pollution control devices (water wash and filters that are an integral part of the paint spray booth are not considered air pollution control devices), and solvent cleaning operations located at a facility whose facility-wide actual emissions of volatile organic compounds are less than five tons per year (Graphic arts operations, coating operations, and solvent cleaning operations are defined in 15A NCAC 02Q .0803);
 - (ii) sawmills that saw no more than 2,000,000 board feet per year provided only green wood is sawed;
 - (iii) perchloroethylene dry cleaners that emit less than 13,000 pounds of perchloroethylene per year;
 - (iv) electrostatic dry powder coating operations with filters or powder recovery systems including electrostatic dry powder coating operations equipped with curing ovens with a heat input of less than 10,000,000 Btu per hour;
 - (E) miscellaneous:

- (i) any source whose emissions would not violate any applicable emissions standard and whose potential emissions of particulate, sulfur dioxide, nitrogen oxides, volatile organic compounds, and carbon monoxide before air pollution control devices, i.e., potential uncontrolled emissions, are each no more than five tons per year and whose potential emissions of hazardous air pollutants are below their ~~lesser~~ lesser quantity cutoff except:
- (I) storage tanks;
 - (II) fuel combustion equipment;
 - (III) space heaters burning waste oil;
 - (IV) generators, excluding emergency generators, or other non-self-propelled internal combustion engines;
 - (V) bulk gasoline plants;
 - (VI) printing, paint spray booths, or other painting or coating operations;
 - (VII) sawmills;
 - (VIII) perchloroethylene dry cleaners, or
 - (IX) electrostatic dry powder coating operations, ~~provided that the total potential emissions of particulate, sulfur dioxide, nitrogen oxides, volatile organic compounds, and carbon monoxide from the facility are each less than 40 tons per year and the total potential emissions of all hazardous air pollutants are below their lesser quantity cutoff emission rates or~~ provided that the facility has an air quality permit. (A source identified in Sub-subpart (I) through (IX) of this Part is required to be permitted under 15A NCAC 02Q .0300 unless it qualifies for another exemption under this Paragraph):
- (ii) any facility whose actual emissions of particulate, sulfur dioxide, nitrogen oxides, volatile organic compounds, or carbon monoxide before air pollution control devices, i.e., uncontrolled emissions, are each less than five tons per year, whose potential emissions of all hazardous air pollutants are below their lesser quantity cutoff

emission rate, and none of whose sources would violate an applicable emissions standard; rate;

- (iii) any source that only emits hazardous air pollutants that are not also a particulate or a volatile organic compound and whose potential emissions of hazardous air pollutants are below their lesser quantity cutoff emission rates; or
- (iv) any incinerator covered under Subparagraph (c)(4) of 15A NCAC 02D .1201;
- (F) case-by-case exemption: activities that the applicant demonstrates to the satisfaction of the Director:
 - (i) to be negligible in their air quality impacts,
 - (ii) not to have any air pollution control device, and
 - (iii) not to violate any applicable emission control standard when operating at maximum design capacity or maximum operating rate, whichever is greater.

(d) Because an activity is exempted from being required to have a permit does not mean that the activity is exempted from any applicable requirement or that the owner or operator of the source is exempted from demonstrating compliance with any applicable requirement.

(e) Emissions from stationary source activities identified in Paragraph (c) of this Rule shall be included in determining compliance with the toxic air pollutant requirements under 15A NCAC 02D .1100 or 02Q .0700 according to 15A NCAC 02Q .0702 (exemptions from air toxic permitting).

(f) The owner or operator of a facility or source claiming an exemption under Paragraph (c) of this Rule shall provide the Director documentation upon request that the facility or source is qualified for that exemption.

(g) If the Director finds that an activity exempted under Paragraph (c) of this Rule is in violation of or has violated a rule in 15A NCAC 02D, he may revoke the permit exemption for that activity and require that activity to be permitted under this Subchapter.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(4); 143-215.108.

SECTION .0600 – TRANSPORTATION FACILITY PROCEDURES

15A NCAC 02Q .0603 APPLICATIONS

(a) A transportation facility permit application may be obtained from and shall be filed in writing in accordance with Rule .0104 of this Subchapter.

(b) Applicants shall file transportation facility permit applications at least 90 days before projected date of construction of a new transportation facility or modification of an existing transportation facility.

(c) The permittee shall file requests for permit name or ownership changes as soon as the permittee is aware of the imminent name or ownership change.

(d) A transportation facility permit application shall be made in triplicate on official forms of the Director and shall include plans and specifications giving all necessary data and information as required by the application form.

(e) A transportation facility permit application containing dispersion modeling analyses that demonstrate compliance with ambient air quality standards for carbon monoxide or traffic analyses showing a level of service of A, B, C, or D as defined in the Highway Capacity Manual, ~~1985 edition~~, using planned roadway and intersection improvements shall include approval for the improvements from the appropriate state or city department of transportation. The Highway Capacity Manual is hereby incorporated by reference and ~~does not include any subsequent~~ shall automatically include any later amendments and editions. This manual may be obtained from the Institute of Transportation Engineers, ~~525 School Street Southwest, Suite 410, 1099 14th Street, NW, Suite 300 West, Washington, D.C. 20005-3438 20024-2729~~ at a cost of ~~one hundred twenty dollars (\$120.00), seventy seven dollars (\$77.00).~~

(f) Whenever the information provided on the permit application forms does not describe the transportation facility to the extent necessary to evaluate the application, the Director may request that the applicant provide any other information that the Director considers necessary to evaluate the transportation facility. Before acting on any permit application, the Director may request any information from an applicant and conduct any inquiry or investigation that he considers necessary to determine compliance with applicable standards including traffic level of service.

(g) A non-refundable permit application fee shall accompany each transportation facility permit application. The permit application fee is described in Section .0200 of this Subchapter.

Authority G.S. 143-215.3(a)(1); 143-215.108; 143-215.109.

15A NCAC 02Q .0605 FINAL ACTION ON PERMIT APPLICATIONS

(a) The Director may:

- (1) issue a permit containing the conditions necessary to carry out the purposes of G.S. 143, Article 21B;
- (2) rescind a permit upon request by the permittee; or
- (3) deny a permit application when necessary to carry out the purposes of G.S. 143, Article 21B.

(b) The Director shall issue a permit for the construction or modification of a transportation facility subject to the rules in 15A NCAC 2D .0800 if the permit applicant submits a complete application and demonstrates to the satisfaction of the Director that the ambient air quality standard for carbon monoxide applicable standards will not be exceeded.

(c) The Director shall issue a permit for a period of time necessary to complete construction, but such period shall not exceed five years.

(d) The Director shall not approve a permit for a transportation facility that:

- (1) interferes with the attainment or maintenance of the ambient air quality standard for carbon monoxide; any applicable standard,
- (2) results in a contravention of applicable portions of the implementation plan control strategy; or
- (3) is demonstrated with dispersion modeling to exceed the ambient air quality standard for carbon monoxide. an applicable standard.

Authority G.S. 143-215.3(a)(1); 143-215.108; 143-215.109.

SECTION .0700 - TOXIC AIR POLLUTANT PROCEDURES

15A NCAC 02Q .0701 APPLICABILITY

(a) With the exceptions in Rule .0702 of this Section, no person shall cause or allow any toxic air pollutant named in 15A NCAC 2D .1104 to be emitted from any facility into the atmosphere at a rate that exceeds the applicable rate(s) in Rule .0711 of this Section without having received a permit to emit toxic air pollutants as follows:

- (1) new facilities according to Rule .0704 of this Section;
- (2) existing facilities according to Rule .0705 of this Section;
- (3) modifications according to Rule .0706 of this Section.

(b) Within one year after promulgation of MACT standards for the industrial boilers, commercial/institutional boilers, process heaters, stationary combustion turbines and stationary internal combustion engines source categories under Section 112 (d) of the Clean Air Act that are applicable to combustion sources as defined in Rule .0703 of this Section, the Division shall assess such MACT standards to determine whether additional measures are necessary with respect to toxic air pollutant emissions from combustion sources. Upon completion of this determination, the Commission shall proceed through normal rulemaking procedures, if necessary, to implement additional measures.

(c) Facilities required to comply with MACT standards under 15A NCAC 2D .1109, .1111, or .1112 or 40 CFR Part 63 shall be deemed in compliance with this Subchapter and 15A NCAC 2D .1100 unless the Division determines that modeled emissions result in one or more acceptable ambient levels in 15A NCAC 2D .1104 being exceeded. This review shall be made according to the procedures in 15A NCAC 2D .1106. Once a facility demonstrates compliance with the acceptable ambient levels in 15A NCAC 2D .1104, future demonstrations shall only be required on a five-year basis. When an acceptable ambient level for a toxic air pollutant in 15A NCAC 2D .1104 is changed, any condition that has previously been put in a permit to protect the previous acceptable ambient level for that toxic air pollutant shall not be changed until the permit is renewed, at which time the owner or operator of the facility shall submit an air toxic

evaluation showing that the new acceptable ambient level will not be exceeded.

Authority G.S. 143-215.3(a)(1); 143-215.108; 143B-282; S. L. 1989, c. 168, s. 45.

15A NCAC 02Q .0709 DEMONSTRATIONS

(a) Demonstrations. The owner or operator of a source who is applying for a permit or permit modification to emit toxic air pollutants shall:

- (1) demonstrate to the satisfaction of the Director through dispersion modeling that the emissions of toxic air pollutants from the facility will not cause any acceptable ambient level listed in 15A NCAC 02D .1104 to be exceeded beyond the premises (adjacent property boundary); or
- (2) demonstrate to the satisfaction of the Commission or its delegate that the ambient concentration beyond the premises (adjacent property boundary) for the subject toxic air pollutant will not adversely affect human health (e.g., a risk assessment specific to the facility) though the concentration is higher than the acceptable ambient level in 15A NCAC 02D .1104 by providing one of the following demonstrations:
 - (A) the area where the ambient concentrations are expected to exceed the acceptable ambient levels in 15A NCAC 02D .1104 is not inhabitable or occupied for the duration of the averaging time of the pollutant of concern, or
 - (B) new toxicological data that show that the acceptable ambient level in 15A NCAC 02D .1104 for the pollutant of concern is too low and the facility's ambient impact is below the level indicated by the new toxicological data.

(b) Technical Infeasibility and Economic Hardship. This Paragraph shall not apply to any incinerator covered under 15A NCAC 2D .1200. The owner or operator of any source constructed before May 1, 1990, or a perchloroethylene dry cleaning facility subject to a GACT standard under 40 CFR 63.320 through 63.325 who cannot supply a demonstration described in Paragraph (a) of this Rule shall:

- (1) demonstrate to the satisfaction of the Commission or its delegate that complying with the guidelines in 15A NCAC 2D .1104 is technically infeasible (the technology necessary to reduce emissions to a level to prevent the acceptable ambient levels in 15A NCAC 2D .1104 from being exceeded does not exist); or
- (2) demonstrate to the satisfaction of the Commission or its delegate that complying with the guidelines in 15A NCAC 2D .1104 would result in serious economic hardship. (In

deciding if a serious economic hardship exists, the Commission or its delegate shall consider market impact; impacts on local, regional and state economy; risk of closure; capital cost of compliance; annual incremental compliance cost; and environmental and health impacts.)

If the owner or operator makes a demonstration to the satisfaction of the Commission or its delegate pursuant to Subparagraphs (1) or (2) of this Paragraph, the Director shall require the owner or operator of the source to apply maximum feasible control. Maximum feasible control shall be in place and operating within three years from the date that the permit is issued for the maximum feasible control.

(c) Pollution Prevention Plan. The owner or operator of any facility using the provisions of Paragraph (a)(2)(A) or Paragraph (b) of this Rule shall develop and implement a pollution prevention plan consisting of the following minimum elements:

- (1) statement of corporate and facility commitment to pollution prevention;
- (2) identification of current and past pollution prevention activities;
- (3) timeline and strategy for implementation;
- (4) description of ongoing and planned employee education efforts;
- (5) identification of internal pollution prevention goal selected by the facility and expressed in either qualitative or quantitative terms.

The facility shall submit along with the permit application the pollution prevention plan. The pollution prevention plan shall be maintained on site. A progress report on implementation of the plan shall be prepared by the facility annually and be made available to Division personnel for review upon request.

(d) Modeling Demonstration. If the owner or operator of a facility demonstrates by modeling that no toxic air pollutant

emitted from the facility exceeds the acceptable ambient level values given in 15A NCAC 02D .1104 beyond the facility's premises, further modeling demonstration is not required with the permit application. However, the Commission may still require more stringent emission levels according to its analysis under 15A NCAC 02D .1107.

(e) Change in Acceptable Ambient Level. When an acceptable ambient level for a toxic air pollutant in 15A NCAC 02D .1104 is changed, any condition that has previously been put in a permit to protect the previous acceptable ambient level for that toxic air pollutant shall not be changed until:

- (1) the facility makes a modification that results in a net increase of that toxic air pollutant, at which time the owner or operator of the facility shall submit an air toxic evaluation showing that the new acceptable ambient level will not be exceeded; or
- (2) the owner or operator of the facility requests that the condition be changed and submits along with that request an air toxic evaluation showing that the new acceptable ambient level will not be exceeded.

Authority G.S. 143-215.3(a)(1); 143-215.108; 143B-282; S.L. 1989, c. 168, s. 45.

15A NCAC 02Q .0711 EMISSION RATES REQUIRING A PERMIT

(a) A permit to emit toxic air pollutants shall be required for any facility whose actual (or permitted if higher) rate of emissions from all sources are greater than any one of the following toxic air pollutant permitting emissions rates:

Pollutant (CAS Number)	Carcinogens lb/yr	Chronic Toxicants lb/day	Acute Systemic Toxicants lb/hr	Acute Irritants lb/hr
acetaldehyde (75-07-0)				6.8
acetic acid (64-19-7)				0.96
acrolein (107-02-8)				0.02
acrylonitrile (107-13-1)	10			
ammonia (7664-41-7)				0.68
aniline (62-53-3)			0.25	
arsenic and inorganic arsenic compounds	0.016			
asbestos (1332-21-4)	1.9 X 10 ⁻⁶			
aziridine (151-56-4)		0.13		
benzene (71-43-2)	8.1			
benzidine and salts (92-87-5)	0.0010			
benzo(a)pyrene (50-32-8)	2.2			
benzyl chloride (100-44-7)			0.13	
beryllium (7440-41-7)	0.28			
beryllium chloride (7787-47-5)	0.28			
beryllium fluoride (7787-49-7)	0.28			
beryllium nitrate (13597-99-4)	0.28			
bioavailable chromate pigments, as chromium (VI) equivalent	0.0056			

PROPOSED RULES

Pollutant (CAS Number)	Carcinogens lb/yr	Chronic Toxicants lb/day	Acute Systemic Toxicants lb/hr	Acute Irritants lb/hr
bis-chloromethyl ether (542-88-1)	0.025			
bromine (7726-95-6)				0.052
1,3-butadiene (106-99-0)	12			
cadmium (7440-43-9)	0.37			
cadmium acetate (543-90-8)	0.37			
cadmium bromide (7789-42-6)	0.37			
carbon disulfide (75-15-0)		3.9		
carbon tetrachloride (56-23-5)	460			
chlorine (7782-50-5)		0.79		0.23
chlorobenzene (108-90-7)		46		
chloroform (67-66-3)	290			
chloroprene (126-99-8)		9.2	0.89	
cresol (1319-77-3)			0.56	
p-dichlorobenzene (106-46-7)				16.8
dichlorodifluoromethane(75-71-8)		5200		
dichlorofluoromethane (75-43-4)		10		
di(2-ethylhexyl)phthalate (117-81-7)		0.63		
dimethyl sulfate (77-78-1)		0.063		
1,4-dioxane (123-91-1)		12		
epichlorohydrin (106-89-8)	5600			
ethyl acetate (141-78-6)			36	
ethylenediamine (107-15-3)		6.3	0.64	
ethylene dibromide (106-93-4)	27			
ethylene dichloride (107-06-2)	260			
ethylene glycol monoethyl ether (110-80-5)		2.5	0.48	
ethylene oxide (75-21-8)	1.8			
ethyl mercaptan (75-08-1)			0.025	
fluorides		0.34	0.064	
formaldehyde (50-00-0)				0.04
hexachlorocyclopentadiene(77-47-4)		0.013	0.0025	
hexachlorodibenzo-p-dioxin(57653-85-7)	0.0051			
n-hexane (110-54-3)		23		
hexane isomers except n- hexane				92
hydrazine (302-01-2)		0.013		
hydrogen chloride (7647-01-0)				0.18
hydrogen cyanide (74-90-8)		2.9	0.28	
hydrogen fluoride (7664-39-3)		0.63		0.064
hydrogen sulfide (7783-06-4)				0.52
maleic anhydride (108-31-6)		0.25	0.025	
manganese and compounds		0.63		
manganese cyclopentadienyl tricarbonyl (12079-65-1)		0.013		
manganese tetroxide (1317-35-7)		0.13		
mercury, alkyl		0.0013		
mercury, aryl and inorganic compounds		0.013		
mercury, vapor (7439-97-6)		0.013		
methyl chloroform (71-55-6)		250		64
methylene chloride (75-09-2)	1600		0.39	
methyl ethyl ketone (78-93-3)		78		22.4
methyl isobutyl ketone (108-10-1)		52		7.6

PROPOSED RULES

Pollutant (CAS Number)	Carcinogens lb/yr	Chronic Toxicants lb/day	Acute Systemic Toxicants lb/hr	Acute Irritants lb/hr
methyl mercaptan (74-93-1)			0.013	
nickel carbonyl (13463-39-3)		0.013		
nickel metal (7440-02-0)		0.13		
nickel, soluble compounds, as nickel		0.013		
nickel subsulfide (12035-72-2)	0.14			
nitric acid (7697-37-2)				0.256
nitrobenzene (98-95-3)		1.3	0.13	
n-nitrosodimethylamine (62-75-9)	3.4			
non-specific chromium (VI) compounds, as chromium (VI) equivalent	0.0056			
pentachlorophenol (87-86-5)		0.063	0.0064	
perchloroethylene (127-18-4)	13000			
phenol (108-95-2)			0.24	
phosgene (75-44-5)		0.052		
phosphine (7803-51-2)				0.032
polychlorinated biphenyls (1336-36-3)	5.6			
soluble chromate compounds, as chromium (VI) equivalent		0.013		
styrene (100-42-5)			2.7	
sulfuric acid (7664-93-9)		0.25	0.025	
tetrachlorodibenzo-p-dioxin (1746-01-6)	0.00020			
1,1,1,2-tetrachloro-2,2,-difluoroethane (76-11-9)		1100		
1,1,2,2-tetrachloro-1,2-difluoroethane (76-12-0)		1100		
1,1,2,2-tetrachloroethane (79-34-5)	430			
toluene (108-88-3)		98		14.4
toluene diisocyanate,2,4-(584-84-9) and 2,6- (91-08-7) isomers		0.003		
trichloroethylene (79-01-6)	4000			
trichlorofluoromethane (75-69-4)			140	
1,1,2-trichloro-1,2,2-trifluoroethane(76-13-1)				240
vinyl chloride (75-01-4)	26			
vinylidene chloride (75-35-4)		2.5		
xylene (1330-20-7)		57		16.4

(b) When determining if the following pollutants qualify for exemption under Paragraph (a) of this Rule, the highest emissions occurring for any 15-minute period shall be multiplied by four and the product shall be compared to the value in Paragraph (a). These pollutants are:

- (1) acetaldehyde (75-07-0)
- (2) acetic acid (64-19-7)
- (3) acrolein (107-02-8)
- (4) ammonia (7664-41-7)
- (5) bromine (7726-95-6)
- (6) chlorine (7782-50-5)
- (7) formaldehyde (50-00-0)
- (8) hydrogen chloride (7647-01-0)
- (9) hydrogen fluoride (7664-39-3)
- (10) nitric acid (7697-37-2)

Authority G.S. 143-215.3(a)(1);143-215.108; 143B-282; S. L. 1989, c. 168, s. 45.

SECTION .0900 – PERMIT EXEMPTIONS

15A NCAC 02Q .0901 PURPOSE AND SCOPE

(a) The purpose of this Section is to define categories of facilities or sources that are exempted from needing a permit under Section .0300 of this Subchapter.

(b) Sources at a facility required to have a permit under Section .0500 of this Subchapter shall not be eligible for exemption under this Section.

(c) This Section does not apply to activities exempted from permitting under Rule .0102 of this Section.

(d) Coverage under this Section is voluntary. If the owner or operator of a facility or source qualified to be covered under a rule in this Section does not want to be covered under that rule, he shall notify the Director in writing that he does not want his facility or source covered under this Section. Along with the notification, he shall submit a permit application according to the procedures in Section .0300 of this Subchapter, and the Director

shall act on that application following the procedures in Section .0300 of this Subchapter.

(e) To qualify for exemption under this Section, the facility or source shall comply with all the requirements in the applicable rule in this Section.

(f) If the Director finds that a facility or source covered under this Section is in violation of the requirements of this Section, he may require that facility or source to be permitted under Section .0300 of this Subchapter.

Authority G.S. 143-215.3(a); 143-215.107(a)(10); 143-215.108.

15A NCAC 02Q .0902 PORTABLE CRUSHERS

(a) This Rule applies to portable crushers that:

- (1) crush no more than 300,000 tons during any 12 months;
- (2) burn no more than 17,000 gallons of diesel fuel during any 12 months if it uses:
 - (A) a diesel-fired generator; or
 - (B) a diesel engine to drive the crusher;
- (3) do not operate at any one facility or site more than 12 months;
- (4) do not operate at quarry that has an air permit issued under this Subchapter; and
- (4) continuously use water spray to control emissions from the crushers.

(b) The owner or operator of a portable crusher and any associated generators shall comply with 15A NCAC 02D .0510 (particulates from sand, gravel, or crushed stone operations), .0516 (sulfur dioxide emissions from combustion sources), .0521 (control of visible emissions), .0524 (new source performance standards, 40 CFR Part 60, Subpart OOO), .0535 (excess emissions reporting and malfunctions), .0540 (particulates from fugitive non-process dust emission sources), and .1806 (control and prohibition of odorous emissions).

(c) The owner or operator of a portable crusher shall not cause or allow any material to be produced, handled, transported, or stockpiled without taking measures to reduce to a minimum any particulate matter from becoming airborne to prevent exceeding the ambient air quality standards beyond the property line for particulate matter (PM2.5, PM10, and total suspended particulates).

(d) The owner or operator of a portable crusher shall maintain records of the amount of material crushed and the quantity of fuel burned in the diesel-fired generator so that the Division can determine upon review of these records that the crusher qualifies to be covered under this Rule.

(e) The owner or operator of a portable crusher shall clearly label each crusher, hopper, feeder, screen, conveyor, elevator, and generator with a permanent and unique identification number.

(f) If a source is covered under 15A NCAC 02D .0524 (40 CFR Part 60, Subpart OOO), the owner or operator of a portable crusher shall submit to the Director notifications are required under 15A NCAC 02D .0524 (40 CFR Part 60, Subpart OOO).

(g) If the Director or his authorized representative requests copies of notifications or testing records required under 15A NCAC 02D .0524 (40 CFR Part 60, Subpart OOO), the owner or operator of a portable crusher shall submit the requested

notifications or testing records within two business days of such a request.

Authority G.S. 143-215.3(a); 143-215.107(a)(10); 143-215.108.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Physical Therapy Examiners intends to amend the rule cited as 21 NCAC 48E .0110.

Proposed Effective Date: November 1, 2004

Public Hearing:

Date: August 5, 2004

Time: 1:00 p.m.

Location: NC Board of Physical Therapy Examiners Office, 18 West Colony Place, Suite 140, Durham, NC

Reason for Proposed Action: *Foreign Trained Applicants for licensure are required to demonstrate an educational background substantially equivalent to that of a United States educated physical therapist. Currently, in the United States, physical therapists are required to graduate with a post-baccalaureate degree. The proposed rule change extends the post-baccalaureate requirement to foreign educated physical therapists.*

Procedure by which a person can object to the agency on a proposed rule: *If you have any objection(s) to the proposed rule, please forward a typed or handwritten letter indicating your specific reason(s) for your objection(s) to the following address: Ben Massey, Jr., Executive Director, NC Board of Physical Therapy Examiners, 18 West Colony Place, Suite 140, Durham, NC 27705, Phone (919)490-6393.*

Written comments may be submitted to: *Ben Massey, Jr., Executive Director, NC Board of Physical Therapy Examiners, 18 West Colony Place, Suite 140, Durham, NC 27705, Phone (919)490-6393/(800)800-8982, Fax (919)490-5106, Email ncptboard@mindspring.com*

Comment period ends: September 13, 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 48 - BOARD OF PHYSICAL THERAPY EXAMINERS

SUBCHAPTER 48E - APPLICATION FOR LICENSURE

SECTION .0100 - REQUIREMENTS

21 NCAC 48E .0110 FOREIGN-TRAINED PHYSICAL THERAPISTS

(a) A foreign-trained physical therapist is one who has graduated from a program located outside the United States which has not been accredited by the Commission on Accreditation of Physical Therapy Education (CAPTE), (~~CAPTE~~), and includes programs in which the courses of instruction are not presented in English.

(b) English Translations. All application forms and supporting documents shall be in English or accompanied by an English translation.

(c) Supporting Documents. In addition to the other requirements of this Section and G.S. 90-270.30, each foreign-trained applicant shall submit the following:

- (1) If the applicant has graduated from a physical therapy educational program, a certification of physical therapy education shall be submitted directly to the Board.
- (2) If the applicant does not meet the requirements of G.S. 90-270.29(2), the Board shall examine the applicant's educational background to determine if the general ~~college~~ and professional ~~instruction~~ education is substantially equivalent to that received by a graduate of a CAPTE approved program. ~~of a United States physical therapy educational program.~~ For candidates ~~applying for licensure~~ graduating prior to December 31, 2002, a minimum of 120 semester hours of college education at the freshman through senior level is required, which includes a minimum of 60 semester hours of professional curriculum, including basic health sciences, clinical sciences and clinical education, and a minimum of 42 semester hours of general education. Up to 21 hours may be substituted for actual course work by obtaining a passing score on College Level Examination Program (CLEP) examinations.

(3) For candidates ~~applying~~ graduating after December 31, 2002, the applicant's educational background must be substantially equivalent to a Post-Baccalaureate degree from a CAPTE approved physical therapy

educational program. In order for a foreign-trained applicant's educational background to be determined substantially equivalent to a post-baccalaureate degree from a CAPTE approved program, the general and professional education must satisfy the requirements for the first professional degree as determined by the course work evaluation tool utilized by the FCCPT (Foreign Credentialing Commission on Physical Therapy, Inc.), or its successor organization. Up to one-half (1/2) of the general education credit hours may be substituted for actual course work by obtaining a passing score on CLEP examinations.

(4) The applicant shall make arrangements to have the credentials evaluated by a credentialing service acceptable to the Board which must have a physical therapist consultant on its staff. The Board recognizes the ~~Foreign Credentialing Commission of Physical Therapy, Inc. (FCCPT), FCCPT,~~ or a service determined by the Board to be equivalent. The Board shall make its own review of applicant's educational program and is not bound by the findings of the credentialing service.

(3) (5) Proof acceptable to the Board shall be provided that:

- (A) For examinations administered prior to August 1, 1998, the required minimum score of 210 on the TSE (Test of Spoken English) or the SPEAK (Speaking Proficiency English Assessment Kit) examination was obtained;
- (B) For examinations administered on or after August 1, 1998, the required minimum score of 50 on the TSE examination or the SPEAK examination was obtained, the required minimum score of the Test of Written English (TWE) of 4.5, and the Test of English as a Foreign Language (TOEFL) of 560; or
- (C) English is the applicant's ~~native~~ primary language.

Authority G.S. 90-270.26; 90-270.29; 90-270.30; 90-270.31.

CHAPTER 61 - THE NORTH CAROLINA RESPIRATORY CARE BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Respiratory Care Board intends to amend the rules cited as 21 NCAC 61 .0201, .0302.

Proposed Effective Date: November 1, 2004

Public Hearing:

Date: July 30, 2004

Time: 1:00 p.m.

Location: NC Respiratory Care Board, 1100 Navaho Dr., Suite 242, Raleigh, NC

Reason for Proposed Action:

21 NCAC 61 .0201 – To provide continuing education requirements for individuals applying for licensure who have been out of the practice of respiratory care.

21 NCAC 61 .0302 – To provide clarification of continuing education requirements for renewal of license.

Procedure by which a person can object to the agency on a proposed rule:

A person may object to the Board on a proposed rule by sending a written objection addressed to Floyd Boyer, RRT RCP Executive Director, North Carolina Respiratory Care Board, 1100 Navaho Dr., Suite 242, Raleigh, NC 27609, phone (919) 878-5595, fax (919) 878-5565, and email fboyer@ncrcb.org.

Written comments may be submitted to: Floyd Boyer, RRT RCP Executive Director, North Carolina Respiratory Care Board, 1100 Navaho Dr., Suite 242, Raleigh, NC 27609, phone (919) 878-5595, fax (919) 878-5565, and email fboyer@ncrcb.org.

Comment period ends: September 13, 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

SECTION .0200 – APPLICATION FOR LICENSE

21 NCAC 61 .0201 APPLICATION PROCESS

(a) 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.

(b) Applicants for licensure who have been inactive and who have not practiced respiratory care, for a period of time greater than one year, must complete the following requirements in addition to the requirements in Subparagraphs (a)(1)-(4) of this Rule:

- (1) For applicants who have not practiced respiratory care for a period of time greater than 1 year, the applicant must provide evidence of 10 hours of continuing education, that meet the requirements of 21 NCAC 61 .0401, for each year of inactivity.
- (2) For applicants who have not practiced respiratory care for a period of time greater than five years, the applicant must provide evidence from the National Board for Respiratory Care (NBRC) of successful completion of the Certified Respiratory Therapist (CRT) examination taken as an assessment examination within the 90-day period before receipt of the application for licensure.

Authority G.S. 90-652(1),(2) and (13); 90-653(a).

SECTION .0300 –LICENSING

21 NCAC 61 .0302 LICENSE RENEWAL

(a) Any licensee desiring the renewal of a license shall apply for renewal and shall submit the ~~required fee.~~ fee established in Rule .0204 of this Chapter.
(b) Any person whose license is lapsed or expired and who engages in the practice of respiratory care as defined in G.S. 90-

648(10) will be subject to the penalties prescribed in G.S. 90-659.

(c) Each applicant for renewal shall provide proof of completion of continuing education requirements as established in Rule .0401 of this Chapter.

(d) Each applicant for renewal shall provide a copy of current certification in Basic Life Support (BLS) 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. The board shall accept a copy of the applicant's BLS Instructor certificate or Advanced Cardiac Life Support (ACLS) certificate in lieu of the BLS certificate.

~~(e)~~(e) Licenses lapsed in excess of 24 months shall not be renewable. Persons whose licenses have been lapsed in excess of 24 months and who desire to be licensed shall apply for a new license and shall meet all the requirements then existing.

Authority G.S. 90-652(1),(2),(4) and (13).

CHAPTER 64 – BOARD OF EXAMINERS FOR SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Examiners for Speech and Language Pathologists and Audiologists intends to adopt the rule cited as 21 NCAC 64 .0214.

Proposed Effective Date: December 1, 2004

Public Hearing:

Date: August 27, 2004

Time: 10:00 a.m.

Location: Airport Courtyard by Marriott, 2002 Hospitality Court, Morrisville, NC

Reason for Proposed Action: Complaints have been received about current advertising practices.

Procedure by which a person can object to the agency on a proposed rule: Attend public hearing or submit written objection.

Written comments may be submitted to: John C. Randall, 3100 Tower Dr., 522, Durham, NC 27707

Comment period ends: September 13, 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

SECTION .0200 - INTERPRETATIVE RULES

21 NCAC 64 .0214 AUDIOLOGY ADVERTISING

The Board of Examiners for Speech and Language Pathologists and Audiologists interprets the word "misleading" used in G.S. 90-301A(3) as including any representation that uses the term "audiology" or "audiologist" in describing services offered at a particular location unless a North Carolina licensed audiologist provides said services at that location during operational hours.

Authority G.S. 90-304(a)(3).

Note from the Codifier: The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.
 This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *Medical Care Commission*

Rule Citation: 10A NCAC 13F .0301-.0307, .0309-.0312, .0403-.0404, .0704, .0905, .0907, .0909, .1201, .1210; 13G .0202, .0403-.0404, .0703-.0704, .0905, .0907, .0909, .1201, .1212

Effective Date: *July 1, 2004*

Date Approved by the Rules Review Commission: *June 17, 2004*

Reason for Action: *Temporary rulemaking authority for Adult Care Home Rules under 10A NCAC 13F and 13G given legislatively to the Medical Care Commission by the General Assembly in 2002 and extended in 2003 through July 1, 2004.*

CHAPTER 13 - NC MEDICAL CARE COMMISSION

SUBCHAPTER 13F - LICENSING OF HOMES FOR THE AGED AND INFIRM

SECTION .0300 - PHYSICAL PLANT

10A NCAC 13F .0301 APPLICATION OF PHYSICAL PLANT REQUIREMENTS

The physical plant requirements for each facility shall be applied as follows:

- (1) New construction shall comply with the requirements of Rules .0301 - .0311 of this Section;
- (2) Except where otherwise specified, existing licensed facilities or portions of existing licensed facilities shall meet licensure and code requirements in effect at the time of construction, change in service or bed count, addition, renovation, or alteration, however in no case shall the requirements for any licensed facility where no addition or renovation has been made, be less than those requirements found in the 1971 "Minimum and Desired Standards and Regulations" for "Homes for the Aged and Infirm", copies of which are available at the Division of Facility Services, 701 Barbour Drive, Raleigh, North Carolina, 27603 at no cost;
- (3) New additions, alterations, modifications and repairs shall meet the technical requirements of Rules .0301 - .0311 of this Section; however, where strict conformance with

current requirements would be impractical, the Division may approve alternative measures where the facility can demonstrate to the Division's satisfaction that the alternative measures do not reduce the safety or operating effectiveness of the facility;

- (4) Effective July 1, 1987, resident bedrooms and resident services shall not be permitted on the second floor of any facility licensed for seven or more beds prior to April 1, 1984 and classified as two-story wood frame construction by the North Carolina State Building Code;
- (5) Rules .0301 – 0311 of this Subchapter are minimum requirements and are not intended to prohibit buildings, systems or operational conditions that exceed minimum requirements;
- (6) The bed capacity and services provided in a facility shall be in compliance with G.S. 131E, Article 9 regarding Certificate of Need. A facility shall be licensed for no more beds than the number for which required physical space and other required facilities are available;
- (7) Equivalency: Alternate methods, procedures, design criteria and functional variations from the physical plant requirements may be approved by the Division when the facility can effectively demonstrate that the intent of the physical plant requirements are met and that the variation does not reduce the safety or operational effectiveness of the facility; and
- (8) Where rules, codes or standards have any conflict, the most stringent requirement shall apply and any conflicting requirement shall not apply.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

10A NCAC 13F .0302 DESIGN AND CONSTRUCTION

(a) Any building licensed for the first time shall meet the requirements of the North Carolina State Building Code for new construction, construction as well as all of the rules of this Section. ~~No horizontal exits shall be permitted in newly constructed facilities or new additions to existing facilities.~~ All new construction, additions and renovations to existing buildings shall meet the requirements of the North Carolina State Building Code for I-2 Institutional Occupancy if the facility houses 13 or more residents or the North Carolina State Building Code requirements for Large Residential Care Facilities if the facility houses seven to twelve residents. The North Carolina State Building Code, all applicable volumes, which is incorporated by

reference, including all subsequent amendments may be purchased from the Department of Insurance Engineering Division located at 322 Chapanoke Road, Suite 200, Raleigh, North Carolina 27603 at a cost of three hundred eighty dollars (\$380.00). The facility shall also meet all of the rules of this Section.

(b) In a facility licensed before April 1, 1984, the building shall meet and be maintained to meet all the requirements for new construction required by the North Carolina State Building Code in effect at the time the building was constructed. Where code requirements require a modification of the building's structural system, an alternative method may be used to meet the intent of the code.

(c) In a facility licensed before April 1, 1984 and constructed prior to January 1, 1975, the building, in addition to meeting the requirements of the North Carolina State Building Code in effect at the time the building was constructed, shall be provided with the following:

- (1) A fire alarm system with pull stations near each exit and sounding devices which are audible throughout the building must be provided.
- (2) Products of combustion (smoke) U/L listed detectors in all corridors. The detectors must be no more than 60 feet from each other and no more than 30 feet from any end wall.
- (3) Heat detectors or products of combustion detectors in all storage rooms, kitchens, living rooms, dining rooms and laundries.
- (4) All detection systems interconnected with the fire alarm system.
- (5) Emergency power for the fire alarm system, heat detection system, and products of combustion detection system. The emergency power for these systems may be a manual start system capable of monitoring the building for 24 hours and sound the alarm for five minutes at the end of that time. The emergency power for the emergency lights shall be a manual start generator or a U/L approved trickle charge battery system capable of providing light for 1 1/2 hours when normal power fails.

(d) The building shall meet sanitation requirements as determined by the North Carolina Division of Environmental Health.

(e) Effective July 1, 1987, resident bedrooms and resident services shall not be permitted on the second floor of any facility licensed prior to April 1, 1984 and classified as two-story wood frame construction by the North Carolina State Building Code.

(f) The facility shall have current sanitation and fire and building safety inspection reports which shall be maintained in the facility and available for review.

(b) Each facility shall be planned, constructed, equipped and maintained to provide the services offered in the facility.

(c) Any existing building converted from another use to an Adult Care Home shall meet all requirements of a new facility.

(d) Any existing licensed facility that is closed or vacant for more than one year shall meet all requirements of a new facility.

(e) The sanitation, water supply, sewage disposal and dietary facilities shall comply with the rules of the North Carolina

Division of Environmental Health, which are incorporated by reference, including all subsequent amendments. The "Rules Governing the Sanitation of Hospitals, Nursing and Rest Homes, Sanitariums, Sanatoriums, and Educational and Other Institutions", 15A NCAC 18A .1300 are available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Copies may be obtained from Environmental Health Services Section, 1632 Mail Service Center, Raleigh, North Carolina 27699-1632 at no cost.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284;

Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Amended Eff. July 1, 1990; September 1, 1986; April 1, 1984;

Temporary Amendment Eff. September 1, 2003;

Amended Eff. June 1, 2004;

Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F.0301.0303 LOCATION

(a) The home proposed facility must shall be in a location approved by local zoning boards, boards and be a safe distance from streets, highways, railroads, open lakes and other hazards. It must be located on a street, road or highway accessible by car. The home shall be located so that hazards to the occupants are minimized.

(b) Plans for the building and site are to be reviewed and approved by the Construction Section of the Division of Facility Services. Services prior to licensure.

(c) An adult care home may be located in an existing building or in a building newly constructed specifically for that purpose.

(d) The building and site are to be reviewed and approved by the Construction Section of the Division of Facility Services.

(d) The site of the proposed facility shall be approved by the Department prior to construction and shall:

- (1) be accessible by streets, roads and highways and be maintained for motor vehicles and emergency vehicle access;
- (2) be accessible to fire fighting and other emergency services;
- (3) have a water supply, sewage disposal system, garbage disposal system and trash disposal system approved by the local health department having jurisdiction;
- (4) meet all local ordinances and zoning laws; and
- (5) be free from exposure to hazards and pollutants.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284;

Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Amended Eff. January 1, 1991; April 1, 1984;

Temporary Amendment Eff. July 1, 2003.

Amended Eff. June 1, 2004;

Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F.0304 PLANS AND SPECIFICATIONS

- (a) When construction or remodeling is planned, two copies of Construction Documents and specifications shall be submitted by the applicant or his appointed representative to the Department for review and approval. As a preliminary step to avoid last minute difficulty with final plan approval, Schematic drawings and Design Development drawings may be submitted for approval prior to the required submission of Construction Documents.
- (b) Approval of Construction Documents and specifications shall be obtained from the Division prior to licensure. Approval of Construction Documents shall expire after one year unless a building permit for the construction has been obtained.
- (c) If an approval expires, renewed approval shall be issued provided revised Construction Documents meeting all current regulations, codes and standards are submitted and reviewed.
- (d) Any changes made during construction shall require the approval of the Division to assure that licensing requirements are maintained.
Completed construction or remodeling shall conform to the minimum standards established in Rules .0301 - .0311 of this Section including the operation of all building systems and shall be approved in writing by the Division prior to licensure or occupancy. Within 90 days following licensure, the Owner or Licensee shall submit documentation to the Division that "as built" drawings have been received from the builder.
- (e) The applicant or his designated agent shall notify the Division when actual construction or remodeling starts and at points when construction is 50 percent, 75 percent and 90 percent complete and upon final completion.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

10A NCAC 13F-~~0303~~0305 PHYSICAL ENVIRONMENT

The home shall provide ~~ample~~ living arrangements to meet the individual needs of the residents, the live-in staff and other live-in persons.

- (1) The requirements for each living room and recreational area are:
 - (a) Each living room and recreational area shall be located off a lobby or ~~corridor~~ corridor. At least 50 percent of required living and recreational areas shall be and enclosed with walls and doors;
 - (b) In buildings with a licensed capacity of 15 or less, there shall be a minimum area of 250 square feet;
 - (c) In buildings with a licensed capacity of 16 or more, there shall be a minimum of 16 square feet per resident; and
 - (d) Each living room and recreational area shall have windows.
- (2) The requirements for the dining room are:
 - (a) The dining room shall be located off a lobby or corridor and enclosed with walls and doors;

- (b) In buildings with a licensed capacity of 15 or less, there shall be a minimum of 200 square feet;
 - (c) In building with a licensed capacity of 16 or more, there shall be a minimum of 14 square feet per resident; and
 - (d) The dining room shall have windows.
- (3) ~~The requirements for the kitchen are:~~
- (a) ~~The size of the kitchen and the kitchen equipment shall meet the sanitation requirements of the North Carolina Department of Environment, Health, and Natural Resources; Division of Environmental Health. Scaled drawings and specifications shall be submitted to the Division of Facility Services; and~~
 - (b) ~~In areas where approved water and sewer services are not available, the owner shall secure from the local sanitarian instructions on the installation of an approved water and sewer system and comply with these instructions.~~
- (4)(3) The requirements for the bedroom are:
- (a) The number of resident beds set up shall not exceed the licensed capacity of the facility;
 - (b) There shall be bedrooms sufficient in number and size to meet the individual needs according to age and sex of the residents, ~~the administrator or supervisor in charge, other any~~ live-in staff and ~~any~~ other persons living in the home. Residents shall not share bedrooms with staff or other live-in non-residents;
 - (c) Only rooms authorized as bedrooms shall be used for residents' bedrooms;
 - (d) Bedrooms shall be located on an outside wall and off a corridor. A room where access is through a bathroom, kitchen, or another bedroom shall not be approved for a resident's bedroom;
 - (e) There ~~must~~ shall be a minimum area of 100 square feet excluding vestibule, closet or wardrobe space, in rooms occupied by one person and a minimum area of 80 square feet per bed, excluding vestibule, closet or wardrobe space, in rooms occupied by two ~~or more~~ people;
 - (f) The total number of residents assigned to a bedroom shall not exceed the number authorized for that particular bedroom;
 - (g) A bedroom may not be occupied by more than ~~four~~ residents ~~two~~

- ~~residents; This does not apply to homes licensed before April 1, 1984, with five residents occupying one bedroom, which meet all other rules of this Subchapter;~~
- (h) Resident bedrooms shall be designed to accommodate all required furnishings;
 - (i) Each resident bedroom shall be ventilated with one or more windows which are maintained operable and well lighted. The window area shall be equivalent to at least eight percent of the floor ~~space.~~ space and be provided with insect screens. The window opening may be restricted to a six inch opening to inhibit resident elopement or suicide. The windows shall be low enough to see outdoors from the bed and chair, with a maximum 36 inch sill height; and
 - (j) Bedroom closets or wardrobes shall be large enough to provide each resident with a minimum of 48 cubic feet of ~~hanging~~ clothing storage space (approximately two feet deep by three feet wide ~~of hanging space~~ by eight feet ~~high.~~ high) of which at least one-half shall be for hanging clothes with an adjustable height hanging bar.
- ~~(5)(4)~~ The requirements for bathrooms and toilet rooms are:
- (a) Minimum bathroom and toilet facilities shall include a toilet and a hand lavatory for each 5 residents and a tub or shower for each 10 residents or portion thereof;
 - (b) Entrance to the bathroom shall not be through a kitchen, another person's bedroom, or another bathroom;
 - (c) Toilets and baths for staff and visitors shall be in accordance with ~~Volume II, Plumbing,~~ the North Carolina ~~State Building Code;~~ Code, Plumbing Code;
 - (d) Bathrooms and toilets accessible to the physically handicapped shall be provided as required by ~~Section 11X,~~ Volume I, ~~I-C,~~ North Carolina ~~State Building Code;~~ Code, Accessibility Code;
 - (e) The bathrooms and toilet rooms shall be designed to provide privacy. Bathrooms and toilet rooms with two or more water closets (commodes) shall have privacy partitions or curtains for each water closet. Each tub or shower shall have privacy partitions or curtains;
 - (f) Hand grips shall be installed at all commodes, tubs and showers used by or accessible to residents;
 - (g) Each home shall have at least one bathroom opening off the corridor with: a door three feet minimum width, a three feet by three feet roll-in shower designed to allow the staff to assist a resident in taking a shower without the staff getting wet, a bathtub accessible on at least two sides, a lavatory and a toilet. ~~All fixtures shall meet the State Building Code requirements for the physically handicapped in effect at the time the building was constructed;~~
 - (h) Bathrooms and toilet rooms shall be located as conveniently as possible to the residents' bedrooms;
 - (i) Resident toilet rooms and bathrooms shall not be utilized for storage or purposes other than those indicated in ~~Item (5)(4)~~ of this Rule;
 - (j) Toilets and baths shall be well lighted and mechanically ventilated at two cubic feet per minute. The mechanical ventilation requirement does not apply to facilities licensed before April 1, 1984, with ~~adequate~~ natural ventilation;
 - (k) Nonskid surfacing or strips shall be installed in showers and bath areas; and
 - (l) The floors of the bathrooms and toilet rooms shall have, water-resistant covering.
- ~~(6)(5)~~ The requirements for storage rooms and closets are:
- (a) General Storage for the Home. A minimum area of five square feet (40 cubic feet) per licensed capacity shall be provided. This storage space shall be either in the facility or within 500 feet of the facility on the same site;
 - (b) Linen Storage. Storage areas shall be adequate in size and number for separate storage of clean linens and separate storage of soiled linens. Access to soiled linen storage shall be from a corridor or laundry room;
 - (c) Food Storage. Space shall be provided for dry, refrigerated and frozen food items to comply with sanitation regulations;
 - (d) Housekeeping storage requirements are:

- (i) A housekeeping closet, with mop sink or mop floor receptor, shall be provided at the rate of one per 60 residents or portion thereof; and
 - (ii) There shall be separate locked areas for storing cleaning agents, bleaches, pesticides, and other substances which may be hazardous if ingested, inhaled or handled. Cleaning supplies shall be supervised while in use;
 - (e) Handwashing facilities with wrist type lever handles shall be provided immediately adjacent to the drug storage area;
 - (f) Storage for Resident's Articles. Some means for residents to lock personal articles within the home shall be provided; and
 - (g) Staff Facilities. Some means for staff to lock personal articles within the home shall be provided.
- ~~(7)~~(6) The requirements for corridors are:
- (a) Doors to spaces other than small reach-in closets shall not swing into the corridor;
 - (b) Handrails shall be provided on both sides of corridors at 36 inches above the floor and be capable of supporting a 250 pound concentrated load;
 - (c) Corridors shall be lighted sufficiently with night lights providing 1 foot-candle power at the floor; and
 - (d) Corridors shall be free of all equipment and other obstructions.
- ~~(8)~~(7) The requirements for outside entrances and exits are:
- (a) ~~Public and service~~ Service entrances shall not be through ~~required~~ resident use areas;
 - (b) All steps, porches, stoops and ramps shall be provided with handrails and guardrails; ~~and~~
 - (c) All exit door locks shall be easily operable, by a single hand motion, from the inside at all times without ~~keys, keys; and~~
 - (d) In homes with at least one resident who is determined by a physician or is otherwise known to be disoriented or a wanderer, each ~~required~~ exit door accessible by residents shall be equipped with a sounding device that is activated when the door is opened. The sound shall be of sufficient volume that it can be heard by staff.
- ~~(9)~~(8) The requirements for floors are:
- (a) All floors shall be of smooth, non-skid material and so constructed as to be easily cleanable;
 - (b) Scatter or throw rugs shall not be used; and
 - (c) All floors shall be kept in good repair.
- ~~(10)~~(9) Soil Utility Room. A separate room shall be provided and equipped for the cleaning and sanitizing of bed pans and shall have handwashing facilities.
- ~~(11)~~(10) Office. There shall be an area within the home large enough to accommodate normal administrative functions.
- ~~(12)~~(11) The requirements for laundry facilities are:
- (a) Laundry facilities shall be large enough to accommodate washers, dryers, and ironing equipment or work tables;
 - (b) These facilities shall be located where soiled linens will not be carried through the kitchen, dining, clean linen storage, living rooms or recreational areas; and
 - (c) A minimum of one residential type washer and dryer each shall be ~~provided,~~ provided in a separate room which is accessible by staff, residents and family, even if all laundry services are contracted.
- ~~(13)~~(12) The requirements for outside premises are:
- (a) The outside grounds shall be maintained in a clean and safe condition;
 - (b) If the home has a fence around the premises, the fence shall not prevent residents from exiting or entering freely or be hazardous; and
 - (c) Outdoor walkways and drives shall be illuminated by no less than five foot-candles of light at ground level.
- ~~(14)~~(13) Alternate methods, procedures, design criteria and functional variations from the physical environment requirements, because of extraordinary circumstances, new programs or unusual conditions, may be approved by the Division when the facility can effectively demonstrate to the Division's satisfaction that the intent of the physical environment requirements are met and the variation does

not reduce the safety or operational effectiveness of the facility.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0334; 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; April 1, 1987; July 1, 1984; April 1, 1984; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F .0304 .0306 HOUSEKEEPING AND FURNISHINGS

(a) Facilities shall:

- (1) have walls, ceilings, and floors or floor coverings kept clean and in good repair;
- (2) have no chronic unpleasant odors;
- (3) have furniture clean and in good repair;
- (4) have ~~an~~ a North Carolina Division of Environmental Health approved sanitation classification at all times in facilities with 12 beds or less and North Carolina Division of Environmental Health sanitation scores of 85 or above at all times in facilities with 13 beds or more;
- (5) be maintained in an uncluttered, clean and orderly manner, free of all obstructions and hazards;
- (6) have an adequate supply of bath soap, clean towels, washcloths, sheets, pillow cases, blankets, and additional coverings on hand at all times;
- (7) make available the following items as needed through any means other than charge to the personal funds of recipients of State-County Special Assistance:
 - (A) protective sheets and clean, absorbent, soft and smooth pads;
 - (B) bedpans, urinals, hot water bottles, and ice caps; and
 - (C) bedside commodes, walkers, and wheelchairs;
- (8) have television and radio, each in good working order; ~~and~~
- (9) have curtains, draperies or blinds, where appropriate. ~~appropriate;~~
- (10) have recreational equipment, supplies for games, books, magazines and a current newspaper available for residents; ~~and~~
- (11) have a clock in an area commonly used by residents.

~~(b) Residents will be allowed to bring their own furniture and personal belongings if permitted by the home.~~

~~(c)~~(b) Each bedroom shall have the following furnishings in good repair and clean for each resident:

- (1) ~~Single~~ A bed equipped with box springs and mattress or solid link springs and no-sag innerspring or foam mattress. Hospital bed

appropriately equipped shall be arranged for as needed. ~~A double bed is allowed if used only for single occupancy, unless occupied by husband and wife.~~ A water bed is allowed if requested by a resident and permitted by the home. Each bed is to have the following:

- (A) at least one pillow with clean pillow case;
 - (B) clean top and bottom sheets on the bed, with bed changed as often as necessary but at least once a week; and
 - (C) clean bedspread and other clean coverings as needed;
- (2) a bedside type table;
 - (3) chest of drawers or bureau when not provided as built-ins, or a double chest of drawers or double dresser for two residents;
 - (4) a wall or dresser mirror that can be used by each resident;
 - (5) a minimum of one comfortable chair (rocker or straight, arm or without arms, as preferred by resident), high enough from floor for easy rising;
 - (6) additional chairs available, as needed, for use by visitors;
 - (7) individual clean ~~towel, towel and wash cloth, cloth and towel bar; bar in the bedroom or an adjoining bathroom;~~ and
 - (8) a light overhead of bed with a switch within reach of person lying on bed; or a lamp. The light shall ~~be of~~ provide a minimum of 30 foot-candle power of illumination for reading.

~~(d)~~(c) The living room shall have the following furnishings; functional living room furnishings for the comfort of aged and disabled persons, with coverings that are easily cleanable.

- (1) ~~functional living room furnishings for the comfort of aged and disabled persons, with coverings easily cleanable;~~
- (2) ~~recreational equipment, supplies for games, books, and reasonably current magazines;~~
- (3) ~~an easily readable clock; and~~
- (4) ~~a newspaper.~~

~~(e)~~(d) The dining room shall have the following furnishings:

- (1) small tables serving from two to eight persons and chairs to seat all residents eating in the dining room; tables and chairs equal to the resident capacity of the home shall be on the premises; and
- (2) ~~movable, chairs that are sturdy, non-folding chairs, non-folding, without rollers and~~ designed to minimize tilting.

(e) This Rule shall apply to new and existing facilities.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984; Temporary Amendment Eff. September 1, 2003.

Amended Eff. June 1, 2004;
 Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F-~~0305~~.0307 FIRE ALARM SYSTEM

(a) The fire alarm system ~~must shall~~ be able to transmit an automatic signal to the local fire department where ~~possible, the local fire department has the capability to receive it.~~

~~(b) For the minimum fire alarm system in facilities licensed before April 1, 1984, see Rule .0302(c) of this Subchapter.~~

~~(c)(b)~~ Any other applicable fire safety requirements required by city ordinances or county building inspectors ~~must shall~~ be provided.

(c) In a facility licensed before April 1, 1984 and constructed prior to January 1, 1975, the building, in addition to meeting the requirements of the North Carolina State Building Code in effect at the time the building was constructed, shall be provided with the following:

- (1) A fire alarm system with pull stations near each exit and sounding devices which are audible throughout the building;
- (2) Products of combustion (smoke) U/L listed detectors in all corridors. The detectors shall be no more than 60 feet from each other and no more than 30 feet from any end wall;
- (3) Heat detectors or products of combustion detectors in all storage rooms, kitchens, living rooms, dining rooms and laundries;
- (4) All detection systems interconnected with the fire alarm system; and
- (5) Emergency power for the fire alarm system, heat detection system, and products of combustion detection shall be automatic start generator or trickle charge battery system capable of operating the fire alarm systems for 24 hours and be able to sound the alarm for five minutes at the end of that time. Emergency egress lights and exit signs shall be powered from an automatic start generator or a U/L approved trickle charge battery system capable of operation for 1-1/2 hours when normal power fails.

(d) When any facility not equipped with a complete automatic fire extinguishment system replaces the fire alarm system, each bedroom shall be provided with smoke detectors. Other building spaces shall be provided with such fire detection devices as required by the North Carolina State Building Code and requirements of this Subchapter.

History Note: Authority G.S. 131D-2; 143B-165;
 S.L. 2002-0160; 2003-0284;
 Eff. January 1, 1977;
 Readopted Eff. October 31, 1977;
 Amended Eff. April 1, 1984;
 Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F-~~0307~~.0309 PLAN FOR EVACUATION

(a) A written ~~fire/disaster~~ fire evacuation plan (including a diagrammed drawing) which has the written approval of the local fire department Code Enforcement Official ~~must shall~~ be

prepared in large print and posted in a central location on each floor. The plan ~~must shall~~ be reviewed with each resident on admission and ~~must shall~~ be a part of the orientation for all new staff.

(b) There ~~must shall~~ be at least 12 rehearsals of the fire/disaster fire plan each year (four times on each shift) quarterly on each shift in accordance with the requirement of the local Fire Prevention Code Enforcement Official.

(c) Records of rehearsals shall be maintained and copies furnished to the county department of social services annually. The records ~~must shall~~ include the date and time of the rehearsals, the shift, staff members present, and a short description of what the rehearsal involved.

(d) A written disaster plan, which has the written approval of or has been documented as received by the local emergency management agency and the local agency designated to coordinate special needs sheltering during disasters, shall be prepared and updated at least annually and shall be maintained in the facility.

(e) A facility that elects to be designated as a special care shelter during an impending disaster or emergency event shall follow the guidelines established by the State of North Carolina Disaster Plan 2001. The facility shall contact the Division of Facility Services to determine which licensure rules may be waived according to G.S. 131D-7 to allow for emergency care shelter placements prior to sheltering during the emergency event.

(f) This Rule shall apply to new and existing facilities.

History Note: Authority G.S. 131D-2; 143B-165;
 S.L. 2002-0160; 2003-0284;
 Eff. January 1, 1977;
 Readopted Eff. October 31, 1977;
 Amended Eff. April 1, 1987; April 1, 1984;
 Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F-~~0308~~.0310 ELECTRICAL OUTLETS

All electrical outlets in wet locations ~~such as at sinks~~, bathrooms and outside of building ~~must shall~~ have ground fault interrupters.

History Note: Authority G.S. 131D-2; 143B-165;
 S.L. 2002-0160; 2003-0284;
 Eff. January 1, 1977;
 Readopted Eff. October 31, 1977;
 Amended Eff. April 1, 1984;
 Temporary Amendment July 1, 2004.

10A NCAC 13F-~~0309~~.0311 OTHER REQUIREMENTS

(a) The building and all fire safety, electrical, mechanical and plumbing equipment shall be maintained in a safe and operating condition.

(b) There shall be an approved heating system sufficient to maintain 75 degrees F (24 degrees C) under winter design conditions. In addition, the following shall apply to heaters and cooking appliances.

- (1) Built-in electric heaters, if used, shall be installed or protected so as to avoid burn hazards to residents and room furnishings.
- (2) Unvented fuel burning room heaters and portable electric heaters are prohibited.

- (3) Fireplaces, fireplace inserts and wood stoves shall be designed or installed so as to avoid a burn hazard to residents. Fireplace inserts and wood stoves shall be U.L. listed.
 - (4) Ovens, ranges and cook tops located in resident activity or recreational areas shall not be used except under facility staff supervision. The degree of staff supervision shall be based on the facilities assessment of the capabilities of each resident. The operation of the equipment shall have a locking feature provided, that shall be controlled by staff.
 - (5) Ovens, ranges and cook tops located in resident rooms shall have a locking feature provided, controlled by staff, to limit the use of the equipment by residents who have been assessed by the facility to be incapable of operating the equipment in a safe manner.
- (c) Air conditioning or at least one fan per resident bedroom and living and dining areas shall be provided when the temperature in the main center corridor exceeds 80 degrees F (26.7 degrees C).
- (d) The hot water system shall be of such size to provide an adequate supply of hot water to the kitchen, bathrooms, laundry, housekeeping closets and soil utility room. The hot water temperature at all fixtures used by residents shall be maintained at a minimum of 100 degrees F (38 degrees C) and shall not exceed 116 degrees F (46.7 degrees C).
- (e) All multi-story facilities shall be equipped with elevators.
- (f) In addition to the required emergency lighting, minimum lighting shall be as follows:
- (1) 30 foot-candle power for reading;
 - (2) 10 foot-candle power for general lighting; and
 - (3) 1 foot-candle power at the floor for corridors at night.
- (g) The spaces listed in this Paragraph shall be provided with exhaust ventilation at the rate of two cubic feet per minute per square foot. This requirement does not apply to facilities licensed before April 1, 1984, with adequate natural ventilation in these specified spaces:
- (1) soiled linen storage;
 - (2) soil utility room;
 - (3) bathrooms and toilet rooms;
 - (4) housekeeping closets; and
 - (5) laundry area.
- (h) ~~Where required for staffing purposes, In facilities licensed for 7-12 residents,~~ an electrically operated call system shall be provided connecting each resident bedroom to the live-in staff bedroom. The resident call ~~switches~~ system activator shall be such that they can be activated with a single action and remain on until ~~switched off~~ deactivated by staff ~~staff at the point of origin.~~ The call ~~switch~~ system activator shall be within reach of the resident lying on ~~his~~ the bed.
- (i) In newly licensed facilities without live-in staff, an electrically operated call system shall be provided connecting each resident bedroom and bathroom to a staff station. The resident call system activator shall be such that they can be activated with a single action and remain on until deactivated by staff at the point of origin. The call system activator shall be within reach of the resident lying on the bed.

(j) Except where otherwise specified, existing facilities housing persons unable to evacuate without staff assistance shall provide those residents with handbells or other signaling devices.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 1999-0334; 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; April 1, 1987; April 1, 1984; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F .0310.0312 BUILDING CODE AND SANITATION REQUIREMENTS

~~Homes for the aged must meet all institutional building code requirements of the North Carolina Insurance Department and the sanitation requirements of the state division of health services. Some of these requirements have been incorporated into these standards and regulations after consultation with both agencies.~~

History Note: Authority G.S. 131D-2; 143B-153; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Repeal Eff. July 1, 2004.

SECTION .0400 - STAFF QUALIFICATIONS

10A NCAC 13F .0403 QUALIFICATIONS OF MEDICATION STAFF

(a) ~~Effective February 15, 2000, staff~~ Staff who administer medications, hereafter referred to as medication aides, and staff who directly supervise the administration of medications shall have documentation of successfully completing the clinical skills validation portion of the competency evaluation according to Paragraphs (d) and (e) of Rule 10A NCAC ~~13G~~ 13F .0503 prior to the administration or supervision of the administration of medications. ~~Medication aides who perform other personal care tasks shall also meet the staff training and competency requirements according to Rule .0501 of this Section.~~ Persons authorized by state occupational licensure laws to administer medications are exempt from this requirement.

(b) ~~Effective July 1, 2000, medication~~ Medication aides and their direct supervisors, except persons authorized by state occupational licensure laws to administer medications, shall successfully pass the written examination within 90 days after successful completion of the clinical skills validation portion of a competency evaluation according to Rule .0503 of this Section. ~~Medication aides shall also meet the staff training and competency requirements according to Rule .0501 of this Section.~~

(c) Medication aides and staff who directly supervise the administration of medications, except persons authorized by state occupational licensure laws to administer medications, shall complete six hours of continuing education annually related to medication administration.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0334; 2002-0160; 2003-0284;

Temporary Adoption Eff. January 1, 2000; December 1, 1999;
Eff. July 1, 2000;

Temporary Amendment Eff. July 1, 2004.

**10A NCAC 13F .0404 QUALIFICATIONS OF
ACTIVITY DIRECTOR**

~~Since activities are a required part of the program of the family care home, there~~ There shall be a designated ~~activities coordinator~~ activity director who meets the ~~requirements and following qualifications: qualifications set forth in this Rule.~~

- (1) ~~The qualifications of the administrator and co-administrator referenced in Paragraphs (2) and (5) of Rule 10A NCAC 13G .0401 shall apply to the activities coordinator.~~ The ~~activities coordinator~~ activity director (employed on or after August 1, 1991) shall meet a minimum educational requirement by being at least a high school graduate or certified under the GED Program or by passing an alternative examination established by the Department of Health & Human ~~Services; Services.~~
- (2) The ~~activities coordinator~~ activity director hired on or after the effective date of this Rule shall have completed or complete, within ~~48~~ nine months of employment or assignment to this position, ~~the 48-hour course entitled "The Activities Coordinator Program."~~an activity course for assisted living activity directors offered by community colleges or a comparable activity course as determined by the Department based on instructional hours and content. A person with a degree in recreational administration or a related field meets this requirement as does a person who completed the ~~required~~ activity coordinator course of 48 hours or more through a community college before the effective date of this ~~Rule; and Rule.~~
- (3) ~~The activities coordinator shall be willing to work with bona fide inspectors and the monitoring and licensing agencies toward meeting and maintaining the rules of this Subchapter and other legal requirements.~~

History Note: Authority G.S. 131D-2; 143B-165;
S.L. 2002-0160; 2003-0284;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. April 1, 1987; April 1, 1984;
Temporary Amendment Eff. July 1, 2003;
Amended Eff. June 1, 2004;
Temporary Amendment Eff. July 1, 2004.

SECTION .0700 - ADMISSION AND DISCHARGE

**10A NCAC 13F .0704 RESIDENT CONTRACT,
INFORMATION ON HOME AND RESIDENT REGISTER**

(a) The administrator or administrator-in-charge shall furnish and review with the resident or responsible person information

on the home upon admission and when changes are made to that information. A statement indicating that this information has been received upon admission or amendment as required by this Rule shall be signed and dated by each person to whom it is given and retained in the resident's record in the home. The information shall include at least the following:

- (1) the resident contract to which the following applies:
 - (A) the contract shall specify rates for resident services and accommodations, including the cost of different levels of service, if applicable, and any other charges or fees;
 - (B) the contract shall disclose any health needs or conditions that the facility has determined it cannot meet pursuant to G.S. 131D-2(a1)(4);
 - (C) the contract shall be signed and dated by the administrator or administrator-in-charge and the resident or responsible person, a copy given to the resident or responsible person and a copy kept in the resident's record;
 - (D) the resident or responsible person shall be notified as soon as any change is known, but not less than 30 days for rate changes initiated by the facility, of any changes in the contract and be provided an amended contract or an amendment to the contract for review and signature;
 - (E) gratuities in addition to the established rates shall not be accepted; and
 - (F) the maximum monthly adult care home rate that may be charged to Special Assistance recipients is established by the North Carolina Social Services Commission and the North Carolina General Assembly. Note: It is permissible by Special Assistance policy for facilities to accept payments for room and board from a third party, such as family member, charity or faith community, if the payment is made voluntarily to supplement the cost of room and board for the added benefit of a private room or a private or semi-private room in a special care unit.
- (2) a written copy of all house rules, including facility policies on smoking, alcohol consumption, visitation, refunds and the requirements for discharge of residents consistent with the rules of this Subchapter, and amendments disclosing any changes in the house rules;

- (3) a copy of the Declaration of Residents' Rights as found in G.S. 131D-21;
- (4) a copy of the home's grievance procedures which shall indicate how the resident is to present complaints and make suggestions as to the home's policies and services on behalf of himself or others; and
- (5) a statement as to whether the home has signed Form DSS-1464, Statement of Assurance of Compliance with Title VI of the Civil Rights Act of 1964 for Other Agencies, Institutions, Organizations or Facilities, and which shall also indicate that, if the home does not choose to comply or is found to be in non-compliance, the residents of the home would not be able to receive State-County Special Assistance for Adults and the home would not receive supportive services from the county department of social services.

(b) The administrator or administrator-in-charge and the resident or the resident's responsible person shall complete and sign the Resident Register within 72 hours of the resident's admission to the facility and revise the information on the form as needed. The Resident Register is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or at no charge from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708. The facility may use a resident information form other than the Resident Register as long as it contains at least the same information as the Resident Register.

History Note: Authority 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

SECTION .0900 – RESIDENT CARE AND SERVICES

10A NCAC 13F .0905 ACTIVITIES PROGRAM

(a) Each home shall develop a program of activities designed to promote the residents' active involvement with each other, their families, and the community. The program is to provide social, physical, intellectual, and recreational activities in a planned, coordinated, and structured manner, using the Activities Coordinator's Guide, a copy of which each facility is required to have. When there is a cluster of homes, one Activities Coordinator's Guide may be shared by the homes.

(b) The program shall be designed to promote active involvement by all residents but is not to require any individual to participate in any activity against his will. If there is a question about a resident's ability to participate in an activity, the resident's physician shall be consulted to obtain a statement regarding the resident's capabilities.

(c) Each home shall assign a person to be the activities coordinator, who meets the qualifications specified in Rule .0404 of this Subchapter. The activities coordinator-activity director, as required in Rule .0404 of this Subchapter, is responsible for: responding to the residents' need and desire for meaningful activities, by:

- (1) Reviewing upon admission personal information about each resident's interests and

capabilities recorded on an individualized index card or the equivalent. This card is to be completed from, at least, the information recorded on the Resident Register, Form DSS 1865. It shall be maintained for use by the activities coordinator for developing activities and is to be updated as needed;

~~(2)~~(1) Using the information on the residents' interests and capabilities as documented upon admission and updated as needed to arrange for and or provide planned individual and group activities for the residents-residents, taking into account the varied interests, capabilities and possible cultural differences of the residents; In addition to individual activities, there shall be a minimum of 10 hours of planned group activities per week. Homes designated for residents with HIV disease are exempt from the 10 hour requirement as long as the facility can demonstrate each resident's involvement in a structured volunteer program that provides the required range of activities;

~~(3)~~(2) Preparing preparing a monthly calendar of planned group activities which is to be in easily readable, readable with large print, posted in a prominent location on-by the first day of each month, and updated when there are any changes;

~~(4)~~(3) Involving-involving community resources, such as recreational, volunteer, religious, aging and developmentally disabled-associated agencies, to enhance the activities available to residents-residents;The coordinator may use the home's aides in carrying out some activities with residents; and

~~(5)~~(4) Evaluating-evaluating and documenting the overall effectiveness of the activities program at least every six months with input from the residents to determine what have been the most valued activities and to elicit suggestions of ways to enhance the program-program;

(5) encouraging residents to participate in activities; and

(6) assuring there are adequate supplies, supervision and assistance to enable each resident to participate. Note: Aides and other facility staff may be used to assist with activities.

(d) A variety of group and individual activities shall be provided. The program is to include, at least, the following types of activities:

- (1) Social and Recreational Activities:
 - (A) Opportunity shall be available for both individual and group social and recreational activities sufficiently diverse to accommodate the residents' varied interests and capabilities. These activities emphasize increasing

- self-confidence and stimulating interest and friendships;
- (B) Individual activity includes one to one interactions in mutually enjoyable activity, such as buddy walks, card playing and horseshoes as well as activity by oneself, such as bird watching, nature walks, and card playing;
- (C) Each resident shall have the opportunity to participate in at least one planned group social or recreational activity weekly. A group activity is one which involves a number of residents in physical and mental interaction. Each resident shall be encouraged to participate in an activity which best matches his physical, mental and emotional capability. Such activities may include group singing, dancing, bingo, and exercise classes;
- (D) Each resident shall have the opportunity to participate in at least one outing every other month. A resident interested in involving himself in the community more frequently shall be encouraged and helped to do so. The coordinator is to contact volunteers and residents' families to assist in the effort to get residents involved in activities outside the home;
- (E) If a resident cannot participate actively in community events, arrangements shall be made so that the more active residents can still participate in such outings. If there is a question about a resident's ability to participate in an activity, the resident's physician shall be consulted to obtain a statement regarding the resident's capabilities; and
- (F) The activities planned and offered shall take into account possible cultural differences of the residents;
- (2) Diversional and Intellectual Activities:
- (A) Opportunity for both individual and group diversional and intellectual activities sufficiently diverse to accommodate the residents' varied interests and capabilities shall be available. There shall be adequate supplies and supervision provided to enable each resident to participate;
- (B) Individual activities emphasize individual accomplishments, creative expression, increased knowledge and the learning of new skills. Such activities may include sewing, crafts,

painting, reading, creative writing, and wood carving;

- (C) Each resident shall have the opportunity to participate in at least one planned group activity weekly that emphasizes group accomplishment, creative expression, increased knowledge, and the learning of new skills. Such activities may include discussion groups, drama, resident council meetings, book reviews, music appreciation, review of current events, and spelling bees; and

(D) The activities planned and offered shall take into account possible cultural differences of the residents.

(d) There shall be a minimum of 14 hours of a variety of planned group activities per week that include activities that promote socialization, physical interaction, group accomplishment, creative expression, increased knowledge and learning of new skills. Homes that care exclusively for residents with HIV disease are exempt from this requirement as long as the facility can demonstrate planning for each resident's involvement in a variety of activities. Note: Examples of group activities are group singing, dancing, games, exercise classes, seasonal parties, discussion groups, drama, resident council meetings, book reviews, music appreciation, review of current events and spelling bees.

(e) Residents shall have the opportunity to participate in activities involving one to one interaction and activity by oneself that promote enjoyment, a sense of accomplishment, increased knowledge, learning of new skills, and creative expression. Note: Examples of these activities are crafts, painting, reading, creative writing, buddy walks, card playing, and nature walks.

(f) Each resident shall have the opportunity to participate in at least one outing every other month. Residents interested in being involved in the community more frequently shall be encouraged to do so.

(3)(g) Work-Type and Volunteer Service Activities: Each resident shall have the opportunity to participate in meaningful work-type and volunteer service activities in the home or in the community, but participation shall be on an entirely voluntary basis, never forced upon residents and Under no circumstances shall this activity be forced upon a resident. Residents shall not be assigned these tasks in place of staff. Examples of work-type and volunteer services activities range from bedmaking, personal ironing, and assisting another resident, to more structured activities such as general ironing, making or repairing toys for children, telephone reassurance, and gardening. Note: Examples of work-type and volunteer service activities range from bedmaking, personal ironing, and assisting another resident, to more structured activities such as general ironing, making or repairing toys for children, telephone reassurance, and gardening.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977;

*Amended Eff. April 1, 1987; April 1, 1984;
Temporary Amendment Eff. July 1, 2003;
Amended Eff. July 1, 2004;
Temporary Amendment Eff. July 1, 2004 (This temporary
amendment replaces the permanent rule approved by RRC
on May 20, 2004).*

10A NCAC 13F .0907 RESPITE CARE

(a) Respite care shall be controlled by 10 NCAC 42C .2406 and all the rules of this Subchapter except for Rules 42D .1808, .1827, and .1828. Rule .1801 of this Subchapter shall apply to respite care except that Rules 42C .2402 and .2404 as referenced in Rule 42D .1801 of this Subchapter do not apply

(b) If the facility is staffing to census, the respite care residents shall be included in the daily census for determination of appropriate staffing levels according to the rules of this Subchapter.

(a) For the purposes of this Subchapter, respite care is defined as supervision, personal care and services provided for persons admitted to an adult care home on a temporary basis for temporary caregiver relief, not to exceed 30 days.

(b) Respite care is not required as a condition of licensure. However, respite care is subject to the requirements of this Subchapter except for Rules .0702, .0704(b), .0801, .0802 and .1201.

(c) The number of respite care residents and adult care home residents shall not exceed the facility's licensed bed capacity.

(d) If the facility is staffing to census, the respite care residents shall be included in the daily census for determination of appropriate staffing levels according to the rules of this Subchapter.

(e) The respite care resident contract shall specify the rates for respite care services and accommodations, the date of admission to the facility and the proposed date of discharge from the facility. The contract shall be signed by the administrator or designee and the respite care resident or his responsible person and a copy given to the resident and responsible person.

(f) Upon admission of a respite care resident into the facility, the facility shall assure that the resident has a current FL-2 and been tested for tuberculosis disease according to Rule .0703 of this Subchapter and that there are current physician orders for any medications, treatments and special diets for inclusion in the respite care resident's record. The facility shall assure that the respite care resident's physician or prescribing practitioner is contacted for verification of orders if the orders are not signed and dated within seven calendar days prior to admission to the facility as a respite care resident or for clarification of orders if orders are not clear or complete.

(g) The facility shall complete an assessment which allows for the development of a short-term care plan prior to or upon admission to the facility with input from the resident or responsible person. The assessment shall address respite resident needs, including identifying information, hearing, vision, cognitive ability, functional limitations, continence, special procedures and treatments as ordered by physician, skin conditions, behavior and mood, oral and nutritional status and medication regimen. The facility may use the Resident Register or an equivalent as the assessment instrument. The care plan shall be signed and dated by the facility's administrator or

designated representative and the respite care resident or responsible person.

(h) The respite care resident's record shall include a copy of the signed respite care contract; the FL-2; the assessment and care plan; documentation of a tuberculosis test according to Paragraph (f) of this Rule; documentation of any contacts (office, home or telephone) with the resident's physician or other licensed health professionals from outside the facility; physician orders; medication administration records; a statement, signed and dated by the resident or responsible person, indicating that information on the home as required in Rule .0704(a) of this Subchapter has been received; a written description of any acute changes in the resident's condition or any incidents or accidents resulting in injury to the respite care resident, and any action taken by the facility in response to the changes, incidents or accidents; and how the responsible person or his designated representative can be contacted in case of an emergency.

(i) The respite care resident's responsible person or his designated representative shall be contacted and informed of the need to remove the resident from the facility if one or more of the following conditions exists:

- (1) the resident's condition is such that he is a danger to himself or poses a direct threat to the health of others as documented by a physician; or
- (2) the safety of individuals in the home is threatened by the behavior of the resident as documented by the facility.

Documentation of the emergency discharge shall be on file in the facility.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2000-50; 2002-0160; 2003-0284; Temporary Adoption Eff. November 1, 2000; Eff. July 18, 2002. Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F .0909 RESIDENT RIGHTS

The facility shall assure that the rights of all residents guaranteed under G.S. 131D-21, Declaration of Residents' Rights, are maintained and may be exercised without hindrance.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

SECTION .1200 – POLICIES, RECORDS AND REPORTS

10A NCAC 13F .1201 RESIDENT RECORDS

The rules stated in 10A NCAC 13G .1201 shall control for this Subchapter. In addition, the administrator of a facility accepting recipients of State County Special Assistance for Adults funds must establish and maintain the uniform chart of accounts and cost reporting system developed by the Division of Social Services. Each affected home must submit an annual fiscal report of its costs and revenues to the Division of Social Services.

(a) The following shall be maintained on each resident in an orderly manner in the resident's record in the facility and made

available for review by representatives of the monitoring and licensing agencies:

- (1) FL-2 or MR-2 forms and the patient transfer form or hospital discharge summary, when applicable;
- (2) Resident Register;
- (3) receipt for the following as required in Rule .0704 of this Subchapter:
 - (A) contract for services, accommodations and rates;
 - (B) house rules as specified in Rule .0704(a)(2) of this Subchapter;
 - (C) Declaration of Residents' Rights (G.S. 131D-21);
 - (D) the home's grievance procedures; and
 - (E) civil rights statement;
- (4) resident assessment and care plan;
- (5) contacts with the resident's physician, physician service or other licensed health professional as required in Rule .0902 of this Subchapter;
- (6) orders or written treatments or procedures from a physician or other licensed health professional and their implementation;
- (7) documentation of immunizations against influenza virus and pneumococcal disease according to G.S. 131D-9 or the reason the resident did not receive the immunizations based on this law; and
- (8) the Adult Care Home Notice of Discharge and Adult Care Home Hearing Request Form if the resident is being or has been discharged.

Note: When a resident leaves the facility for a medical evaluation, records necessary for that medical evaluation such as Subparagraphs (a)(1), (4), (5), (6) and (7) of this Rule may be sent with the resident.

(b) A resident financial record providing an accurate accounting of the receipt and disbursement of the resident's personal funds if handled by the facility according to Section .1100 of this Subchapter shall be maintained on each resident in an orderly manner in the facility and made available for review by representatives of the monitoring and licensing agencies. When there is an approved cluster of licensed facilities, financial records may be kept in one location among the clustered facilities.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1984; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13F .1210 RECORD OF STAFF QUALIFICATIONS

The facility shall maintain records of staff qualifications required by the rules in Section .0400 of this Subchapter in the facility. When there is an approved cluster of licensed facilities, these records may be kept in one location among the clustered facilities.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

SUBCHAPTER 13G – LICENSING OF FAMILY CARE HOMES

SECTION .0200 - LICENSING

10A NCAC 13G .0202 THE LICENSE

- (a) Except as otherwise provided in Rule .0203 of this Subchapter, the Department shall issue an adult care home license to any person who submits an application on the forms provided by the Department with a non-refundable license fee as required by G.S. 131D-2(b)(1) ~~if and~~ the Department determines that the applicant complies with the provisions of all applicable State adult care home licensure statutes and rules. All applications for a new license shall disclose the names of individuals who are co-owners, partners or shareholders holding an ownership or controlling interest of five percent or more of the applicant entity.
- (b) The license shall be conspicuously posted in a public place in the home.
- (c) The license shall be in effect for 12 months from the date of issuance unless revoked for cause, voluntarily or involuntarily terminated, or changed to provisional licensure status.
- (d) A provisional license may be issued in accordance with G.S. 131D-2(b).
- (e) When a provisional license is issued, the administrator shall post the provisional license and a copy of the notice from the Division of Facility Services identifying the reasons for it, in place of the full license.
- (f) The license is not transferable or assignable.
- (g) The license shall be terminated when the home is licensed to provide a higher level of care or a combination of a higher level of care and adult care home level of care.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0113; 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1984; Temporary Amendment Eff. January 1, 1998; Amended Eff. April 1, 1999; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2004.

SECTION .0400 – STAFF QUALIFICATIONS

10A NCAC 13G .0403 QUALIFICATIONS OF MEDICATION STAFF

- (a) ~~Effective February 15, 2000, staff~~ Staff who administer medications, hereafter referred to as medication aides, and staff who directly supervise the administration of medications shall have documentation of successfully completing the clinical skills validation portion of the competency evaluation according to Paragraphs (d) and (e) of Rule .0503 of this Section prior to the administration or supervision of the administration of

medications. ~~Medication aides who perform other personal care tasks shall also meet the staff training and competency requirements according to Rule .0501 of this Section.~~ Persons authorized by state occupational licensure laws to administer medications are exempt from this requirement.

(b) ~~Effective July 1, 2000, medication~~ Medication aides and their direct supervisors, except persons authorized by state occupational licensure laws to administer medications, shall successfully pass the written examination within 90 days after successful completion of the clinical skills validation portion of a competency evaluation according to Rule .0503 of this Section. ~~Medication aides shall also meet the staff training and competency requirements according to Rule .0501 of this Section.~~

(c) Medication aides and staff who directly supervise the administration of medications, except persons authorized by state occupational licensure laws to administer medications, shall complete six hours of continuing education annually related to medication administration.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-0334; 2002-0160; 2003-0284; Temporary Adoption Eff. January 1, 2000; December 1, 1999; Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13G .0404 QUALIFICATIONS OF ACTIVITY DIRECTOR

~~Since activities are a required part of the program of the family care home, there~~ There shall be a designated activities coordinator activity director who meets the requirements and following qualifications: qualifications set forth in this Rule.

- (1) ~~The qualifications of the administrator and co-administrator referenced in Paragraphs (2) and (5) of Rule 10A NCAC 13G .0401 shall apply to the activities coordinator.~~ The activities coordinator activity director (employed on or after August 1, 1991) shall meet a minimum educational requirement by being at least a high school graduate or certified under the GED Program or by passing an alternative examination established by the Department of Health & Human Services; Services.
- (2) ~~The activities coordinator activity director hired on or after the effective date of this Rule shall must complete~~ have completed or complete, within ~~48~~ nine months of employment or assignment to this position, ~~the 48-hour course entitled "The Activities Coordinator Program."~~ an activity course for assisted living activity directors offered by community colleges or a comparable activity course as determined by the Department based on instructional hours and content. A person with a degree in recreational administration or a related field meets this requirement as does a person who completed the ~~required activity coordinator course of 48 hours or more~~

through a community college before the effective date of this Rule; and Rule.

- (3) ~~The activities coordinator shall be willing to work with bona fide inspectors and the monitoring and licensing agencies toward meeting and maintaining the rules of this Subchapter and other legal requirements.~~

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. April 1, 1984; Amended Eff. July 1, 1990; April 1, 1987; January 1, 1985; ARRC Objection Lodged March 18, 1991; Amended Eff. August 1, 1991; Temporary Amendment Eff. July 1, 2004.

SECTION .0700 - ADMISSION AND DISCHARGE

10A NCAC 13G .0703 RESIDENT REGISTER

(a) ~~Before or at admission, the~~ The administrator or supervisor-in-charge, and the resident or his responsible person shall complete and sign the Resident Register ~~(Form DSS 1865).~~ within 72 hours of the resident's admission to the home. The Resident Register is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or at no charge from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708. The facility may use a resident information form other than the Resident Register as long as it contains at least the same information as the Resident Register. Special instructions for the completion of several items on the Resident Register are:

- (1) ~~name, address and telephone number of the resident's physician. If a resident does not have a personal physician, arrangements must be made by the administrator with the resident, his responsible person or social worker to have a physician before admission; and~~
- (2) ~~personal information from the resident, his responsible person and social worker. This must at least include information about the resident's ties to the community, his preferences for food and activities, and his capabilities and capacity for self care.~~

(b) The administrator or supervisor-in-charge ~~must shall~~ revise the completed Resident Register ~~(Form DSS 1865)~~ with the resident or his responsible person as needed.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13G .0704 RESIDENT CONTRACT AND INFORMATION ON HOME

~~At admission, the~~ The administrator or supervisor-in-charge ~~must shall~~ furnish and review with the resident or his responsible person ~~essential information on the home.~~ home upon admission and when changes are made to that information. A statement

indicating that this information has been received upon admission or amendment as required by this Rule is to be signed and dated by each person to whom it is given. This statement ~~must shall~~ be retained in the resident's record in the home. The information ~~must shall~~ at least include:

- (1) a copy of the home's resident contract specifying rates for resident services and ~~accommodations; accommodations, including the cost of different levels of service, if applicable, any other charges or fees, and any health needs or conditions the home has determined it cannot meet pursuant to G.S. 131D-2(a1)(4); in addition, the following applies:~~
 - (a) The contract ~~must shall~~ be signed and dated by the administrator or supervisor-in-charge and the resident or his responsible person and a copy given to the resident or his responsible person;
 - (b) The resident or his responsible person ~~must shall~~ be notified ~~as much in advance as possible, as soon as any change is known, but not less than 30 days for rate changes initiated by the home,~~ of any rate changes or other changes in the contract affecting the resident services and accommodations and be provided an amended copy of the contract for review and signature;
 - (c) A copy of each signed contract ~~must shall~~ be kept in the resident's record in the home;
 - (d) Gratuities in addition to the established rates shall not be accepted; and
 - (e) The maximum monthly rate ~~for domiciliary care~~ that may be charged to ~~public~~ Special Assistance recipients is established by the North Carolina Social Services Commission ~~or and the North Carolina General Assembly;~~ Note: It is permissible by Special Assistance policy for facilities to accept payments for room and board from a third party, such as family member, charity or faith community, if the payment is made voluntarily to supplement the cost of room and board for the added benefit of a private room.
- (2) a written copy of any house rules, including the conditions for the discharge and transfer of residents, the refund policies, and the home's policies on smoking, alcohol consumption and ~~visitation~~ visitation. ~~The resident or his responsible person must be promptly notified of any change in the house rules and provided~~

- (3) ~~an amended copy. All house rules must be consistent with the rules in this Subchapter; Subchapter and amendments disclosing any changes in the house rules;~~ a copy of the Adult Care Home Residents' Bill of Rights; Rights as found in G.S. 131D-21;
- (4) a copy of the home's grievance procedures which ~~must shall~~ indicate how the resident is to present complaints and make suggestions as to the home's policies and services on behalf of ~~himself or others;~~ and
- (5) a statement as to whether the home has signed Form DSS-1464, Statement of Assurance of Compliance with Title VI of the Civil Rights Act of 1964 for Other Agencies, Institutions, Organizations or Facilities, and which assuring compliance with Title VI of the Civil Rights Act. ~~This statement must shall~~ also indicate that if the home does not choose to comply or is found to be in non-compliance the residents of the home would not be able to receive State-County Special Assistance for Adults and the home would not receive supportive services from the county department of social services.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. April 1, 1984; Amended Eff. July 1, 1990; April 1, 1987; Temporary Amendment Eff. July 1, 2004.

SECTION .0900 – RESIDENT CARE AND SERVICES

10A NCAC 13G .0905 ACTIVITIES PROGRAM

- (a) Each home ~~must shall~~ develop a program of activities designed to promote the residents' active involvement with each other, their families, and the community. ~~The program is to provide social, physical, intellectual, and recreational activities in a planned, coordinated, and structured manner, using the Activities Coordinator's Guide, a copy of which each facility is required to have. When there is a cluster of homes, one Activities Coordinator's Guide may be shared by the homes.~~
- (b) The program ~~must shall~~ be designed to promote active involvement by all residents but is not to require any individual to participate in any activity against his will. If there is a question about a resident's ability to participate in an activity, the resident's physician shall be consulted to obtain a statement regarding the resident's capabilities.
- (c) ~~Each home must assign a person to be the activities coordinator, who meets the qualifications specified in Rule .0404 of this Subchapter. The activities coordinator activity director, as required in Rule .0404 of this Subchapter, is responsible for: responding to the residents' need and desire for meaningful activities, by:~~
 - (1) ~~Reviewing upon admission personal information about each resident's interests and capabilities recorded on an individualized index card or the equivalent. This card is to be completed from, at least, the information~~

recorded on the Resident Register, Form DSS-1865. It must be maintained for use by the activities coordinator for developing activities and is to be updated as needed;

(2)(1) ~~Using~~ using the information on the residents' interests and capabilities as documented upon admission and updated as needed to arrange for ~~and or~~ provide planned individual and group activities for the ~~residents~~ residents, taking into account the varied interests, capabilities and possible cultural differences of the residents; In addition to individual activities, there must be a minimum of 10 hours of planned group activities per week. Homes designated for residents with HIV disease are exempt from the 10-hour requirement as long as the facility can demonstrate each resident's involvement in a structured volunteer program that provides the required range of activities;

(3)(2) ~~Preparing~~ preparing a monthly calendar of planned group activities which is to be ~~in~~ easily readable, readable with large print, posted in a prominent location ~~on~~ by the first day of each month, and updated when there are any changes;

(4)(3) ~~Involving~~ involving community resources, such as recreational, volunteer, religious, aging and developmentally disabled-associated agencies, to enhance the activities available to ~~residents~~ residents; The coordinator may use the home's aides in carrying out some activities with residents; and

(5)(4) ~~Evaluating~~ evaluating and documenting the overall effectiveness of the activities program at least every six months with input from the residents to determine what have been the most valued activities and to elicit suggestions of ways to enhance the ~~program~~ program;

(5) encouraging residents to participate in activities; and

(6) assuring there are adequate supplies, supervision and assistance to enable each resident to participate. Note: Aides and other facility staff may be used to assist with activities.

(d) A variety of group and individual activities must be provided. The program is to include, at least, the following types of activities:

(1) Social and Recreational Activities:

(A) Opportunity must be available for both individual and group social and recreational activities sufficiently diverse to accommodate the residents' varied interests and capabilities. These activities emphasize increasing self-confidence and stimulating interest and friendships;

(B) Individual activity includes one to one interactions in mutually

enjoyable activity, such as buddy walks, card playing and horseshoes as well as activity by oneself, such as bird watching, nature walks, and card playing;

(C) ~~Each resident must have the opportunity to participate in at least one planned group social or recreational activity weekly. A group activity is one which involves a number of residents in physical and mental interaction. Each resident must be encouraged to participate in an activity which best matches his physical, mental and emotional capability. Such activities may include group singing, dancing, bingo, and exercise classes;~~

(D) ~~Each resident must have the opportunity to participate in at least one outing every other month. A resident interested in involving himself in the community more frequently shall be encouraged and helped to do so. The coordinator is to contact volunteers and residents' families to assist in the effort to get residents involved in activities outside the home;~~

(E) ~~If a resident cannot participate actively in community events, arrangements shall be made so that the more active residents can still participate in such outings. If there is a question about a resident's ability to participate in an activity, the resident's physician must be consulted to obtain a statement regarding the resident's capabilities; and~~

(G) ~~The activities planned and offered must take into account possible cultural differences of the residents;~~

(2) Diversional and Intellectual Activities:

(A) Opportunity for both individual and group diversional and intellectual activities sufficiently diverse to accommodate the residents' varied interests and capabilities must be available. There must be adequate supplies and supervision provided to enable each resident to participate;

(B) Individual activities emphasize individual accomplishments, creative expression, increased knowledge and the learning of new skills. Such activities may include sewing, crafts, painting, reading, creative writing, and wood carving;

(C) Each resident must have the opportunity to participate in at least

one planned group activity weekly that emphasizes group accomplishment, creative expression, increased knowledge, and the learning of new skills. Such activities may include discussion groups, drama, resident council meetings, book reviews, music appreciation, review of current events, and spelling bees; and

~~(E) The activities planned and offered must take into account possible cultural differences of the residents.~~

(d) There shall be a minimum of 14 hours of a variety of planned group activities per week that include activities that promote socialization, physical interaction, group accomplishment, creative expression, increased knowledge and learning of new skills. Homes that care exclusively for residents with HIV disease are exempt from this requirement as long as the facility can demonstrate planning for each resident's involvement in a variety of activities. Note: Examples of group activities are group singing, dancing, games, exercise classes, seasonal parties, discussion groups, drama, resident council meetings, book reviews, music appreciation, review of current events and spelling bees.

(e) Residents shall have the opportunity to participate in activities involving one to one interaction and activity by oneself that promote enjoyment, a sense of accomplishment, increased knowledge, learning of new skills, and creative expression. Note: Examples of these activities are crafts, painting, reading, creative writing, buddy walks, card playing, and nature walks.

(f) Each resident shall have the opportunity to participate in at least one outing every other month. Residents interested in being involved in the community more frequently shall be encouraged to do so.

~~(3)(g) Work-Type and Volunteer Service Activities: Each resident must shall have the opportunity to participate in meaningful work-type and volunteer service activities in the home or in the community, but participation must shall be on an entirely voluntary basis, never forced upon residents and Under no circumstances shall this activity be forced upon a resident. Residents shall not be assigned these tasks in place of staff. Examples of work-type and volunteer services activities range from bedmaking, personal ironing, and assisting another resident, to more structured activities such as general ironing, making or repairing toys for children, telephone reassurance, and gardening. Note: Examples of work-type and volunteer service activities range from bedmaking, personal ironing, and assisting another resident, to more structured activities such as general ironing, making or repairing toys for children, telephone reassurance, and gardening.~~

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. August 3, 1992; April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13G .0907 RESPITE CARE

(a) For the purposes of this Subchapter, respite care is defined as supervision, personal care and services provided for persons admitted to an adult care home on a temporary basis for temporary caregiver relief, not to exceed 30 days.

(b) Respite care is not required as a condition of licensure. However, respite care is subject to the requirements of this Subchapter except for Rules .0702, .0703, .0705, ~~.1201, .0801, .0802 and 1002(a), .0802 and .1201.~~

(c) The number of respite care residents and adult care home residents shall not exceed the facility's licensed bed capacity.

(d) The respite care resident contract shall specify the rates for respite care services and accommodations, the date of admission to the facility and the proposed date of discharge from the facility. The contract shall be signed by the administrator or designee and the respite care resident or his responsible person and a copy given to the resident and responsible person.

(e) Upon admission of a respite care resident into the facility, the facility shall assure that the resident has a current FL-2 and been tested for tuberculosis disease within the past 12 months according to Rule .0702 of this Subchapter and that there are current physician orders for any medications, treatments and special diets for inclusion in the respite care resident's record. The facility shall assure that the respite care resident's physician or prescribing practitioner is contacted for verification of orders if the orders are not signed and dated within seven calendar days prior to admission to the facility as a respite care resident or for clarification of orders if orders are not clear or complete. ~~Tests for tuberculosis disease shall comply with control measures adopted by the Commission for Health Services as specified in 10A NCAC 41A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the Department of Health and Human Services, Tuberculosis Control Program, 1902 Mail Service Center, Raleigh, North Carolina 27699-1902.~~

(f) The facility shall complete an assessment which allows for the development of a short-term care plan prior to or upon admission to the facility with input from the resident or responsible person. The assessment shall address respite resident needs, including identifying information, hearing, vision, cognitive ability, functional limitations, continence, special procedures and treatments as ordered by physician, skin conditions, behavior and mood, oral and nutritional status and medication regimen. The facility may ~~develop and use its own assessment instrument or use the assessment instrument approved by the Department for initial admission assessments as stated in Rule .0801 of this Subchapter.~~ the Resident Register or an equivalent as the assessment instrument. The care plan shall be signed and dated by the facility's administrator or designated representative and the respite care resident or responsible person.

(g) The respite care resident's record shall include a copy of the signed respite care contract; the FL-2; the assessment and care plan; documentation of a tuberculosis test according to Paragraph (e) of this Rule; documentation of any contacts (office, home or telephone) with the resident's physician or other licensed health professionals from outside the facility; physician orders; medication administration records; a statement, signed and dated by the resident or responsible person, indicating that information on the home as required in Rule .0704 of this Subchapter has been received; a written description of any acute changes in the resident's condition or any incidents or accidents

resulting in injury to the respite care resident, and any action taken by the facility in response to the changes, incidents or accidents; and how the responsible person or his designated representative can be contacted in case of an emergency.

(h) The respite care resident's responsible person or his designated representative shall be contacted and informed of the need to remove the resident from the facility if one or more of the following conditions exists:

- (1) the resident's condition is such that he is a danger to himself or poses a direct threat to the health of others as documented by a physician; or
- (2) the safety of individuals in the home is threatened by the behavior of the resident as documented by the facility.

Documentation of the emergency discharge shall be on file in the facility.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2000-50; 2002-0160; 2003-0284; Temporary Adoption Eff. November 1, 2000; Eff. July 18, 2002; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13G .0909 RESIDENT RIGHTS

The facility shall assure that the rights of all residents guaranteed under G.S. 131D-21, Declaration of Residents' Rights, are maintained and may be exercised without hindrance.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

SECTION .1200 – POLICIES, RECORDS AND REPORTS

10A NCAC 13G .1201 RESIDENT RECORDS

~~(a) The administrator is responsible for correctly maintaining required records.~~

~~(b) All forms required by the rules of this Subchapter are available free of charge, upon request, from the county department of social services.~~

~~(c)(a) The following records must shall be maintained on each resident in an orderly manner in the resident's record in the facility facility. They are to be kept in an orderly manner and be and made readily available for review by representatives of the monitoring and licensing agencies.~~

- (1) FL-2 or MR-2 Forms and patient transfer form or hospital discharge summary, when applicable;
- (2) Resident Register; Register (Form DSS 1865);
- (3) receipt for: for the following as required in Rule .0704 of this Subchapter:
 - (A) contract for services, accommodations and rates;
 - (B) house rules ~~to include discharge, transfer and refund policies;~~ as specified in Rule .0704(2) of this Subchapter;

- (C) ~~Adult Care Home Residents' Bill of Rights; Declaration of Residents' Rights (G.S. 131D-21);~~
- (D) home's grievance procedures; and
- (E) civil rights statement;
- (4) ~~Report of Health Services to Resident (Form DSS 1867) or approved equivalent. resident assessment and care plan;~~
- (5) contacts with the resident's physician, physician service or other licensed health professional as required in Rule .0902 of this Subchapter;
- (6) orders or written treatments or procedures from a physician or other licensed health professional and their implementation;
- (7) documentation of immunizations against influenza virus and pneumococcal disease according to G.S. 131D-9 or the reason the resident did not receive the immunizations based on this law; and
- (8) the Adult Care Home Notice of Discharge and Adult Care Home Hearing Request Form if the resident is being or has been discharged.

Note: When a resident leaves the facility for a medical evaluation, records necessary for that medical evaluation such as Subparagraphs (a)(1), (4), (5), (6) and (7) of this Rule may be sent with the resident.

~~(d)(b) A Resident Financial Record resident financial record (Form DSS 1866), providing an accurate accounting of the receipt and disbursement of the resident's personal funds, if handled by the facility according to Rule .1103 of this Subchapter, approved equivalent method of bookkeeping must be maintained on each resident. The financial records are to be kept shall be maintained on each resident in an orderly manner in the facility and be readily available for review by representatives of monitoring and licensing agencies. When there is an approved cluster of licensed facilities, financial records may be kept in a central location. one location among the clustered facilities.~~

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2004.

10A NCAC 13G .1212 RECORD OF STAFF QUALIFICATIONS

The facility shall maintain records of staff qualifications required by the rules in Section .0400 of this Subchapter in the facility. When there is an approved cluster of licensed facilities, these records may be kept in one location among the clustered facilities.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

APPROVED RULES

*This Section includes the Register Notice citation to rules approved by the Rules Review Commission (RRC) at its meeting May 20, 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.*

These rules have been entered into the North Carolina Administrative Code

APPROVED RULE CITATION				REGISTER CITATION TO THE NOTICE OF TEXT
02	NCAC	09B	.0116*	18:09 NCR
02	NCAC	34	.0102*	18:07 NCR
02	NCAC	34	.0505*	18:07 NCR
02	NCAC	34	.0604	18:07 NCR
02	NCAC	43L	.0104-.0108	18:14 NCR
02	NCAC	43L	.0113-.0116	18:14 NCR
02	NCAC	43L	.0201-.0206	18:14 NCR
02	NCAC	43L	.0401-.0409	18:14 NCR
02	NCAC	43L	.0701-.0702	18:14 NCR
02	NCAC	48A	.1208*	18:14 NCR
04	NCAC	03C	.1601	18:16 NCR
04	NCAC	05A	.0106	18:15 NCR
10A	NCAC	13F	.0213*	18:12 NCR
10A	NCAC	13F	.0504*	18:12 NCR
10A	NCAC	13F	.0507*	18:12 NCR
10A	NCAC	13F	.0702*	18:12 NCR
10A	NCAC	13F	.0905-.0906*	18:12 NCR
10A	NCAC	13F	.1206*	18:12 NCR
10A	NCAC	13G	.0204*	18:12 NCR
10A	NCAC	13G	.0504*	18:12 NCR
10A	NCAC	13G	.0507*	18:12 NCR
10A	NCAC	13G	.0705*	18:12 NCR
10A	NCAC	26C	.0501-.0504*	18:13 NCR
10A	NCAC	27G	.0402*	18:13 NCR
10A	NCAC	27G	.0404*	18:13 NCR
10A	NCAC	27G	.0506*	18:13 NCR
10A	NCAC	27G	.0601-.0610*	18:13 NCR
10A	NCAC	39A	.0102-.0105*	18:13 NCR
10A	NCAC	39A	.0106-.0107	18:13 NCR
10A	NCAC	39A	.0109*	18:13 NCR
10A	NCAC	39A	.0111	18:13 NCR
10A	NCAC	45A	.0303*	18:13 NCR
10A	NCAC	45A	.0403	18:13 NCR
12	NCAC	07D	.0707*	18:10 NCR
15A	NCAC	02B	.0225*	18:11 NCR
15A	NCAC	02B	.0316*	18:11 NCR
15A	NCAC	02D	.0101*	18:08 NCR
15A	NCAC	02D	.0521*	18:08 NCR
15A	NCAC	02D	.0538*	18:08 NCR
15A	NCAC	02D	.0933	18:08 NCR
15A	NCAC	02D	.1404*	18:08 NCR
15A	NCAC	02D	.1409*	18:08 NCR
15A	NCAC	02D	.1416*	18:08 NCR
15A	NCAC	02D	.1417-.1419	18:08 NCR
15A	NCAC	02D	.1422*	18:08 NCR
15A	NCAC	02D	.1901-.1902	18:08 NCR
15A	NCAC	02D	.1903*	18:08 NCR
15A	NCAC	02D	.1906	18:08 NCR

15A	NCAC	02Q	.0806	18:08 NCR
15A	NCAC	02Q	.0809*	18:08 NCR
15A	NCAC	10B	.0409*	18:10 NCR
15A	NCAC	10F	.0333*	18:11 NCR
15A	NCAC	12K	.0103*	18:14 NCR
15A	NCAC	12K	.0105*	18:14 NCR
15A	NCAC	18A	.3506*	18:14 NCR
15A	NCAC	18A	.3508	18:14 NCR
19A	NCAC	03G	.0207*	18:16 NCR
19A	NCAC	03G	.0209*	18:16 NCR
21	NCAC	46	.1604*	18:07 NCR
21	NCAC	46	.1806*	18:07 NCR
21	NCAC	46	.2504*	18:07 NCR
21	NCAC	58A	.0104-.0105*	18:08 NCR
21	NCAC	58A	.0107-.0108*	18:14 NCR
21	NCAC	58A	.0110*	18:08 NCR
21	NCAC	58A	.0302	18:08 NCR
21	NCAC	58A	.0503-.0504*	18:14 NCR
21	NCAC	58A	.0506	18:14 NCR
21	NCAC	58A	.1801	18:14 NCR
21	NCAC	58A	.1802-.1803*	18:14 NCR
21	NCAC	58A	.1804-.1806	18:14 NCR
21	NCAC	58A	.1807*	18:14 NCR
21	NCAC	58A	.1808	18:14 NCR
21	NCAC	58A	.1809*	18:14 NCR
21	NCAC	58A	.1810	18:14 NCR
21	NCAC	58B	.0601	18:14 NCR

These rules are subject to the next Legislative Session. (See G.S. 150B-21.3(b1))

15A	NCAC	02Q	.0702*	18:08 NCR
15A	NCAC	02Q	.0711*	18:08 NCR

**TITLE 2 - DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES**

02 NCAC 09B .0116 ADOPTIONS BY REFERENCE

- (a) The Board incorporates by reference, including subsequent amendments and editions, "Official Methods of Analysis of AOAC," published by the Association of Official Analytical Chemists. Copies of this document may be obtained from the Association of Official Analytical Chemists International, Department 0742, 1970 Chain Bridge Road, McLean, VA 22109-0742, at a cost of three hundred fifty-nine dollars (\$359.00).
- (b) The Board incorporates by reference, including subsequent amendments and editions, "U.S. Pharmacopeia National Formulary USP XXI-NFXVI" and supplements, published by the U.S. Pharmacopeial Convention, Inc. Copies of this document may be obtained from The United States Pharmacopeial Convention, Inc., Attention: Customer Service, 12601 Twinbrook Parkway, Rockville, MD 20852, at a cost of four hundred fifty dollars (\$450.00).
- (c) The Board incorporates by reference, including subsequent amendments and editions, "ASTM Standards on Engine Coolants," published by the American Society for Testing Materials. Copies of this document may be obtained from the American Society for Testing Materials, 1916 Race Street,

Philadelphia, PA 19103, at a cost of seventy-two dollars (\$72.00).

(d) The Board incorporates by reference, including subsequent amendments and editions, "EPA Manual of Chemical Methods for Pesticides and Devices" and supplements, published by AOAC. Copies of this document may be obtained from the Association of Official Analytical Chemists International, Department 0742, 1970 Chain Bridge Road, McLean, VA 22109-0742, at a cost of one hundred forty-nine dollars (\$149.00).

(e) The Board incorporates by reference, including subsequent amendments and editions, "Pesticide Analytical Manual," Volumes I and II, published by the United States Department of Health, Education and Welfare, Food and Drug Administration. Copies of this document may be obtained from the National Technical Information Service, Attention: Orders Department, 5285 Port Royal Road, Springfield, VA 22161, at a cost of sixty-one dollars (\$61.00) for Volume I and two hundred twenty-four dollars (\$224.00) for Volume II.

(f) The Board incorporates by reference, including subsequent amendments and editions, "FDA Compliance Policy Guides," published by the United States Department of Health, Education and Welfare, Food and Drug Administration. Copies of this document may be obtained from the National Technical Information Service, Attention: Orders Department, 5285 Port Royal Road, Springfield, VA 22161, at a cost of one hundred seventy-five dollars (\$175.00).

(g) The Board incorporates by reference, including subsequent amendments and editions, "Bergey's Manual of Determinative Bacteriology," R. E. Buchanan and N. E. Gibbons, Editors, Williams & Wilkins Company, Baltimore. Copies of this document may be obtained from the Williams & Wilkins Company, Attention: Book Order Department, 428 East Preston Street, Baltimore, MD 21202, at a cost of sixty-five dollars (\$65.00).

(h) The Board incorporates by reference, including subsequent amendments and editions, "Microbiology Laboratory Guidebook," published by the United States Department of Agriculture, Animal and Plant Health Inspection Service, Meat and Poultry Inspection Program, Washington, DC. Copies of this document may be obtained from the USDA -Food Safety and Inspection Service, ALA Room 80, South Building, 14th and Independence Avenues, Southwest, Washington, DC 20250, at no charge.

(i) The Board incorporates by reference, including subsequent amendments and editions, "FDA Bacteriological Analytical Manual," published by the Association of Official Analytical Chemists. Copies of this document may be obtained from the Association of Official Analytical Chemists International, Department 0742, 1970 Chain Bridge Road, McLean, VA 22109-0742, at a cost of one hundred twenty-three dollars (\$123.00).

(j) The Board incorporates by reference, including subsequent amendments and editions, "Standard Methods for the Examination of Dairy Products," E. H. Marth, Editor, published by the American Public Health Association. Copies of this document may be obtained from the American Public Health Association, 1015 Fifteenth Street, Northwest, Washington, DC 20005, at a cost of fifty-five dollars (\$55.00).

(k) The Board incorporates by reference, including subsequent amendments and editions, "Compendium of Methods for the Microbiological Examination of Foods," M. L. Speck, Editor, published by the American Public Health Association. Copies of this document may be obtained from the American Public Health Association, 1015 Fifteenth Street, Northwest, Washington, DC 20005, at a cost of ninety dollars (\$90.00).

(l) The Board incorporates by reference, including subsequent amendments and editions, "Bergey's Manual of Systematic Bacteriology," Vol. I, Kreg and Holt, Editors, William E. Wilkins Company, Baltimore. Copies of this document may be obtained from the Williams & Wilkins Company, Attention: Book Order Department, 428 East Preston Street, Baltimore, MD 21202, at a cost of one hundred fifteen dollars (\$115.00).

(m) The Board incorporates by reference, including subsequent amendments and editions, "Manual of Clinical Microbiology," E. H. Lennette, Balows, et al., Editors, published by the American Society for Microbiology. Copies of this document may be obtained from the American Society for Microbiology, PO Box 605, Herndon, VA 22070, at a cost of ninety-eight dollars (\$98.00).

(n) The Board incorporates by reference, including subsequent amendments and editions, "Standard Methods for the Examination of Water and Waste Water," published by American Public Health Association, American Water Works Association, and Water Pollution Control Federation. Copies of this document may be obtained from the American Public Health

Association, 1015 Fifteenth Street, Northwest, Washington, DC 20005, at a cost of one hundred sixty dollars (\$160.00).

(o) The Board incorporates by reference, including subsequent amendments and editions, the following parts or sections of the Code of Federal Regulations, Title 21, Chapter I, as promulgated by the Commissioner of the Food and Drug Administration under the authority of the Federal Food, Drug, and Cosmetic Act:

	Part or Section	Subject of Part or Section
(1)	1.1	General
(2)	1.3	Labeling - Definitions
(3)	1.20	Presence of Mandatory Label Information
(4)	1.21	Failure to Reveal Material Facts
(5)	1.24	Exemptions from Required Label Statements
(6)	1.31	Package Size Savings
(7)	1.35	"Cents-off," or Other Savings Representations
(8)	2.25	Grain Seed Treated with Poisonous Substances; Color Identification to Prevent Adulteration of Human and Animal Food
(9)	2.35	Use of Secondhand Containers for the Shipment or Storage of Food and Animal Feed
(10)	7.12	Guaranty
(11)	7.13	Suggested Forms of Guaranty
(12)	70	Color Additives
(13)	70.3	Definitions
(14)	70.5	General Restrictions on Use
(15)	70.10	Color Additives in Standardized Foods, New Drugs, and Antibiotics
(16)	70.11	Related Substances
(17)	70.20	Packaging Requirements for Straight Colors (Other Than Hair Dyes)
(18)	70.25	Labeling Requirements for Color Additives (Other Than Hair Dyes)
(19)	73	Listing of Color Additives Exempt from Certification
(20)	74	Listing of Color Additives Subject to Certification
(21)	81	General Specifications and General Restrictions for Provisioned Color Additives for Use in Foods, Drugs and Cosmetics
(22)	82	Listing of Certified Provisionally Listed Colors and Specifications
(23)	100	General
(24)	101	Food Labeling (Except 101.11 and 101.103)
(25)	102	Common or Usual Name for Nonstandardized Foods
(26)	103	Quality Standards for Foods with No Identity Standards
(27)	104	Nutritional Quality Guidelines for Foods
(28)	105	Foods for Special Dietary Use
(29)	106	Infant Formula Quality Control Procedures
(30)	107	Infant Formula

APPROVED RULES

(31)	108	Emergency Permit Control	(72)	182	Substances Generally Recognized as Safe
(32)	109	Unavoidable Contaminants in Food for Human Consumption and Food-Packaging Material	(73)	184	Direct Food Substances Affirmed as Generally Recognized as Safe
(33)	110	Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding Human Food	(74)	186	Indirect Food Substances Affirmed as Generally Recognized as Safe
(34)	113	Thermally Processed Low-Acid Foods Packaged in Hermetically Sealed Containers	(75)	189	Substances Prohibited from Use in Human Food
(35)	114	Acidified Foods	(76)	193	Tolerances for Pesticides in Food Administered by the Environmental Protection Agency
(36)	120	Hazard Analysis and Critical Control Point (HACCP) Systems	(77)	200	General
(37)	123	Frozen Raw Breaded Shrimp	(78)	201	Labeling
(38)	129	Processing and Bottling of Bottled Drinking Water (Except as amended by 02 NCAC 09C .0700 - Bottled Water)	(79)	202	Prescription Drug Advertising
(39)	130	Food Standards: General	(80)	210	Current Good Manufacturing Practices in Manufacturing, Processing, Packing or Holding of Drugs; General
(40)	131	Milk and Cream	(81)	211	Current Good Manufacturing Practice for Finished Pharmaceuticals
(41)	133	Cheeses and Related Cheese Products	(82)	225	Current Good Manufacturing Practice for Medicated Feeds
(42)	135	Frozen Desserts	(83)	226	Current Good Manufacturing Practice for Medicated Premixes
(43)	136	Bakery Products	(84)	250	Special Requirements for Specific Human Drugs
(44)	137	Cereal Flours and Related Products	(85)	290	Controlled Drugs
(45)	139	Macaroni and Noodle Products	(86)	299	Drugs; Official Names and Established Names
(46)	145	Canned Fruits	(87)	300	General
(47)	146	Canned Fruit Juices	(88)	310	New Drugs
(48)	150	Fruit Butters, Jellies, Preserves, and Related Products	(89)	312	New Drugs for Investigational Use
(49)	152	Fruit Pies	(90)	314	New Drug Applications
(50)	155	Canned Vegetables	(91)	320	Bioavailability and Bioequivalence Requirements
(51)	156	Vegetable Juices	(92)	329	Habit-Forming Drugs
(52)	158	Frozen Vegetables	(93)	330	Over-the-Counter (OTC) Human Drugs Which Are Generally Recognized as Safe and Effective and Not Misbranded
(53)	160	Eggs and Egg Products	(94)	331	Antacid Products for Over-the-Counter (OTC) Human Use
(54)	161	Fish and Shellfish (Except Section 161.30 and 161.130 through 161.145)	(95)	332	Antiflatulent Products for Over-the-Counter Human Use
(55)	163	Cacao Products	(96)	361	Prescription Drugs for Human Use Generally Recognized as Safe and Effective and Not Misbranded: Drugs Used in Research
(56)	164	Tree Nut and Peanut Products	(97)	369	Interpretive Statements Re: Warnings on Drugs and Devices for Over-the-Counter Sale
(57)	165	Nonalcoholic Beverages	(98)	429	Drugs Composed Wholly or Partly of Insulin
(58)	166	Margarine	(99)	430	Antibiotic Drugs: General
(59)	168	Sweeteners and Table Syrups	(100)	431	Certification of Antibiotic Drugs
(60)	169	Food Dressings and Flavorings	(101)	432	Packaging and Labeling of Antibiotic Drugs
(61)	170	Food Additives	(102)	433	Exemptions from Antibiotic Certification and Labeling Requirements
(62)	172	Food Additives Permitted for Direct Addition to Food for Human Consumption	(103)	436	Tests and Methods of Assay of Antibiotic and Antibiotic-Containing Drugs
(63)	173	Secondary Direct Food Additives Permitted in Food for Human Consumption	(104)	440	Penicillin Antibiotic Drugs
(64)	174	Indirect Food Additives: General	(105)	442	Cepha Antibiotics
(65)	175	Indirect Food Additives: Adhesive Coatings and Components			
(66)	176	Indirect Food Additives: Paper and Paperboard Components			
(67)	177	Indirect Food Additives: Polymers			
(68)	178	Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers			
(69)	179	Irradiation in the Production, Processing and Handling of Food			
(70)	180	Food Additives Permitted in Food on an Interim Basis or in Contact with Food Pending Additional Study			
(71)	181	Prior-Sanctioned Food Ingredients			

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|-------|-----|--|-------|-----|--|
| (106) | 444 | Oligosaccharide Antibiotic Drugs | (142) | 540 | Penicillin Antibiotic Drugs for Animal Use |
| (107) | 446 | Tetracycline Antibiotic Drugs | (143) | 544 | Oligosaccharide Certifiable Antibiotic Drugs for Animal Use |
| (108) | 448 | Peptide Antibiotics | (144) | 546 | Tetracycline Antibiotic Drugs for Animal Use |
| (109) | 449 | Antifungal Antibiotics | (145) | 548 | Certifiable Peptide Antibiotic Drugs for Animal Use |
| (110) | 450 | Antitumor Antibiotic Drugs | (146) | 555 | Chloramphenicol Drugs for Animal Use |
| (111) | 452 | Macrolide Antibiotic Drugs | (147) | 556 | Tolerances for Residues of New Animal Drugs in Food |
| (112) | 453 | Lincomycin Antibiotic Drugs | (148) | 558 | New Animal Drugs for Use in Animal Feeds |
| (113) | 455 | Certain Other Antibiotic Drugs | (149) | 561 | Tolerances for Pesticides in Animal Feeds Administered by the Environmental Protection Agency |
| (114) | 460 | Antibiotic Drugs Intended for Use in Laboratory Diagnosis of Disease | (150) | 564 | Definitions and Standards for Animal Food |
| (115) | 809 | In Vitro Diagnostic Products for Human Use | (151) | 570 | Food Additives |
| (116) | 812 | Investigational Device Exemptions | (152) | 573 | Food Additives Permitted in Feed and Drinking Water of Animals |
| (117) | 813 | Investigational Exemptions for Intraocular Lenses | (153) | 582 | Substances Generally Recognized as Safe |
| (118) | 820 | Good Manufacturing Practices for Medical Devices: General | (154) | 584 | Food Substances Affirmed as Generally Recognized as Safe in Feed and Drinking Water of Animals |
| (119) | 860 | Medical Device Classification Procedures | (155) | 589 | Substances Prohibited from Use in Animal Food or Feed |
| (120) | 861 | Procedures for Performance Standards Development | (156) | 700 | General |
| (121) | 870 | Cardiovascular Devices | (157) | 701 | Cosmetic Labeling |
| (122) | 882 | Neurological Devices | (158) | 720 | Voluntary Filing of Cosmetic Product Ingredient and Cosmetic Raw Material Composition Statements |
| (123) | 884 | Obstetrical and Gynecological Devices | (159) | 730 | Voluntary Filing of Cosmetic Product Experiences |
| (124) | 895 | Banned Devices | (160) | 740 | Cosmetic Product Warning Statements |
| (125) | 500 | General | | | |
| (126) | 501 | Animal Food Labeling | | | |
| (127) | 502 | Common or Usual Names for Nonstandardized Animal Foods | | | |
| (128) | 505 | Interpretive Statements Re: Warnings on Animal Drugs for Over-the-Counter Sale | | | |
| (129) | 507 | Thermally Processed Low-Acid Animal Foods Packaged in Hermetically Sealed Containers | | | |
| (130) | 508 | Emergency Permit Control | | | |
| (131) | 509 | Unavoidable Contaminants in Animal Food and Food-Packaging Material | | | |
| (132) | 510 | New Animal Drugs | | | |
| (133) | 511 | New Animal Drugs for Investigational Use | | | |
| (134) | 514 | New Animal Drug Applications | | | |
| (135) | 520 | Oral Dosage Form New Animal Drugs Not Subject to Certification | | | |
| (136) | 522 | Implantation of Injectable Dosage Form New Animal Drugs Not Subject to Certification | | | |
| (137) | 524 | Ophthalmic and Topical Dosage Form New Animal Drugs Not Subject to Certification | | | |
| (138) | 526 | Intramammary Dosage Forms Not Subject to Certification | | | |
| (139) | 529 | Certain Other Dosage Form New Animal Drugs Not Subject to Certification | | | |
| (140) | 536 | Tests for Specific Antibiotic Dosage Forms | | | |
| (141) | 539 | Bulk Antibiotic Drugs Subject to Certification | | | |

Copies of the Code of Federal Regulations may be obtained at no cost by accessing the website of the U.S. Government Printing Office at <http://www.gpoaccess.gov/cfr/index.html>.

(p) The Board incorporates by reference, including subsequent amendments and editions, "Tolerances and Exemptions from Tolerances for Pesticide Chemicals in or on Raw Agricultural Commodities," 40 C.F.R. Part 180. Copies of the Code of Federal Regulations may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, at a cost of twenty-four dollars (\$24.00).

(q) The Board incorporates by reference, including subsequent amendments and editions, "Definitions and Standards of Identity or Composition for Meats, Meat By-products, and Meat Food Products," 9 C.F.R. Part 319. Copies of the Code of Federal Regulations may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, at a cost of twenty-three dollars (\$23.00).

(r) The Board incorporates by reference, including subsequent amendments and editions, "Definitions and Standards of Identity or Composition for Poultry and Poultry Products," 9 C.F.R. Sections 381.155 through 381.170. Copies of the Code of Federal Regulations may be obtained from the Superintendent of

Documents, Government Printing Office, Washington, DC 20402, at a cost of twenty-three dollars (\$23.00).

(s) The Board incorporates by reference, including subsequent amendments and editions, Title 9, Part 317.2(1) of the Code of Federal Regulations. A copy of this material may be obtained at no cost from the Food and Drug Protection Division of the Department of Agriculture and Consumer Services.

(t) The Board incorporates by reference, including subsequent amendments and editions, Title 9, Part 381.125(b) of the Code of Federal Regulations. A copy of this material may be obtained at no cost from the Food and Drug Protection Division of the Department of Agriculture and Consumer Services.

(u) The Board incorporates by reference, including subsequent amendments and editions, a document entitled, "Fresh Air '2000' - A Look At FDA's Medical Gas Requirements," published by the United States Food and Drug Administration. Copies of this material may be obtained at the FDA website at <http://www.fda.gov/cder/dmpq/freshair.htm>. A copy of this material may also be obtained at no cost from the Food and Drug Protection Division of the North Carolina Department of Agriculture and Consumer Services.

History Note: Authority G.S. 106-139; 106-267; 106-267.2; Eff. December 14, 1981; Amended Eff. June 1, 2004; April 1, 2003; June 1, 1995; April 1, 1992; June 1, 1988; October 1, 1987.

02 NCAC 34 .0102 DEFINITIONS

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

- (1) "Act or law" means the Structural Pest Control Act of North Carolina of 1955.
- (2) "Active infestation of a specific organism" means evidence of present activity by that organism, visible in, on, or under a structure, or in or on debris under the structure.
- (3) "Active ingredient" means an ingredient which will or is intended to prevent, destroy, repel, or mitigate any pest.
- (4) "Acutely toxic rodenticidal baits" means all baits that, as formulated, are classified as Toxicity Category I or II (Signal Word "Danger" or "Warning") under 40 CFR Part 156.10.
- (5) "Board of Agriculture" means the Board of Agriculture of the State of North Carolina.
- (6) "Commercial certified applicator" shall mean any certified applicator employed by a licensed individual.
- (7) "Commercial structure" means any structure which is not a residential structure, including but not limited to shopping centers, offices, nursing homes, and similar structures.
- (8) "Complete surface residual spray" means the over-all application of any pesticide by spray or otherwise, to any surface areas within, on, under, or adjacent to, any structure in such a manner that the pesticide will adhere to surfaces and remain toxic to household pests

- (9) "Continuing education units" or "CEU" means units of noncredit education awarded by the Division of Continuing Studies, North Carolina State University or comparable educational institution, for satisfactorily completing course work.
- (10) "Continuing certification unit" or "CCU" means a unit of credit awarded by the Division upon satisfactory completion of one clock hour of approved classroom training.
- (11) "Crack and crevice application" means an application of pesticide made directly into a crack or void area with equipment capable of delivering the pesticide to the target area.
- (12) "Deficient soil sample" shall mean any soil sample which, when analyzed, is found to contain less than 25 percent, expressed in parts per million (ppm), of the termiticide applied by a licensee which would be found if the termiticide had been applied at the lowest concentration and dosage recommended by the labeling.
- (13) "Department" means the Department of Agriculture and Consumer Services of the State of North Carolina.
- (14) "Disciplinary action" means any action taken by the Committee as provided under the provisions of G.S. 106-65.28.
- (15) "Division" means the Structural Pest Control Division of the Department of Agriculture and Consumer Services of the State of North Carolina.
- (16) "Enclosed space" means any structure by whatever name known, including household structures; commercial buildings; warehouses; docks; vacant structures; places where people congregate such as hospitals, schools, churches, and others; railroad cars; trucks; ships; aircraft; and common carriers. It shall also mean vaults, tanks, chambers, and special rooms designed for use, being used, or intended to be used for fumigation operations.
- (17) "EPA" means the Environmental Protection Agency of the United States Government.
- (18) "EPA registration number" means the number assigned to a pesticide label by EPA.
- (19) "Flammable pesticidal fog" means the fog dispelled into space and produced:
 - (a) from oil solutions of pesticides finely atomized by a blast of heated air or exhaust gases from a gasoline engine; or
 - (b) from mixtures of water and pesticidal oil solutions passed through a combustion chamber, the water being converted to steam, which exerts a shearing action, breaking up the

- pesticidal oil into small droplets (thermal fog); or
- (c) from oil solutions of pesticides which are forced through very narrow space by centrifugal force and atomized as they are thrown off into the air (mechanical or cold fogs).
- (20) "Fog or fogging" means micron sized particles of pesticide(s) dispersed by means of a thermal or centrifugal fogger or a pressurized aerosol pesticide.
- (21) "Fumigation" means the use of fumigants within an enclosed space, or in, or under a structure, in concentrations which may be hazardous to man.
- (22) "Fumigation crew" or "crew" means personnel performing the fumigation operation.
- (23) "Fumigation operation" means all details prior to application of fumigant(s), the application of fumigant(s), fumigation period, and post fumigation details as outlined in these Rules.
- (24) "Fumigation period" means the period of time from application of fumigant(s) until ventilation of the fumigated structure(s) is completed and the structure or structures are declared safe for occupancy for human beings or domestic animals.
- (25) "Fumigator" means a person licensed under the provisions of G.S. 106-65.25(a)(3) or certified under the provisions of G.S. 106-65.26 to engage in or supervise fumigation operations.
- (26) "Gas-retaining cover" means a cover which will confine fumigant(s) to the space(s) intended to be fumigated.
- (27) "General fumigation" means the application of fumigant(s) to one or more rooms and their contents in a structure, at the desired concentration and for the necessary length of time to control rodents, insects, or other pests.
- (28) "Household" means any structure and its contents which are used for man.
- (29) "Household pest" means any vertebrate or invertebrate organism occurring in a structure or the surrounding areas thereof, including but not limited to insects and other arthropods, commensal rodents, and birds which have been declared pests under G.S. 143-444. "Household pest" does not include wood-destroying organisms.
- (30) "Household pest control" means that phase of structural pest control other than the control of wood-destroying organisms and fumigation and shall include the application of remedial measures for the purpose of curbing, reducing, preventing, controlling, eradicating, and repelling household pests.
- (31) "Inactive license" shall mean any structural pest control license held by an individual who has no employees and is not engaged in any structural pest control work except as a certified applicator or registered technician.
- (32) "Infestation of a specific organism" means evidence of past or present activity by that organism, visible in, on, or under a structure, or in or on debris under the structure.
- (33) "Inspection for a specific wood-destroying organism" means the visual examination of all accessible areas of a building and the probing of accessible structural members adjacent to slab areas, chimneys, and other areas particularly susceptible to attack by wood-destroying organisms to determine the presence of and the damage by that specific wood-destroying organism.
- (34) "Inspector" means any employee of the Structural Pest Control Division of the Department of Agriculture and Consumer Services of the State of North Carolina.
- (35) "Licensed structural pest control operation," or "pest control operation," or "operator," or "licensed operator" means any person licensed under the provisions of G.S. 106-65.25(a) or unlicensed who, for direct or indirect hire or compensation is engaged in the business of structural pest control work, as defined in G.S. 106-65.24(23).
- (36) "Liquefied gas aerosol" means the spray produced by the volatilization of a compressed and liquefied gas, to which has been added a nonvolatile oil solution containing a pesticide.
- (37) "Noncommercial certified applicator" shall mean any certified applicator not employed by a licensed individual.
- (38) "Open porch" means any porch without fill in which the distance from the bottom of the slab to the top of the soil beneath the slab is greater than 12 inches.
- (39) "Physical barrier" as used in 02 NCAC 34 .0500, means a barrier, which, by its physical properties and proper installation, is capable of preventing the passage of subterranean termites into a structure to be protected from subterranean termites.
- (40) "Residential structure" means any structure used, or suitable for use, as a dwelling such as a single- or multi-family home, house trailer, motor home, mobile home, a condominium or townhouse, or an apartment or any other structure, or portion thereof.
- (41) "Secretary" means the Secretary to the North Carolina Structural Pest Control Committee.
- (42) "Service vehicle" means any vehicle used regularly to transport the licensee or certified applicator or registered technician or other employee or any equipment or pesticides used in providing structural pest control services.
- (43) "Slab-on-ground" means a concrete slab in which all or part of that concrete slab is resting

- on or is in direct contact with the ground immediately beneath the slab.
- (44) "Solid masonry cap" means a continuous concrete or masonry barrier covering the entire top, width and length, of any wall, or any part of a wall, that provides support for the exterior or structural parts of a building.
- (45) "Space spray" means any pesticide, regardless of its particle size, which is applied to the atmosphere within an enclosed space in such a manner that dispersal of the pesticide particles is uncontrolled. Pesticidal fogs or aerosols, including those produced by centrifugal or thermal fogging equipment or pressurized aerosol pesticides, shall be considered space sprays.
- (46) "Spot fumigation" means the application of a fumigant to a localized space or harborage within, on, under, outside of, or adjacent to, a structure for local household pest or rodent control.
- (47) "Spot surface residual spray" means the application of pesticidal spray directly to a surface and only in specific areas where necessary and in such a manner that the pesticidal material will largely adhere to the surface where applied and will remain toxic to household pests or rodents or other pests for which applied for an extended period of time.
- (48) "Structure" means all parts of a building, whether vacant or occupied, in all stages of construction.
- (49) "Structural pests" means all pests that occur in any type of structure of man and all pests associated with the immediate environs of such structures.
- (50) "Sub-slab fumigation" means the application of a fumigant below or underneath a concrete slab and is considered spot fumigation.
- (51) "Supervision," as used in 02 NCAC 34 .0325, shall mean the oversight by the licensee of the structural pest control activities performed under that license. Such oversight may be in person by the licensee or through instructions, verbal, written or otherwise, to persons performing such activities. Instructions may be disseminated to such persons either in person or through persons employed by the licensee for that purpose.
- (52) "Termiticide(s)" (as used in these Rules) means those pesticides specified in 02 NCAC 34 .0502, Pesticides for Subterranean Termite Prevention and/or Control.
- (53) "Termiticide barrier" shall mean an area of soil treated with an approved termiticide, which, when sampled, is not deficient in termiticide.
- (54) "To use any pesticide in a manner inconsistent with its labeling" means to use any pesticide in a manner not permitted by the labeling. Provided that, the term shall not include:
- (a) applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling unless the labeling specifically prohibits deviation from the specified dosage, concentration, or frequency;
- (b) applying a pesticide against any target pest not specified on the labeling if the application is to the site specified on the labeling, unless the EPA has required that the labeling specifically state that the pesticide may be used only for the pests specified on the labeling; or
- (c) employing any method of application not prohibited by the labeling unless the labeling specifically states that the product may be applied only by the methods specified by the labeling.
- (55) "Type of treatment" means the method used to apply a pesticide formulation to a specific location, including but not limited to: space spray, crack and crevice, complete surface residual, spot surface residual, bait placement, or fog.
- (56) "Unauthorized personnel" means any individual or individuals not given specific authorization by the licensee or certified applicator to enter areas to which access is restricted by these Rules.
- (57) "Waiver" means a standard form prescribed by the Committee pursuant to 02 NCAC 34 .0603 which will, when completed correctly, permit the licensee to deviate from or omit one or more of the minimum treatment methods and procedures for structural pests which are set forth in the Committee rules, definitions, and requirements.
- (58) "Wood-decaying fungi" means any of the brown or white rot fungi in the Class Hymenomycetes that are capable of digesting or consuming the structural elements of wood after installation and causing a significant decline in strength or failure of wooden structural members.
- (59) "Wood-destroying insect report" means any written statement or certificate issued by an operator or his authorized agent, regarding the presence or absence of wood-destroying insects or their damage in a structure.
- (60) "Wood-destroying organism" is an organism such as a termite, beetle, other insect, or fungus which may devour or destroy wood or wood products and other cellulose material in, on, under, in contact with, and around structures.
- (61) "Wood-destroying organism report" means any written statement or certificate issued by an operator or his authorized agent, regarding

the presence or absence of wood-destroying organisms or their damage in a structure.

History Note: Authority G.S. 106-65.29;

Eff. July 1, 1976;

Readopted Eff. November 22, 1977;

Amended Eff. July 1, 2004; August 1, 2002; July 1, 2000; July 1, 1998; August 3, 1992; January 1, 1991; January 1, 1989.

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

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

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

- (1) Establish a vertical barrier in the soil by trenching or trenching and rodding along inside of the main foundation wall; the entire perimeter of all multiple masonry chimney bases, pillars, pilasters, and piers; and both sides of partition or inner walls with a termiticide from the top of the grade to the top of the footing or to a minimum depth of 30 inches, whichever is less. Where footings are exposed, treatment shall be performed adjacent to the footing but not below the bottom of the footing. Trench shall be no less than six inches in depth or to the bottom of the footing, whichever is less. Where drain tile, french drains, or other foundation drainage systems present a hazard of contamination outside the treatment zone, treatment shall be performed in a manner that will not introduce termiticide into the drainage system.
- (2) After a building or structure has been completed and the excavation filled and leveled, so that the final grade has been reached along the outside of the main foundation wall, establish a vertical barrier in the soil by trenching or trenching and rodding adjacent to the outside of the main foundation wall with a termiticide from the top of the grade to the top of the footing or to a minimum depth of 30 inches, whichever is less. Where footings are exposed, treatment shall be performed adjacent to the footing and not below the bottom of the footing. Trench shall be no less than six inches in depth or to the bottom of the footing, whichever is less. Where drain tile, french drains, or other foundation drainage systems present a hazard of contamination outside the treatment zone, treatment shall be performed in a manner that will not introduce termiticide into the drainage system.
- (3) Establish a horizontal termiticide barrier in the soil within three feet of the main foundation, under slabs, such as patios, walkways,

driveways, terraces, gutters, etc., attached to the building. Treatment shall be performed before slab is poured, but after fill material or fill dirt has been spread.

- (4) Establish a horizontal termiticide barrier in the soil under the entire surface of floor slabs, such as basements, porches, entrance platforms, garages, carports, breezeways, sun rooms, etc. The treatment shall be performed before slab is poured but after fill material or fill dirt has been spread.
- (5) Establish a vertical termiticide barrier in the soil around all critical areas, such as expansion and construction joints and plumbing and utility conduits, at their point of penetration of the slab or floor or, for crawl space construction, at the point of contact with the soil.
- (6) If concrete slabs are poured prior to treatment, treatment of slabs shall be performed as required by 02 NCAC 34 .0503(a) or (b): Except that; the buyer of the property or his authorized agent may release the licensee from further treatment of slab areas under this Rule provided such release is obtained in writing on the Subterranean Termite Sub-Slab Release Form provided by the Division, which shall contain the name of the builder, address of property, identification of the slab areas not treated, name and address of the structural pest control company and shall be signed by the company representative and the home buyer. This form may be obtained by writing the North Carolina Department of Agriculture and Consumer Services, Structural Pest Control Division, 1001 Mail Service Center, Raleigh, NC 27699-1001 or by calling (919) 733-6100.
- (c) Slab-on-Ground Construction. All parts of Paragraph (a) of this Rule shall be followed, as applicable, in treating slab-on-ground construction.
- (d) All treating requirements specified in this Rule shall be completed within 60 days following the completion of the structure, as described in Subparagraph (b)(2) of this Rule.
- (e) Paragraphs (b) and (c) of this Rule shall not apply to subterranean termite treatment performed using termite bait(s) labeled for protection of the entire structure when the licensee provides a warranty for the control of subterranean termites on the entire structure.
- (f) Paragraphs (b) and (c) of this Rule shall not apply to subterranean termite treatment performed using EPA registered topically applied wood treatment termiticides labeled for the protection of the entire structure when the licensee applies the material according to labeled directions and provides a warranty for the control of subterranean termites on the entire structure.
- (g) No later than the date of the completion of any treatment performed under this Rule, the licensee or his employee shall place a durable sticker/label, no less than three inches square, on the meter base, circuit breaker box or inside surface of kitchen cabinet door or other readily noticeable location providing, at a minimum, the following information:

- (1) The statement: "This structure was treated for the prevention of subterranean termites. A warranty has been issued to the builder. If you did not receive your copy of this warranty at closing, contact your builder or the company below for additional warranty information." in boldface type;
- (2) Name, address and telephone number of the company performing the treatment; and
- (3) Date of final treatment.

History Note: Authority G.S. 106-65.29;

Eff. July 1, 1976;

Readopted Eff. November 22, 1977;

Amended Eff. August 1, 1980;

Temporary Repeal Eff. August 24, 1987 for a period of 30 days to expire on September 22, 1987;

Temporary Repeal Expired Eff. September 22, 1987;

Amended Eff. July 1, 2004; August 1, 2002; April 1, 2001;

July 1, 1998; January 1, 1991; January 1, 1989.

02 NCAC 48A .1208 NURSERY DEALER CERTIFICATE

(a) Persons who maintain no regular nursery but who deal in nursery stock grown in certified or registered nurseries or who deal in collected plants shall be required to possess a nursery dealer certificate. To obtain such a certificate, the nursery dealer shall submit an application listing all sources of nursery stock and collected plants to be distributed or sold. It shall be a violation of this Section for a nursery dealer to distribute or sell nursery stock or collected plants which have not been inspected and certified by an inspector in North Carolina or an authorized plant pest regulatory official of another state or country.

(b) The annual fee for a nursery dealer certificate shall be fifty dollars (\$50.00) for each location from which nursery stock is sold, bartered, exchanged or given away. This certificate expires December 31 of each year.

(c) All nursery stock or collected plants in the custody of any dealer shall be subject to inspection at any time and shall be maintained in certifiable condition. Dealer certificates may be revoked at any time for cause. Records shall be kept of all plant acquisitions and shall be made available to any inspector of the North Carolina Department of Agriculture and Consumer Services upon request.

History Note: Authority G.S. 106-65.45; 106-65.46;

106-284.18; 106-420;

Eff. January 1, 1985;

Amended Eff. June 1, 1990;

Temporary Amendment Eff. November 24, 2003;

Amended Eff. June 1, 2004.

TITLE 10A - DEPARTMENT OF HEALTH & HUMAN SERVICES

10A NCAC 13F .0213 APPEAL OF LICENSURE ACTION

The licensee of an adult care home may appeal a licensure action by commencing a contested case according to G.S. 150B-23

following attempts at informal resolution according to G.S. 150B-22.

History Note: Authority G.S. 131D-2; 143B-165;

S.L. 2002-0160;

Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Temporary Amendment Eff. July 1, 2003;

Amended Eff. July 1, 2004.

10A NCAC 13F .0504 COMPETENCY VALIDATION FOR LICENSED HEALTH PROFESSIONAL SUPPORT TASKS

(a) An adult care home shall assure that non-licensed personnel and licensed personnel not practicing in their licensed capacity as governed by their practice act and occupational licensing laws are competency validated by return demonstration for any personal care task specified in Subparagraph (a)(1) through (28) of Rule .0903 of this Subchapter prior to staff performing the task and that their ongoing competency is assured through facility staff oversight and supervision.

(b) Competency validation shall be performed by the following licensed health professionals:

- (1) A registered nurse shall validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(1) through (28) of Rule .0903 of this Subchapter.
- (2) In lieu of a registered nurse, a respiratory care practitioner licensed under G.S. 90, Article 38, may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(6), (a)(11), (a)(16), (a)(18), (a)(19) and (a)(21) of Rule .0903 of this Subchapter.
- (3) In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform the personal care task specified in Subparagraph (a)(8) of Rule .0903 of this Subchapter.
- (4) In lieu of a registered nurse, an occupational therapist or physical therapist may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(17) and (a)(22) through (27) of Rule .0903 of this Subchapter.

(c) Competency validation of staff, according to Paragraph (a) of this Rule, for the licensed health professional support tasks specified in Paragraph (a) of Rule .0903 of this Subchapter and the performance of these tasks is limited exclusively to these tasks except in those cases in which a physician acting under the authority of G.S. 131D-2(a1) certifies that non-licensed personnel can be competency validated to perform other tasks on a temporary basis to meet the resident's needs and prevent unnecessary relocation.

History Note: Authority 131D-2; 143B-165; S.L. 2002-0160;

Temporary Adoption Eff. September 1, 2003;

Eff. July 1, 2004.

10A NCAC 13F .0507 TRAINING ON CARDIO-

PULMONARY RESUSCITATION

Each adult care home shall have at least one staff person on the premises at all times who has completed within the last 24 months a course on cardio-pulmonary resuscitation and choking management, including the Heimlich maneuver, provided by the American Heart Association, American Red Cross, National Safety Council, American Safety and Health Institute and Medic First Aid, or by a trainer with documented certification as a trainer on these procedures from one of these organizations.

History Note: Authority 131D-2; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. September 1, 2003; Eff. July 1, 2004.

10A NCAC 13F .0702 DISCHARGE OF RESIDENTS

(a) The discharge of a resident initiated by the facility shall be according to conditions and procedures specified in Paragraphs (a) through (g) of this Rule. The discharge of a resident initiated by the facility involves the termination of residency by the facility resulting in the resident's move to another location and the facility not holding the bed for the resident based on the facility's bed hold policy.

(b) The discharge of a resident shall be based on one of the following reasons:

- (1) the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility as documented by the resident's physician, physician assistant or nurse practitioner;
- (2) the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility as documented by the resident's physician, physician assistant or nurse practitioner;
- (3) the safety of other individuals in the facility is endangered;
- (4) the health of other individuals in the facility is endangered as documented by a physician, physician assistant or nurse practitioner;
- (5) failure to pay the costs of services and accommodations by the payment due date according to the resident contract after receiving written notice of warning of discharge for failure to pay; or
- (6) the discharge is mandated under G.S. 131D-2(a1).

(c) The notices of discharge and appeal rights as required in Paragraph (e) of this Rule shall be made by the facility at least 30 days before the resident is discharged except that notices may be made as soon as practicable when:

- (1) the resident's health or safety is endangered and the resident's urgent medical needs cannot be met in the facility under Subparagraph (b)(1) of this Rule; or
- (2) reasons under Subparagraphs (b)(2), (b)(3), and (b)(4) of this Rule exist.

(d) The reason for discharge shall be documented in the resident's record. Documentation shall include one or more of

the following as applicable to the reasons under Paragraph (b) of this Rule:

- (1) documentation by physician, physician assistant or nurse practitioner as required in Paragraph (b) of this Rule;
- (2) the condition or circumstance that endangers the health or safety of the resident being discharged or endangers the health or safety of individuals in the facility, and the facility's action taken to address the problem prior to pursuing discharge of the resident;
- (3) written notices of warning of discharge for failure to pay the costs of services and accommodations; or
- (4) the specific health need or condition of the resident that the facility determined could not be met in the facility pursuant to G.S. 131D-2(a1)(4) and as disclosed in the resident contract signed upon the resident's admission to the facility.

(e) The facility shall assure the following requirements for written notice are met before discharging a resident:

- (1) The Adult Care Home Notice of Discharge with the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, to the resident on the same day the Adult Care Home Notice of Discharge is dated. These forms may be obtained at no cost from the Division of Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505.
- (2) A copy of the Adult Care Home Notice of Discharge with a copy of the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, or sent by certified mail to the resident's responsible person or legal representative on the same day the Adult Care Home Notice of Discharge is dated.
- (3) Failure to use and simultaneously provide the specific forms according to Subparagraphs (e)(1) and (e)(2) of this Rule shall invalidate the discharge. Failure to use the latest version of these forms shall not invalidate the discharge unless the facility has been previously notified of a change in the forms and been provided a copy of the latest forms by the Department of Health and Human Services.
- (4) A copy of the completed Adult Care Home Notice of Discharge, the Adult Care Home Hearing Request Form as completed by the facility prior to giving to the resident and a copy of the receipt of hand delivery or the notification of certified mail delivery shall be maintained in the resident's record.

(f) The facility shall provide sufficient preparation and orientation to residents to ensure a safe and orderly discharge from the facility as evidenced by:

- (1) notifying staff in the county department of social services responsible for placement services;

- (2) explaining to the resident and responsible person or legal representative why the discharge is necessary;
- (3) informing the resident and responsible person or legal representative about an appropriate discharge destination; and
- (4) offering the following material to the caregiver with whom the resident is to be placed and providing this material as requested prior to or upon discharge of the resident:
 - (A) a copy of the resident's most current FL-2;
 - (B) a copy of the resident's most current assessment and care plan;
 - (C) a copy of the resident's current physician orders;
 - (D) a list of the resident's current medications;
 - (E) the resident's current medications;
 - (F) a record of the resident's vaccinations and TB screening;
- (5) providing written notice of the name, address and telephone number of the following, if not provided on the discharge notice required in Paragraph (e) of this Rule:
 - (A) the regional long term care ombudsman; and
 - (B) the protection and advocacy agency established under federal law for persons with disabilities.

(g) If an appeal hearing is requested:

- (1) the facility shall provide to the resident or legal representative or the resident and the responsible person, and the Hearing Unit copies of all documents and records that the facility intends to use at the hearing at least five working days prior to the scheduled hearing; and
- (2) the facility shall not discharge the resident before the final decision resulting from the appeal has been rendered, except in those cases of discharge specified in Paragraph (c) of this Rule.

(h) If a discharge is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person which means the resident or responsible person may be charged for the days of the required notice if notice is not given or if notice is given and the resident leaves before the end of the required notice period.. Exceptions to the required notice are cases in which a delay in discharge or transfer would jeopardize the health or safety of the resident or others in the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the resident contract or the house rules provided to the resident or responsible person upon admission.

(i) The discharge requirements in this Rule do not apply when a resident is transferred to an acute inpatient facility for mental or physical health evaluation or treatment and the adult care facility's bed hold policy applies based on the expected return of the resident. If the facility decides to discharge a resident who

has been transferred to an acute inpatient facility and there has been no physician-documented level of care change for the resident, the discharge requirements in this Rule apply.

History Note: Authority G.S. 131D-2; 131D-4.5; 131D-21; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13F .0905 ACTIVITIES PROGRAM

(a) Each adult care home shall develop a program of activities designed to promote the residents' active involvement with each other, their families, and the community. The program shall provide social, physical, intellectual, and recreational activities in a planned, coordinated, and structured manner.

(b) The program shall be designed to promote involvement by all residents but is not to require any individual to participate in any activity against his will.

(c) Each home shall assign a person to be the activities coordinator, who meets the qualifications specified in Rule.0404 of this Subchapter. The activities coordinator shall respond to the residents' need and desire for meaningful activities, by:

- (1) Reviewing upon admission personal information about each resident's interests and capabilities recorded on an individualized index card or the equivalent. This card shall be completed from, at least, the information recorded on the Resident register, Form DSS-1865. It shall be maintained for use by the activities coordinator for developing activities and is to be updated as needed;
- (2) Using the information on the residents' interests and capabilities to arrange for and provide planned individual and group activities for the residents. In addition to individual activities, there shall be a minimum of 10 hours of planned group activities per week. Homes designated for residents with HIV disease are exempt from the 10-hour requirement as long as the facility can demonstrate each resident's involvement in a structured volunteer program that provides the required range of activities;
- (3) Preparing a monthly calendar of planned group activities which is to be in easily readable print, posted in a prominent location on the first day of each month, and updated when there are any changes;
- (4) Involving community resources, such as recreational, volunteer, religious, aging and developmentally disabled-associated agencies, to enhance the activities available to residents. The coordinator may use the home's aides in carrying out some activities with residents; and
- (5) Evaluating and documenting the overall effectiveness of the activities program at least every six months with input from the residents to determine what have been the most valued

activities and to elicit suggestions of ways to enhance the program.

(d) A variety of group and individual activities shall be provided. The program is to include, at least, the following types of activities:

(1) Social and Recreational Activities:

(A) Opportunity shall be available for both individual and group social and recreational activities sufficiently diverse to accommodate the residents' varied interests and capabilities. These activities emphasize increasing self-confidence and stimulating interest and friendships;

(B) Individual activity includes one to one interactions in mutually enjoyable activity, such as buddy walks, card playing and horseshoes as well as activity by oneself, such as bird watching, nature walks, and card playing;

(C) Each resident shall have the opportunity to participate in at least one planned group social or recreational activity weekly. A group activity is one which involves a number of residents in physical and mental interaction. Each resident shall be encouraged to participate in an activity which best matches his physical, mental and emotional capability. Such activities may include group singing, dancing, bingo, and exercise classes;

(D) Each resident shall have the opportunity to participate in at least one outing every other month. A resident interested in involving himself in the community more frequently shall be encouraged and helped to do so. The coordinator is to contact volunteers and residents' families to assist in the effort to get residents involved in activities outside the home;

(E) If a resident cannot participate actively in community events, arrangements shall be made so that the more active residents can still participate in such outings. If there is a question about a resident's ability to participate in an activity, the resident's physician shall be consulted to obtain a statement regarding the resident's capabilities; and

(F) The activities planned and offered shall take into account possible cultural differences of the residents;

(2) Diversional and Intellectual Activities:

(A) Opportunity for both individual and group diversional and intellectual activities sufficiently diverse to accommodate the residents' varied interests and capabilities shall be available. There shall be adequate supplies and supervision provided to enable each resident to participate;

(B) Individual activities emphasize individual accomplishments, creative expression, increased knowledge and the learning of new skills. Such activities may include sewing, crafts, painting, reading, creative writing, and wood carving;

(C) Each resident shall have the opportunity to participate in at least one planned group activity weekly that emphasizes group accomplishment, creative expression, increased knowledge, and the learning of new skills. Such activities may include discussion groups, drama, resident council meetings, book reviews, music appreciation, review of current events, and spelling bees; and

(D) The activities planned and offered shall take into account possible cultural differences of the residents.

(3) Work-Type and Volunteer Service Activities: Each resident shall have the opportunity to participate in meaningful work-type and volunteer service activities in the home or in the community, but participation shall be on an entirely voluntary basis. Under no circumstances shall this activity be forced upon a resident. Residents shall not be assigned these tasks in place of staff. Examples of work-type and volunteer services activities range from bedmaking, personal ironing, and assisting another resident, to more structured activities such as general ironing, making or repairing toys for children, telephone reassurance, and gardening.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13F .0906 OTHER RESIDENT CARE AND SERVICES

(a) Transportation. The administrator shall assure the provision of transportation for the residents of adult care homes to necessary resources and activities, including transportation to the nearest appropriate health facilities, social services agencies,

shopping and recreational facilities, and religious activities of the resident's choice. The resident shall not be charged any additional fee for this service. Sources of transportation may include community resources, public systems, volunteer programs, family members as well as facility vehicles.

(b) Mail.

- (1) Residents shall receive their mail promptly and it shall be unopened unless there is a written, witnessed request authorizing management staff to open and read mail to the resident. This request shall be recorded on Form DSS-1865, the Resident Register or the equivalent;
- (2) Outgoing mail written by a resident shall not be censored; and
- (3) Residents shall be encouraged and assisted, if necessary, to correspond by mail with close relatives and friends. Residents shall have access to writing materials, stationery and postage and, upon request, the home shall provide such items at cost. It is not the home's obligation to pay for these items.

(c) Laundry.

- (1) Laundry services shall be provided to residents without any additional fee; and
- (2) It is not the home's obligation to pay for a resident's personal dry cleaning. The resident's plans for personal care of clothing shall be indicated on Form DSS-1865, the Resident Register.

(d) Telephone.

- (1) A telephone shall be available in a location providing privacy for residents to make and receive calls.
- (2) A pay station telephone is not acceptable for local calls; and
- (3) It is not the home's obligation to pay for a resident's toll calls.

(e) Personal Lockable Space.

- (1) Personal lockable space shall be provided for each resident to secure his personal valuables. One key shall be provided free of charge to the resident. Additional keys shall be provided to residents at cost upon request. It is not the home's obligation to pay for additional keys; and
- (2) While a resident may elect not to use lockable space, it shall still be available in the home since the resident may change his mind. This space shall be accessible only to the resident and the administrator or supervisor-in-charge. The administrator or supervisor-in-charge shall determine at admission whether the resident desires lockable space, but the resident may change his mind at any time.

(f) Visiting.

- (1) Visiting in the home and community at reasonable hours shall be encouraged and arranged through the mutual prior

understanding of the residents and administrator;

- (2) There shall be at least 10 hours each day for visitation in the home by persons from the community. If a home has established visiting hours or any restrictions on visitation, information about the hours and any restrictions shall be included in the house rules given to each resident at the time of admission and posted conspicuously in the home;
- (3) A signout register shall be maintained for planned visiting and other scheduled absences which indicates the resident's departure time, expected time of return and the name and telephone number of the responsible party;
- (4) If the whereabouts of a resident are unknown and there is reason to be concerned about his safety, the person in charge in the home shall immediately notify the resident's responsible person, the appropriate law enforcement agency and the county department of social services.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1987; April 1, 1984; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13F .1206 ADVERTISING

The adult care home may advertise provided:

- (1) The name used is as it appears on the license.
- (2) Only the services and accommodations for which the home is licensed are used.
- (3) The home is listed under proper classification in telephone books, newspapers or magazines.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13G .0204 APPLICATION TO LICENSE AN EXISTING BUILDING

(a) An application for a license to operate a family care home for adults in an existing building where no alterations are necessary shall be made at the county department of social services.

(b) The following forms and reports shall be submitted through the county department of social services to the Division of Facility Services:

- (1) the Initial License Application;
- (2) a photograph of each side of the existing structure and one set of schematic floor plans or blueprints of the building showing the floor plan; type of construction; location, size and

- (3) height of windows; location and type of heating system; the use of basement and attic; location of doors and closets;
- (3) the Fire and Building Safety Inspection Report to be submitted with completion of construction or renovation; and
- (4) the Sanitation Report or a permit to begin operation from the sanitary division of the county health department.

(c) If during the study of the administrator and the home it does not appear that qualifications of the administrator or requirements for the home can be met, the county department of social services shall so inform the applicant, indicating in writing the reason, and give the applicant an opportunity to withdraw the application. Upon the applicant's request, the application shall be completed and submitted to the Division of Facility Services for consideration.

(d) The Division of Facility Services shall notify the applicant and the county department of social services of any required changes.

(e) Following review of application, references and all forms, a pre-licensing visit shall be made by a consultant of the Division of Facility Services.

(f) The consultant shall report his findings and recommendations to the Division of Facility Services which shall promptly notify, in writing, the applicant and the county department of social services of the decision to license or not to license the family care home.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; April 1, 1987; April 1, 1984; ARRC Objection Lodged November 14, 1990; Amended Eff. May 1, 1991; Temporary Amendment Eff. September 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 13G .0504 COMPETENCY VALIDATION FOR LICENSED HEALTH PROFESSIONAL SUPPORT TASKS

(a) A family care home shall assure that non-licensed personnel and licensed personnel not practicing in their licensed capacity as governed by their practice act and occupational licensing laws are competency validated by return demonstration for any personal care task specified in Subparagraph (a)(1) through (28) of Rule .0903 of this Subchapter prior to staff performing the task and that their ongoing competency is assured through facility staff oversight and supervision.

(b) Competency validation shall be performed by the following licensed health professionals:

- (1) A registered nurse shall validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(1) through (28) of Rule .0903 of this Subchapter.
- (2) In lieu of a registered nurse, a respiratory care practitioner licensed under G.S. 90, Article 38, may validate the competency of staff who perform personal care tasks specified in

Subparagraphs (a)(6), (11), (16), (18), (19) and (21) of Rule .0903 of this Subchapter.

- (3) In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform the personal care task specified in Subparagraph (a)(8) of Rule .0903 of this Subchapter

- (4) In lieu of a registered nurse, an occupational therapist or physical therapist may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(17) and (a)(22) through (27) of Rule .0903 of this Subchapter.

(c) Competency validation of staff, according to Paragraph (a) of this Rule, for the licensed health professional support tasks specified in Paragraph (a) of Rule .0903 of this Subchapter and the performance of these tasks is limited exclusively to these tasks except in those cases in which a physician acting under the authority of G.S. 131D-2(a1) certifies that non-licensed personnel can be competency validated to perform other tasks on a temporary basis to meet the resident's needs and prevent unnecessary relocation.

History Note: Authority 131D-2; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. September 1, 2003; Eff. July 1, 2004.

10A NCAC 13G .0507 TRAINING ON CARDIO-PULMONARY RESUSCITATION

Each family care home shall have at least one staff person on the premises at all times who has completed within the last 24 months a course on cardio-pulmonary resuscitation and choking management, including the Heimlich maneuver, provided by the American Heart Association, American Red Cross, National Safety Council, American Safety and Health Institute and Medic First Aid, or by a trainer with documented certification as a trainer on these procedures from one of these organizations. If the only staff person on site has been deemed physically incapable of performing these procedures by a licensed physician, that person is exempt from the training.

History Note: Authority 131D-2; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. September 1, 2003; Eff. July 1, 2004.

10A NCAC 13G .0705 DISCHARGE OF RESIDENTS

(a) The discharge of a resident initiated by the facility shall be according to conditions and procedures specified in Paragraphs (a) through (g) of this Rule. The discharge of a resident initiated by the facility involves the termination of residency by the facility resulting in the resident's move to another location and the facility not holding the bed for the resident based on the facility's bed hold policy.

- (b) The discharge of a resident shall be based on one of the following reasons:
 - (1) the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility as documented by the resident's

- physician, physician assistant or nurse practitioner;
 - (2) the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility as documented by the resident's physician, physician assistant or nurse practitioner;
 - (3) the safety of other individuals in the facility is endangered;
 - (4) the health of other individuals in the facility is endangered as documented by a physician, physician assistant or nurse practitioner;
 - (5) failure to pay the costs of services and accommodations by the payment due date according to the resident contract after receiving written notice of warning of discharge for failure to pay; or
 - (6) the discharge is mandated under G.S. 131D-2(a1).
- (c) The notices of discharge and appeal rights as required in Paragraph (e) of this Rule shall be made by the facility at least 30 days before the resident is discharged except that notices may be made as soon as practicable when:
- (1) the resident's health or safety is endangered and the resident's urgent medical needs cannot be met in the facility under Subparagraph (b)(1) of this Rule; or
 - (2) reasons under Subparagraphs (b)(2), (b)(3), and (b)(4) of this Rule exist.
- (d) The reason for discharge shall be documented in the resident's record. Documentation shall include one or more of the following as applicable to the reasons under Paragraph (b) of this Rule:
- (1) documentation by physician, physician assistant or nurse practitioner as required in Paragraph (b) of this Rule;
 - (2) the condition or circumstance that endangers the health or safety of the resident being discharged or endangers the health or safety of individuals in the facility, and the facility's action taken to address the problem prior to pursuing discharge of the resident;
 - (3) written notices of warning of discharge for failure to pay the costs of services and accommodations; or
 - (4) the specific health need or condition of the resident that the facility determined could not be met in the facility pursuant to G.S. 131D-2(a1)(4) and as disclosed in the resident contract signed upon the resident's admission to the facility.
- (e) The facility shall assure the following requirements for written notice are met before discharging a resident:
- (1) The Adult Care Home Notice of Discharge with the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, to the resident on the same day the Adult Care Home Notice of Discharge is dated. These forms may be obtained at no cost from the Division of Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505.
 - (2) A copy of the Adult Care Home Notice of Discharge with a copy of the Adult Care Home Hearing Request Form shall be hand delivered, with receipt requested, or sent by certified mail to the resident's responsible person or legal representative on the same day the Adult Care Home Notice of Discharge is dated.
 - (3) Failure to use and simultaneously provide the specific forms according to Subparagraphs (e)(1) and (e)(2) of this Rule shall invalidate the discharge. Failure to use the latest version of these forms shall not invalidate the discharge unless the facility has been previously notified of a change in the forms and been provided a copy of the latest forms by the Department of Health and Human Services.
 - (4) A copy of the completed Adult Care Home Notice of Discharge, the Adult Care Home Hearing Request Form as completed by the facility prior to giving to the resident and a copy of the receipt of hand delivery or the notification of certified mail delivery shall be maintained in the resident's record.
- (f) The facility shall provide sufficient preparation and orientation to residents to ensure a safe and orderly discharge from the facility as evidenced by:
- (1) notifying staff in the county department of social services responsible for placement services;
 - (2) explaining to the resident and responsible person or legal representative why the discharge is necessary;
 - (3) informing the resident and responsible person or legal representative about an appropriate discharge destination; and
 - (4) offering the following material to the caregiver with whom the resident is to be placed and providing this material as requested prior to or upon discharge of the resident:
 - (A) a copy of the resident's most current FL-2;
 - (B) a copy of the resident's most current assessment and care plan;
 - (C) a copy of the resident's current physician orders;
 - (D) a list of the resident's current medications;
 - (E) the resident's current medications; and
 - (F) a record of the resident's vaccinations and TB screening.
 - (5) providing written notice of the name, address and telephone number of the following, if not provided on the discharge notice required in Paragraph (e) of this Rule:
 - (A) the regional long term care ombudsman; and

(B) the protection and advocacy agency established under federal law for persons with disabilities.

(g) If an appeal hearing is requested:

- (1) the facility shall provide to the resident or legal representative or the resident and the responsible person, and the Hearing Unit copies of all documents and records that the facility intends to use at the hearing at least five working days prior to the scheduled hearing; and
- (2) the facility shall not discharge the resident before the final decision resulting from the appeal has been rendered, except in those cases of discharge specified in Paragraph (c) of this Rule.

(h) If a discharge is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person which means the resident or responsible person may be charged for the days of the required notice if notice is not given or if notice is given and the resident leaves before the end of the required notice period.. Exceptions to the required notice are cases in which a delay in discharge or transfer would jeopardize the health or safety of the resident or others in the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the resident contract or the house rules provided to the resident or responsible person upon admission.

(i) The discharge requirements in this Rule do not apply when a resident is transferred to an acute inpatient facility for mental or physical health evaluation or treatment and the adult care facility's bed hold policy applies based on the expected return of the resident. If the facility decides to discharge a resident who has been transferred to an acute inpatient facility and there has been no physician-documented level of care change for the resident, the discharge requirements in this Rule apply.

History Note: Authority G.S. 131D-2; 131D-4.5; 131D-21; 143B-165; S.L. 99-0334; 2002-0160; Temporary Adoption Eff. January 1, 2000; December 1, 1999; Eff. April 1, 2001; Temporary Amendment Eff. July 1, 2003; Amended Eff. July 1, 2004.

10A NCAC 26C .0501 SCOPE

This Section sets forth rules governing summary suspension and revocation of authorization to receive public funding for providing mental health, developmental disabilities and substance abuse services.

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 26C .0502 DEFINITIONS

As used in the rules in this Section, the following terms have the meanings specified:

- (1) "Authorization to receive public funding for providing services" means approval from the

Department to receive funding through one or more of the following mechanisms;

- (a) enrollment of a provider with Medicaid, as defined in 42 C.F.R. 440.90, 42 C.F.R. 440.130(D), and 42 C.F.R. 440.180 and SL 2002-164; or
- (b) compliance with contract or funding requirements for state or federal funds, as defined in 10A NCAC 27A, Sections .0100 through .0200.

- (2) "Funding authority" means the state agency that is responsible for administering state or federal funds, or the area authority or county program that is responsible for administering local funds.
- (3) "Provider" means any person or entity authorized to provide publicly funded services.
- (4) "Services" means publicly funded mental health, developmental disabilities and substance abuse services.
- (5) "Statutes or rules" mean the North Carolina General Statutes, North Carolina Administrative Code.
- (6) "Substantial failure to comply" means evidence of one or more of the following:
 - (a) the provider has not addressed issues that endanger the health, safety or welfare of clients receiving services;
 - (b) the provider has been convicted of a crime specified in G.S. 122C-80;
 - (c) the provider has not made available and assessable all sources of information necessary to complete the monitoring processes set out in G.S. 122C-112.1;
 - (d) the provider has created or altered documents to avoid sanctions;
 - (e) the provider has created or altered documents to avoid sanctions;
 - (f) the provider has not submitted, revised or implemented a plan of correction in the specified timeframes; or
 - (g) the provider has not removed the cause of a summary suspension in the specified timeframes.

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 26C .0503 SUMMARY SUSPENSION

(a) The DMH/DD/SAS shall issue a written order of agency-wide, site-limited or service-specific summary suspension of state or federal mental health, developmental disabilities and substance abuse services funds and shall refer findings concerning licensed providers for investigation by the licensing agency, when it determines that a client's health, safety or welfare is in immediate jeopardy, as defined in 10A NCAC 27G .0602(5). Where funding is authorized by other public sources,

the DMH/DD/SAS shall refer its findings to the funding authority and shall refer findings concerning licensed providers for investigation by the licensing agency, when it determines that a client's health, safety or welfare is in immediate jeopardy. The DMH/DD/SAS shall include its findings in the order or referral.

(b) An order of summary suspension shall be effective on the date specified in the order or on the date of the first attempt to deliver notification at the last known address of the provider, whichever is later.

(c) The order shall specify a date by which the provider shall remove the cause for the emergency action and authorization for funding shall resume.

(d) The provider may contest the order by requesting a contested case hearing pursuant to G.S. 150B. Requesting a contested hearing does not stay the order for summary suspension.

History Note: Authority G.S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 26C .0504 REVOCATION

(a) The DMH/DD/SAS shall revoke authorization to receive funding to provide services utilizing state or federal mental health, developmental disabilities and substance abuse services funds and make a recommendation to DMA to revoke enrollment for Medicaid, when it finds that there has been substantial failure to comply with statutes or pursuant to Rule .0502(5) of this Section. Where funding is authorized by other public sources, the DMH/DD/SAS shall refer its findings to the funding authority. Regardless of funding authority, the DMH/DD/SAS shall refer findings concerning licensed providers for investigation by the licensing agency when it determines there has been substantial failure to comply with statutes or rules. The DMH/DD/SAS shall include its findings in the revocation order, recommendation or referral.

(b) Before revoking authorization, making a recommendation to the Division of Medical Assistance (DMA) or making a referral to another funding authority or licensing agency, the DMH/DD/SAS shall provide written notice to the provider stating that continued failure to comply with statutes or rules will result in the revocation, recommendation and referral.

(c) The DMH/DD/SAS shall give the provider written notice of the revocation order, the recommendation to DMA or referral of findings to the funding authority or licensing agency, as applicable. The written notice shall include the reasons for the action, and the grievance/appeal process or contested case procedures pursuant to G.S. 150B.

(d) The revocation notice shall be effective on the date specified in the notice or on the date of the first attempt to deliver notification at the last known address of the provider, whichever is later.

(e) The DMH/DD/SAS shall provide to DMA or other funding authority a written notice of the revocation order and a recommendation to revoke Medicaid enrollment. The DMH/DD/SAS shall also provide a copy of the notice and recommendation to the licensing agency, as applicable.

(f) The provider may contest the order by requesting a contested case hearing pursuant to G.S. 150B. Requesting a contested case hearing does not stay the revocation order.

History Note: Authority G. S. 122C-112.1; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 27G .0402 LICENSE ISSUANCE

(a) Applications for licensure shall be requested and completed on the form provided by DFS at least 30 days prior to the planned operation date of a new facility. Copies of reports, findings or recommendations issued by any accreditation agency and corrective action plans shall be submitted with the application for licensure.

(b) The content of license applications shall include:

- (1) Name of person (as defined in G.S. 122C-3) submitting the application;
- (2) Business name of facility, if applicable;
- (3) Street location of the facility (including multiple addresses if more than one building at one site);
- (4) Name and title of the operator of the facility;
- (5) Type of facility; services offered; ages served; and, when applicable, capacity and a floor plan showing bed locations and room numbers, any unlocked time-out rooms, and any locked interior or exterior doors which would prohibit free egress of clients; and
- (6) Indication of whether the facility is operated by an area program, is under contract with an area program, or is a private facility; and
- (7) All application for a new license shall disclose the names of individuals who are owners, partners or shareholders holding an ownership or controlling interest of 5% or more of the applicant entity.

(c) DFS shall conduct an on-site inspection to determine compliance with all rules and statutes. If the facility is operated by or contracted with an area program, DFS may, in lieu of conducting an on-site inspection, accept written verification from the area program or DMH/DD/SAS that the area program or DMH/DD/SAS has conducted an on-site review and the facility is in compliance with rules and statutes. The written verification shall be in such form as DFS may require.

(d) DFS shall issue a license after it determines a facility is in compliance with:

- (1) Certificate of Need law (G.S. 131E-183) and Certificate of Need rules as codified in 10 NCAC 3R .2400, .2500, or .2600, whichever is applicable;
- (2) Building Code and physical plant requirements in these Rules;
- (3) Annual fire and safety and sanitation requirements, with the exception of a day/night or periodic service that does not handle food for which a sanitation inspection report is not required; and
- (4) Applicable rules and statutes.

- (e) Licenses shall be issued to the specific premise for types of services indicated on the application.
- (f) A separate license shall be required for each facility which is maintained on a separate site, even though the sites may be under the same ownership or management.

History Note: Authority G.S. 122C-3; 122C-23; Eff. May 1, 1996; Amended Eff. July 1, 2004.

10A NCAC 27G .0404 OPERATIONS DURING LICENSED PERIOD

- (a) A license shall be valid for a period not to exceed two years from the date on which the license is issued.
- (b) For all facilities providing periodic and day/night services, the license shall be posted in a prominent location accessible to public view within the licensed premises.
- (c) For 24-hour facilities, the license shall be readily available for review upon request.
- (d) A facility shall accept no more clients than the number for which it is licensed.
- (e) DFS may conduct inspections of facilities without advance notice. For facilities that are not operated by or contracted with area programs, and that are not subject to the Accreditation Review described in Section .0600 of these Rules, DFS shall conduct an on-site inspection at least once every two years. For purposes of this inspection, DFS may accept DMH/DD/SAS or area program verification in accordance with Rule .0402(c) of this Section, or deemed status in accordance with Rule .0403 of this Section.
- (f) Written notification must be submitted to DFS prior to any of the following:
 - (1) Construction of a new facility or any renovation of an existing facility;
 - (2) Increase or decrease in capacity by program service type;
 - (3) Change in program service;
 - (4) Change in ownership including any change in a partnership;
 - (5) Change of name of facility; or
 - (6) Change in location of facility.
- (g) When a licensee plans to close a facility or discontinue a service, written notice at least 30 days in advance shall be provided to DFS, to all affected clients, and when applicable, to the legally responsible persons of all affected clients. This notice shall address continuity of services to clients in the facility.
- (h) Licenses shall expire unless renewed by DFS for an additional period. Thirty days prior to the expiration of a license, the licensee shall submit to DFS the following information:
 - (1) Brief description of any changes in the facility since the last written notification was submitted;
 - (2) Annual local fire and sanitation inspection reports, with the exception of a day/night or periodic service that does not handle food for which a sanitation inspection report is not required;

- (3) Copies of deficiencies and corrective action issued by an area program, DMH/DD/SAS, or any accreditation agency; and
- (4) All applications for license renewal shall disclose the names of individuals who are owners, partners or shareholders holding an ownership or controlling interest of 5% or more of the applicant entity.

History Note: Authority G.S. 122C-23; 122C-25; 122C-27; Eff. May 1, 1996; Amended Eff. July 1, 2004.

10A NCAC 27G .0506 COMMUNICATION PROCEDURES FOR OUT OF HOME COMMUNITY PLACEMENT

- (a) The purpose of this Rule is to address communication procedures concerning out of the home-community placements for children and adolescents. This includes children and adolescents served through the area authority or county program developmental disabilities, mental health and substance abuse services system and those children and adolescents residing in ICF-MR facilities in their catchment areas.
- (b) Area authority or county program representative(s) shall meet with the parent(s) or legal guardian and other representatives involved in the care and treatment of the child or adolescent, including local Department of Social Services (DSS), Local Education Agency (LEA) and criminal justice agency, to make service planning decisions prior to the placement of the child and adolescent out of the home-community. The area authority or county program may use existing child and family teams for this purpose.
- (c) The home-community area authority or county program shall be responsible for notification of placement. The notification of placement shall be made via e-mail, fax or hard copy within three business days after out of home-community placement occurs. In case of an emergency, notification may be by telephone with written notification occurring the next day. The following entities shall be notified:
 - (1) legal guardian;
 - (2) other representatives involved in the care and treatment of the child or adolescent;
 - (3) host-community provider; and
 - (4) host-community representatives (may include the court counselor, county DSS, regional Children's Developmental Services Agency (CDSA) or the LEA.
- (d) Notification shall be completed on a form provided by the Secretary, to include the following information:
 - (1) child or adolescent information: name, date of birth, grade, identification number, social security number, date of placement out of home-community;
 - (2) parent/legal guardian information: name, address, telephone number;
 - (3) home-DDS and host-DSS information: county; contact person name, address, telephone number;
 - (4) home-area authority/county program and host-area authority/county program information:

- (5) name of program; contact person name, address, telephone number; home-school and host-school information: school name, address, telephone number, principal, special education program administrator: or
- (6) person completing notification form information: name, date form completed, agency, address and telephone number.

History Note: Authority G.S. 122C-113; 143B-139.1; 150B-21.1; Eff. July 1, 2004.

10A NCAC 27G .0601 SCOPE

- (a) This Section governs area authority or county program monitoring of the provision of public services in the area authority's or county program's catchment area.
- (b) The area authority or county program shall monitor the provision of public services in the area authority's or county program's catchment area pursuant to G.S. 122C-11.
- (c) The area authority or county program shall develop and implement written policies governing monitoring of the provision of public services that include:
 - (1) receiving, reviewing and responding to level II and level III incident reports as set forth in Rules .0605 and .0609 of this Section;
 - (2) receiving and responding to complaints concerning the provision of public services; as set forth in Rules .0606 and .0607;
 - (3) conducting local monitoring of Categories A and B providers of public services as set forth in Rule .0608 of this Section; and
 - (4) analyzing trends in the information identified in Subparagraph (c)(1) through (c)(3) of this Rule.
- (d) As set forth in G.S. 122C-111, monitoring as specified in this Section shall not supercede or duplicate the regulatory authority or functions of the Department of Health and Human Services.
- (e) An area authority, county program or provider of public services shall exchange information, including confidential information, when necessary to coordinate and carry out the monitoring functions set forth in this Section. The exchange of information shall apply as follows:
 - (1) as area authority or county program to another area authority or county program;
 - (2) a provider of public services to an area authority or county program; and
 - (3) a provider of public services to another provider of public services.

History Note: Authority G.S. 122C-112.1; G.S. 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0602 DEFINITIONS

In addition to the terms defined in G.S. 122C-3 and Rules .0103 and .0104 of this Subchapter, the following terms shall apply:

- (1) "Complaint investigation" means the process of determining if an allegation made against a

- provider concerning the provision of public services is substantiated.
- (2) "Confidential information" means the same as defined in G.S. 122C-3(9). The definition contained in the statute controls regardless of the rule language that follows. At the time of adoption, the definition of confidential information was as follows: information whether recorded or not, relating to an individual served by a facility that was received in connection with the performance of any function of the facility. "Confidential information" does not include statistical information from reports and records or information regarding treatment or services which is shared for training, treatment, habilitation or monitoring purposes that does not identify clients either directly or by reference to publicly known or available information.
- (3) "ICF/MR" means a facility certified for Medicaid as an Intermediate Care Facility for the Mentally Retarded.
- (4) "Incident" means the same as defined in 10A NCAC 27G .0103(b)(32). The definition contained in the statute controls regardless of the rule language that follows. At the time of adoption, the definition of incident was as follows: any happening which is not consistent with the routine operation of a facility or service or the routine care of a client and that is likely to lead to adverse effects upon a client.
- (5) "Level I incident" means the same as defined in 10A NCAC 27G .0103(b)(32) and does not meet the definition of a level II incident or level II incident.
- (6) "Level II incident" means the same as defined in 10A NCAC 27G .0103(b)(32) and results in a threat to a client's health, safety; or a threat to the health, safety of others due to client behavior and does not meet definition of a level III incident.
- (7) "Level III incident" means the same as defined in 10A NCAC 27G .0103(b)(32) and results in:
 - (a) a death, permanent physical or psychological impairment to a client;
 - (b) a death, permanent physical or psychological impairment caused by a client; or
 - (c) a threat to public safety caused by a client.
- (8) "Local Monitoring" means area authority or county program monitoring of the provision of public services in its catchment area that are provided by Categories A and B providers. The area authority or county program shall collaborate with State Agencies and other local

- agencies to ensure statewide oversight of Categories A and B providers.
- (9) "Monitor" or "Monitoring" means the interaction between the area authority or county program and a provider of public services regarding the functions set forth in Rule .0601(c) of this Section.
- (10) "Provider category" means the type of facility in which a client receives services or resides. The provider category determines the extent of monitoring that a provider receives and is determined as follows:
- (a) Category A - facilities licensed pursuant to G.S. 122C, Article 2, except for hospitals; these include 24-hour residential facilities, day treatment and outpatient services;
 - (b) Category B - G.S. 122C, Article 2, community based providers not requiring State licensure;
 - (c) Category C - hospitals, state-operated facilities, nursing homes, adult care homes, family care homes, foster care homes or child care facilities; and
 - (d) Category D - individuals providing only outpatient or day services and are licensed or certified to practice in the State of North Carolina.
- (11) "Public services" means the same as defined in G.S. 122C-3 (30b). The definition contained in the statute controls regardless of the rule language that follows. At the time of adoption, the definition of public services was as follows: publicly funded mental health, developmental disabilities and substance abuse services, whether provided by public or private providers.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0603 INCIDENT RESPONSE REQUIREMENTS FOR CATEGORIES A AND B PROVIDERS

- (a) Categories A and B providers shall respond to level I, II or III incidents by:
- (1) attending to the health and safety needs of individuals involved in the incident;
 - (2) determining the cause of the incident;
 - (3) developing and implementing corrective measures;
 - (4) developing and implementing measures to prevent similar incidents;
 - (5) assigning person(s) to be responsible for implementation of the corrections and preventive measures; and
 - (6) maintaining documentation regarding Subparagraphs (a)(1) through (a)(5) of this Rule.

(b) In addition to the requirements set forth in Paragraph (a) of this Rule, Categories A and B providers shall respond to a level III incident that occurs while the client is in the care of a provider or on the provider's premises by:

- (1) immediately securing the client record by:
 - (A) obtaining the client record;
 - (B) making a photocopy;
 - (C) certifying the copy's completeness; and
 - (D) transferring the copy to a peer review team;
- (2) convening a meeting of a peer review team within 24 hours of the incident. The peer review team shall:
 - (A) review the copy of the client record as specified in Subparagraph (b)(1) of this Rule;
 - (B) gather other information needed; and
 - (C) issue a report concerning the incident to the provider and to the client's home area authority or county program to facilitate the monitoring of services as required by G.S. 122C-111 and other State statutes; and
- (3) immediately notifying the following:
 - (A) the area authority or county program responsible for the catchment area where the services are provided pursuant to Rule .0604;
 - (B) the client's legal guardian, as applicable; and
 - (C) any other authorities required by law.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0604 AREA AUTHORITY OR COUNTY PROGRAM RESPONSE TO COMPLAINTS

(a) Categories A and B providers shall report a level II or level III incident to the area authority or county program responsible for the catchment area where services are provided within 72 hours of the incident. The report shall be submitted on a form provided by the Secretary. The report may be submitted via mail, in person, facsimile or other electronic means. The report shall include the following information:

- (1) reporting provider contact and identification information;
- (2) client identification information;
- (3) type of incident;
- (4) description of incident;
- (5) status of the effort to determine the cause of the incident; and
- (6) other individuals or authorities notified or responding.

(b) Categories A and B providers shall explain any missing or incomplete information. By the end of the next business day, the provider shall update the report by:

- (1) notifying the area authority or county program when it has reason to believe that information provided in the report may be erroneous, misleading or otherwise unreliable; and

- (2) submitting to the area authority or county program information required on the incident form that was previously unavailable.
- (c) Categories A and B providers shall submit, upon request by the area authority or county program, other information obtained regarding the incident, including:
 - (1) hospital records including confidential information;
 - (2) reports by other authorities; and
 - (3) the provider's response to the incident.
- (d) Categories A and B providers shall send a report quarterly to the area authority or county program. The report shall be submitted on a form provided by the Secretary via electronic means and shall include summary information as follows:
 - (1) medication errors that do not meet the definition of a level II or level III incident;
 - (2) searches of a client or his living area; and
 - (3) seizures of client property or property in the possession of a client.
- (e) Categories A and B providers shall send a copy of all level III incident reports to DFS and DMH/DD/SAS for Category A providers and to DMH/DD/SAS for Category B providers immediately upon receipt of the report.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0605 AREA AUTHORITY OR COUNTY PROGRAM MANAGEMENT OF INCIDENTS

Upon learning of a level III incident that occurs while a client is in the care of a provider or on a provider's premises, the area authority or county program shall respond by:

- (1) ensuring the necessary actions have been taken to protect the client's health and safety;
- (2) ensuring the client records are secured as set forth in Rule .0603 of this Section;
- (3) ensuring a meeting of a peer review team is convened within 24 hours as set forth in Rule .0603 of this Section;
- (4) ensuring the client's legal guardian, as applicable, and other authorities are notified as set forth in Rule .0603 of this Section;
- (5) reviewing the peer review team report; and
- (6) conducting local monitoring of the provider according to the requirements as set forth in Rule .0608 of this Section.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0606 AREA AUTHORITY REQUIREMENTS CONCERNING COMPLAINTS PERTAINING TO ALL PROVIDER CATEGORIES

- (a) The area authority or county program shall respond to complaints received concerning the provision of public services pertaining to all provider categories. The area authority or county program shall:
 - (1) establish a written notification procedure to inform each client of the complaint process concerning the provision of public services.

The procedure shall include the provision of written information explaining the client's right to contact the area authority or county program, the DMH/DD/SAS, DFS and the Governor's Advocacy Council for Persons with Disabilities;

- (2) seek to resolve issues of concern through informal agreement between the client and the provider and document the attempts at resolution; and
- (3) develop and implement written policies for receiving, processing, referring, investigating and following up on complaints. The policies shall include:
 - (A) safeguards for protecting the identity of the complainant;
 - (B) safeguards for protecting the complainant and any staff person from harassment or retaliation;
 - (C) procedures to receive and track complaints;
 - (D) procedures to assist a client in initiating the complaint process;
 - (E) procedures for encouraging the complainant to communicate with the provider to allow for resolution of the issue;
 - (F) methods to be used in investigating a complaint;
 - (G) options to be considered in resolving a complaint, including corrective action and referral to the DMH/DD/SAS, DFS, DSS or other agencies as required; and
 - (H) procedures governing appeals made by the provider;

(b) When the area authority or county program refers the complaint to the State or local government agency responsible for the regulation and oversight of the provider, the area authority or county program shall send a letter to the complainant informing them of the referral and the contact person at the agency where the referral was made.

(c) The area authority or county program shall contact the State or local government agency where the referral was made within 120 days of the date the area authority or county program received the complaint to determine the actions the State or local government agency has taken in response to the complaint. The area authority or county program shall ensure the State or local government agency's response is provided to the complainant and the client's home area authority or county program, if different.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0607 COMPLAINTS PERTAINING TO CATEGORY A OR CATEGORY B PROVIDERS EXCLUDING ICF/MR FACILITIES

- (a) The area authority or county program shall respond to complaints received concerning the provision of public services

pertaining to Categories A and B providers within its catchment area, except ICF/MR facilities.

(b) The area authority or county program shall make contact with the provider when investigating a complaint. The area authority or county program shall state the purpose of the contact and inform the provider that the area authority or county program is in receipt of a complaint concerning the provider.

(c) The area authority or county program shall complete the complaint investigation within 30 days of the date of the receipt of the complaint.

(d) Upon completion of the complaint investigation, the area authority or county program shall submit a report of investigation findings to the complainant, the provider and the client's home area authority or county program, if different. The report shall be submitted within 10 working days of the date of completion of the investigation. The complaint investigation report shall include:

- (1) statements of the allegations or complaints lodged;
- (2) steps taken and information reviewed to reach conclusions about each allegation or complaint;
- (3) conclusions reached regarding each allegation or complaint;
- (4) citations of law and rule pertinent to each allegation or complaint; and
- (5) required action regarding each allegation or complaint.

(e) The provider shall submit a plan of correction to the area authority or county program for each issue requiring correction identified in the report. The plan of correction shall be submitted to the area authority or county program within 10 working days from the date the provider receives the complaint investigation report. The corrective actions shall not exceed 60 days from the date of the complaint investigation report.

(f) The area authority or county program shall review and respond in writing to the provider's plan of correction with approval or a description of additional required information. The area authority or county program shall respond to the provider within 10 working days of receipt of the plan of correction.

(g) The area authority or county program shall follow-up on issues requiring correction in the investigation report no later than 60 days from the date the plan of correction is approved.

(h) The area authority or county program shall refer investigation of a complaint concerning a Category A provider to DFS, or a Category B provider to DMH/DD/SAS when the area authority or county program is a party to the complaint.

(i) The area authority or county program shall provide information regarding the disposition of the complaint to the complainant and the client's home area authority or county program, if different, as soon as the investigation is concluded.

(j) The area authority or county program shall maintain copies of complaint investigation, resolution and follow-up reports for Category A and B providers for review by the Department of Health and Human Services.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0608 LOCAL MONITORING

(a) The area authority or county program shall develop and implement written policies governing local monitoring of Categories A and B providers. The written policies shall address:

- (1) the frequency and extent of local monitoring based on the following:
 - (A) number and severity of level II or level III incidents reported by the provider;
 - (B) the provider's response to the incidents; and
 - (C) the provider's compliance with the reporting requirements as set forth in Rule .0604 of this Section;
 - (D) the number and types of complaints received concerning a provider ;
 - (E) the provider's response to the complaints;
 - (F) the conclusions reached from investigation of the complaints;
 - (G) the results of reviews conducted by DFS, DMH/DD/SAS or DSS;
 - (H) compliance with the requirements of the provision of public services;
 - (I) the addition of a new service; and
 - (J) accreditation by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the Council on Accreditation (COA), the Council for Accreditation of Rehabilitation Facilities (CARF) or the Council on Quality and Leadership, and the results of the accreditation agencies reviews of the provider.

(2) the referral of local monitoring of a Category A provider to DFS or a Category B provider to DMH/DD/SAS based on the following:

- (A) local monitoring identifies an issue a State agency is required to review;
- (B) a plan of correction resulting from local monitoring is not submitted to the area authority or county program within the designated timeframe;
- (C) issues identified in a local monitoring report are not corrected by the provider; or
- (D) the area authority or county program is the provider of the service to be monitored; and

(3) the appeal of the results of local monitoring.

(b) When local monitoring occurs, the area authority or county program shall communicate the results to the provider within 10 working days of completion. The communication of the results shall constitute a local monitoring report that includes:

- (1) identification of each service monitored;
- (2) identification of any issues requiring correction; and
- (3) the timelines for implementing the corrections which shall not exceed 60 days from the date

the provider receives the local monitoring report.

(c) An area authority or county program that conducts the local monitoring of a provider serving another area authority's or county program's client shall provide a copy of the local monitoring report to the client's home area authority or county program, upon request, within 10 days of completion.

(d) The area authority or county program shall submit a report of local monitoring activities to DFS and DMH/DD/SAS not less than monthly on a form provided by the Secretary via electronic means. The monthly monitoring report shall include:

- (1) identification information for providers monitored during the reporting period;
- (2) whether issues requiring correction were identified; and
- (3) an explanation of any uncorrected issues.

History Note: Authority G.S. 122C-111; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0609 AREA AUTHORITY OR COUNTY PROGRAM REPORTING REQUIREMENTS

(a) The area authority or county program shall review, not less than quarterly, level II and level III incidents, complaints concerning the provision of public services and local monitoring results as part of its quality improvement process as set forth in Rule .0201(a)(7) of this Subchapter.

(b) The area authority or county program shall provide a report based on the review specified in Paragraph (a) of this Rule. The report shall be submitted to DMH/DD/SAS, the local Client Rights Committee and the Governor's Advocacy Council for Persons with Disabilities quarterly on a form provided by the Secretary via electronic means.

The report shall include the following:

- (1) summary numbers of the types of complaints, incidents and results of local monitoring;
- (2) trends identified through analyses of complaints, level II and level III incidents and local monitoring; and
- (3) use of the analyses for improvement of the service system and planning of future monitoring activities.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 27G .0610 REQUIREMENTS CONCERNING THE NEED FOR PROTECTIVE SERVICES

(a) If the circumstances identified surrounding an incident, complaint or routine local monitoring give reasonable cause to believe that reveal that a disabled an adult receiving services from a Category A or Category B provider may be abused, neglected or exploited and in need of protective services, the area authority or county program shall ensure initiate the procedures outlined in G.S. 108A, Article 6, are initiated.

(b) If the circumstances surrounding an incident, complaint or local monitoring reveal that a child or adolescent may be abused, neglected or exploited and in need of protective services, the

area authority or county program shall ensure the procedures outlined in G. S. 7B, Article 3, are initiated.

History Note: Authority G.S. 122C-112.1; 143B-139.1; Eff. July 1, 2004.

10A NCAC 39A .0102 DEFINITIONS

The following definitions shall apply throughout this Section:

- (1) "Agriculture" means farming of the land in all its branches including cultivation, tillage, growing, harvesting, preparation, and processing for market or storage.
- (2) "Migrant" means an individual present in North Carolina whose principal employment is agriculture on a seasonal basis, as opposed to year-round employment, and who establishes a temporary abode for seasonal employment. The term includes an individual who has been so employed within the past 24 months and the individual's dependents.
- (3) "Migrant Health Clinic" means a health department, physician's office, or other entity that, under contract with the North Carolina Farmworker Health Program, provides health or dental services to migrants on a regularly scheduled basis, pursuant to the Migrant Health Program.
- (4) "Migrant Health Program" means the program described in the rules of this Section.
- (5) "Primary Care" means preventive, diagnostic, treatment, consultant, referral, and other services rendered by physicians, physician assistants and nurse practitioners; routine associated laboratory services; diagnostic radiologic services; and emergency health services.
- (6) "North Carolina Farmworker Health Program" means the program within the Office of Research, Demonstrations, and Rural Health Development that administers the Migrant Health Program.
- (7) "Migrant Health Entry Point" means an entity designated by the North Carolina Farmworker Health Program to certify migrants for participation in the fee-for-service component of the Migrant Health Program. In designating Migrant Health Entry Points, the program shall consider the following criteria: density of farmworkers in the agency's service area; number of farmworker patients served by the agency; and the agency's ability to offer linguistically appropriate services, night or weekend hours, and outreach services. A list of designated Migrant Health Entry Points can be obtained by writing to the North Carolina Farmworker Health Program, Office of Research, Demonstrations, and Rural Health Development, 2009 Mail Service Center, Raleigh, NC 27699-2009.

History Note: Authority G.S. 130A-223; Sec. 329, 95 Stat 569; Eff. January 1, 1983; Amended Eff. June 1, 2004.

10A NCAC 39A .0103 MIGRANT HEALTH PROGRAM SERVICES

- (a) The North Carolina Farmworker Health Program may contract with local health departments, public or private agencies or providers to provide the following health services to migrants:
- (1) primary care services;
 - (2) dental services;
 - (3) outreach services;
 - (4) health status assessments;
 - (5) referrals for medical and dental care; and
 - (6) other services as specified in the contract.
- (b) A local health department, public or private agency or provider interested in contracting for migrant health services may submit a brief proposal to the North Carolina Farmworker Health Program. The proposal shall include:
- (1) a description of service area;
 - (2) a statement of needs to be addressed, expressed in quantitative terms to the extent possible;
 - (3) a statement of specific goals and objectives for addressing needs;
 - (4) an outline of methodology and activities for achieving goals and objectives;
 - (5) a statement of monitoring methods to be used in measuring outcome of activities; and
 - (6) a projected detailed budget.
- (c) Contracts may be renewed on an annual basis based upon determination of a continuing need for these services in the area served by the provider and the need for services in other areas of the State and the availability of funds.

History Note: Authority G.S. 130A-223; Sec. 329, Public Health Services Act, 95 Stat. 569(42 U.S.C. 254b); Eff. January 1, 1983; Amended Eff. June 1, 2004; September 1, 1990.

10A NCAC 39A .0104 CO-PAYMENTS

- (a) Migrant Health Clinics shall adopt a schedule of co-payments for all covered services provided to migrants. Patients shall be charged for covered services based on that schedule. Copies of the schedule of co-payments shall be sent to the North Carolina Farmworker Health Program and may be inspected at or obtained from that agency. No one shall be denied service at a sponsored Migrant Health Clinic based solely on an inability or failure to pay.
- (b) The patient co-payment for the fee-for-service component of the Migrant Health Program shall be in accordance with 10A NCAC 45A.

History Note: Authority G.S. 130A-223; Sec. 329, Public Health Services Act, 95 Stat. 569(42 U.S.C. 259B); 42 C.F.R. 56.302(f); Eff. January 1, 1983; Amended Eff. June 1, 2004; April 1, 1995; September 1, 1990.

10A NCAC 39A .0105 FEE-FOR-SERVICE REIMBURSEMENT

The North Carolina Farmworker Health Program shall purchase medical care for migrants on a fee-for-service basis in accordance with the rules of this Section and the rules contained in 10A NCAC 45A.

History Note: Authority G.S. 130A-223; Sec. 329, 95 Stat 569; Eff. January 1, 1983; Amended Eff. June 1, 2004.

10A NCAC 39A .0109 COVERED SERVICES

(a) The following services are covered by the Migrant Health Program when provided to eligible migrant farmworkers:

- (1) Ambulatory care services that are necessary and essential for immediate health needs in the form of:
 - (A) primary care services;
 - (B) hospital outpatient services;
 - (C) basic preventive, simple restorative, and simple surgical dental services that are specifically listed in a Dental Guide established by the North Carolina Farmworker Health Program based upon the following factors: the most urgent dental needs of migrant patients; the cost of effectiveness of the procedure; and the need to maximize the benefits to patients utilizing finite program dollars. A copy of the Dental Guide may be obtained free of charge by writing to the North Carolina Farmworker Health Program, Office of Research, Demonstrations, and Rural Health Development, 2009 Mail Service Center, Raleigh, NC 27699-2009;
 - (D) laboratory tests, diagnostic X-rays;
 - (E) drugs on a formulary established by the North Carolina Farmworker Health Program based upon the following factors: the medical needs of migrant patients, the cost effectiveness of the drugs, the availability of generic or other less costly alternatives, and the need to maximize the benefits to patients utilizing finite program dollars. A copy of this formulary may be obtained free of charge by writing to the NCFHP, Office of Research, Demonstrations, and Rural Health Development, 2009 Mail Service Center, Raleigh, North Carolina, 27699-2009;
 - (F) mental health services (limited to two visits per patient per FY); and
 - (G) medical supplies necessary for administering covered drugs.

- (2) The following services must receive approval from the Program Director before being considered for reimbursement, and shall be reviewed on a case-by-case basis considering the extent to which the services are necessary and essential for the immediate health care needs of the patient, the total cost of the plan of treatment, and the probability of the patient completing the course of therapy:
- (A) home health services;
 - (B) physical therapy and occupational therapy; and
 - (C) rental or purchase of durable medical equipment.

(b) Services not covered by the Migrant Health Program include the following:

- (1) inpatient care, custodial care, hospice care;
- (2) any elective procedure;
- (3) routine physical exams, routine vision or hearing exams;
- (4) eyeglasses or hearing aids;
- (5) speech therapy;
- (6) chiropractic therapy;
- (7) emergency room services;
- (8) ground and air ambulance transportation; and
- (9) medical supplies (except those necessary for administering covered drugs).

History Note: Authority G.S. 130A-223; Eff. January 1, 1983; Amended Eff. October 1, 1990; January 1, 1986; Temporary Amendment Eff. July 6, 1992 for a Period of 180 Days to Expire on January 2, 1993; Amended Eff. June 1, 2004; April 1, 1995; October 1, 1992.

10A NCAC 45A .0303 PAYMENT LIMITATIONS

- (a) Payment program payments shall be made for authorized services only when funds are available.
- (b) During the last six months of the fiscal year, the State Health Director may limit payment program benefits that can be authorized when the total amount of outstanding authorizations, plus the estimated authorizations for the remainder of the fiscal year, less estimated cancellations, exceeds 100 percent of the program's cash balance. The State Health Director shall rescind the limitations at the end of the fiscal year, or prior to the end of the fiscal year if sufficient funds become available to authorize full program benefits for the remainder of the fiscal year. The Director of the Office of Research, Demonstrations, and Rural Health Development may limit payment program benefits for the Migrant Health Program when the cost of the services is projected to surpass the program's cash balance within the fiscal year. The Director of the Office of Research, Demonstrations, and Rural Health Development shall rescind the limitations if sufficient funds become available to reimburse for program benefits for the Migrant Health Program.
- (c) Payment program benefits shall be available only for services or appliances which are not covered by another third party payor or which cannot be paid for out of funds received in settlement of a civil claim. Patients shall apply for Medicaid or Medicare benefits to which they may be entitled. However,

payment program benefits shall be available for Children's Special Health Services sponsored clinic patients who cannot reasonably be examined or treated by a Medicaid provider or an authorized provider for another third party payor because of transportation problems, a need for emergency care, or similar exceptional situations. All exceptions must be approved by the Children's Special Health Services program's medical director. Also, Children's Special Health Services may make payments for services provided to Medicaid patients when acting as a Medicaid provider under an agreement making the program eligible for reimbursement from Medicaid. Providers shall take reasonable measures to collect other third party payments. For the purposes of this Subchapter, third party payor means any person or entity that is or may be indirectly liable for the cost of services or appliances furnished to a patient. Third party payors include the following:

- (1) School services, including physical or occupational therapy, speech and language pathology and audiology services, and nursing services for special needs children;
- (2) Medicaid;
- (3) Medicare, Part A and Part B;
- (4) Insurance;
- (5) Social Services;
- (6) Worker's compensation;
- (7) CHAMPUS; and
- (8) Head Start programs.

(d) The Department shall not pay Medicaid co-payments or in any other way supplement Medicaid payments.

(e) If prior to the Department's payment for particular services or appliances, the provider, the patient, or a person responsible for the patient receives partial or total payment for the services or appliances from a third party payor, or receives funds in settlement of a civil claim, the Department shall pay only the amount, if any, by which the Department's payment rate exceeds the amount received by the person. For the purpose of this Rule the Department's payment rate means the rate of reimbursement established in 10A NCAC 45A .0400.

(f) Notwithstanding Paragraph (e) of this Rule, when the provider, the patient or a person responsible for the patient receives other third party payments equal to or exceeding the Department's payment rate, the Department shall pay the difference between the other third party payments and the provider's charge for an adopted child that meets the requirements of 10A NCAC 43F .0801. The Department's payment shall not exceed the payment rate in Section .0400 of the Subchapter.

(g) If after the Department makes payment for particular services or appliances, the provider, the patient, or a person responsible for the patient receives partial or total payment for the services or appliances from a third party payor, or receives funds in settlement of a civil claim which are available to pay for the services or appliances, the person receiving the payment shall reimburse the Department to the extent of the amount received by the person without exceeding the amount of the Department's prior payment to the provider. This reimbursement shall be made to the Department within 45 days after receipt of the third party payment.

(h) Notwithstanding Paragraph (g) of this Rule, if after the Department makes payment for particular services or appliances

for an adopted child that meets the requirements of 10A NCAC 43F .0801, the provider receives partial or total payment from a third party payor, the provider shall only be required to reimburse the Department the amount by which the total of payments exceeds the provider's charge.

(i) If the Department requests a refund of a payment made to a provider, the refund shall be made to the Department within 45 days after the date of the refund request.

History Note: Authority G.S. 130A-5(3); 130A-124; 130A-127; 130A-129; 130A-205; Eff. July 1, 1981; Amended Eff. February 1, 1990; September 1, 1989; March 1, 1989; Transferred and Recodified from 10 NCAC 4C .0303 Eff. April 4, 1990; Amended Eff. June 1, 2004; April 1, 1992; February 1, 1992; May 1, 1991; February 1, 1991.

TITLE 12 - DEPARTMENT OF JUSTICE

12 NCAC 07D .0707 TRAINING REQUIREMENTS FOR UNARMED SECURITY GUARDS

(a) Applicants for an unarmed security guard registration shall complete a basic training course for unarmed security guards within 30 days from hire. The course shall consist of a minimum of 16 hours of classroom instruction including:

- (1) The Security Officer in North Carolina - (minimum of one hour);
- (2) Legal Issues for Security Officers - (minimum of three hours);
- (3) Emergency Response - (minimum of three hours);
- (4) Communications - (minimum of two hours);
- (5) Patrol Procedures - (minimum of three hours);
- (6) Note Taking and Report Writing - (minimum of three hours);
- (7) Department - (minimum of one hour).

A minimum of four hours of classroom instruction shall be completed prior to a security guard being placed on a duty station. These four hours shall include The Security Officer in North Carolina and Legal Issues for Security Officers.

(b) Licensees shall submit the name and resume for a proposed certified unarmed security guard trainer to the Director for Board approval.

(c) Training shall be conducted by a Board certified unarmed security guard trainer. A Board approved lesson plan covering the training requirements in 12 NCAC 07D .0707(a) shall be made available to each trainer. The Board shall approve other media training materials that deliver the training requirements of 12 NCAC 07D .0707(a).

(d) These provisions shall not apply to:

- (1) temporary unarmed security guards as defined by G.S. 74C-11(f); and
- (2) any unarmed security guard registered with the Board on January 1, 1990.

History Note: Authority G.S. 74C-5; 74C-11; 74C-13; Eff. January 1, 1990;

Amended Eff. June 1, 2004.

TITLE 15A - DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

15A NCAC 02B .0225 OUTSTANDING RESOURCE WATERS

(a) General In addition to the existing classifications, the Commission may classify unique and special surface waters of the state as outstanding resource waters (ORW) upon finding that such waters are of exceptional state or national recreational or ecological significance and that the waters have exceptional water quality while meeting the following conditions:

- (1) that the water quality is rated as excellent based on physical, chemical or biological information;
- (2) the characteristics which make these waters unique and special may not be protected by the assigned narrative and numerical water quality standards.

(b) Outstanding Resource Values. In order to be classified as ORW, a water body must exhibit one or more of the following values or uses to demonstrate it is of exceptional state or national recreational or ecological significance:

- (1) there are outstanding fish (or commercially important aquatic species) habitat and fisheries;
- (2) there is an unusually high level of water-based recreation or the potential for such recreation;
- (3) the waters have already received some special designation such as a North Carolina or National Wild and Scenic River, Native or Special Native Trout Waters, National Wildlife Refuge, etc, which do not provide any water quality protection;
- (4) the waters represent an important component of a state or national park or forest; or
- (5) the waters are of special ecological or scientific significance such as habitat for rare or endangered species or as areas for research and education.

(c) Quality Standards for ORW

- (1) Freshwater: Water quality conditions shall be maintained to protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values shall be developed on a site specific basis during the proceedings to classify waters as ORW. No new discharges or expansions of existing discharges shall be permitted, and stormwater controls for all new development activities requiring an Erosion and Sedimentation Control Plan in accordance with rules established by the NC Sedimentation Control Commission or an appropriate local erosion and sedimentation control program shall be required to follow the stormwater provisions as specified in 15A NCAC 02H .1000. Specific stormwater

requirements for ORW areas are described in 15A NCAC 02H .1007.

- (2) Saltwater: Water quality conditions shall be maintained to protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values shall be developed on a site-specific basis during the proceedings to classify waters as ORW. New development shall comply with the stormwater provisions as specified in 15A NCAC 02H .1000. Specific stormwater management requirements for saltwater ORWs are described in 15A NCAC 02H .1007. New non-discharge permits shall meet reduced loading rates and increased buffer zones, to be determined on a case-by-case basis. No dredge or fill activities shall be allowed if those activities would result in a reduction of the beds of submerged aquatic vegetation or a reduction of shellfish producing habitat as defined in 15A NCAC 03I .0101(b)(20)(A) and (B), except for maintenance dredging, such as that required to maintain access to existing channels and facilities located within the designated areas or maintenance dredging for activities such as agriculture. A public hearing is mandatory for any proposed permits to discharge to waters classified as ORW.

Additional actions to protect resource values shall be considered on a site specific basis during the proceedings to classify waters as ORW and shall be specified in Paragraph (e) of this Rule. These actions may include anything within the powers of the Commission. The Commission shall also consider local actions which have been taken to protect a water body in determining the appropriate state protection options. Descriptions of boundaries of waters classified as ORW are included in Paragraph (e) of this Rule and in the Schedule of Classifications (15A NCAC 02B .0302 through 02B .0317) as specified for the appropriate river basin and shall also be described on maps maintained by the Division of Water Quality.

(d) Petition Process. Any person may petition the Commission to classify a surface water of the state as an ORW. The petition shall identify the exceptional resource value to be protected, address how the water body meets the general criteria in Paragraph (a) of this Rule, and the suggested actions to protect the resource values. The Commission may request additional supporting information from the petitioner. The Commission or its designee shall initiate public proceedings to classify waters as ORW or shall inform the petitioner that the waters do not meet the criteria for ORW with an explanation of the basis for this decision. The petition shall be sent to:

Director
DENR/Division of Water Quality
1617 Mail Service Center
Raleigh, North Carolina 27699-1617

The envelope containing the petition shall clearly bear the notation: **RULE-MAKING PETITION FOR ORW CLASSIFICATION.**

(e) Listing of Waters Classified ORW with Specific Actions
Waters classified as ORW with specific actions to protect exceptional resource values are listed as follows:

- (1) Roosevelt Natural Area [White Oak River Basin, Index Nos. 20-36-9.5-(1) and 20-36-9.5-(2)] including all fresh and saline waters within the property boundaries of the natural area shall have only new development which complies with the low density option in the stormwater rules as specified in 15A NCAC 2H .1005(2)(a) within 575 feet of the Roosevelt Natural Area (if the development site naturally drains to the Roosevelt Natural Area).
- (2) Chattooga River ORW Area (Little Tennessee River Basin and Savannah River Drainage Area): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section. However, expansions of existing discharges to these segments shall be allowed if there is no increase in pollutant loading:
 - (A) North and South Fowler Creeks;
 - (B) Green and Norton Mill Creeks;
 - (C) Cane Creek;
 - (D) Ammons Branch;
 - (E) Glade Creek; and
 - (F) Associated tributaries.
- (3) Henry Fork ORW Area (Catawba River Basin): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section:
 - (A) Ivy Creek;
 - (B) Rock Creek; and
 - (C) Associated tributaries.
- (4) South Fork New and New Rivers ORW Area [New River Basin (Index Nos. 10-1-33.5 and 10)]: the following management strategies, in addition to the discharge requirements specified in Subparagraph (c)(1) of this Rule, shall be applied to protect the designated ORW areas:
 - (A) Stormwater controls described in Subparagraph (c)(1) of this Rule shall apply to land within one mile of and that drains to the designated ORW areas;
 - (B) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW shall be permitted such that the following water quality standards are maintained in the ORW segment:
 - (i) the total volume of treated wastewater for all upstream

- discharges combined shall not exceed 50 percent of the total instream flow in the designated ORW under 7Q10 conditions, which are defined in Rule .0206(a)(1) of this Section;
 - (ii) a safety factor shall be applied to any chemical allocation such that the effluent limitation for a specific chemical constituent shall be the more stringent of either the limitation allocated under design conditions (pursuant to 15A NCAC 02B .0206) for the normal standard at the point of discharge, or the limitation allocated under design conditions for one-half the normal standard at the upstream border of the ORW segment;
 - (iii) a safety factor shall be applied to any discharge of complex wastewater (those containing or potentially containing toxicants) to protect for chronic toxicity in the ORW segment by setting the whole effluent toxicity limitation at the higher (more stringent) percentage effluent determined under design conditions (pursuant to 15A NCAC 02B .0206) for either the instream effluent concentration at the point of discharge or twice the effluent concentration calculated as if the discharge were at the upstream border of the ORW segment;
- (C) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW shall comply with the following:
- (i) Oxygen Consuming Wastes: Effluent limitations shall be as follows: BOD = 5 mg/l, and NH₃-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) shall be limited to effluent concentrations of 10 mg/l for trout waters and to 20 mg/l for all other waters;
- (iii) Emergency Requirements: Failsafe treatment designs shall be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;
 - (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, effluent limitations shall be set for phosphorus or nitrogen, or both.
- (5) Old Field Creek (New River Basin): the undesignated portion of Old Field Creek (from its source to Call Creek) shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section.
- (6) In the following designated waterbodies, no additional restrictions shall be placed on new or expanded marinas. The only new or expanded NPDES permitted discharges that shall be allowed shall be non-domestic, non-process industrial discharges. The Alligator River Area (Pasquotank River Basin) extending from the source of the Alligator River to the U.S. Highway 64 bridge including New Lake Fork, North West Fork Alligator River, Juniper Creek, Southwest Fork Alligator River, Scouts Bay, Gum Neck Creek, Georgia Bay, Winn Bay, Stumpy Creek Bay, Stumpy Creek, Swann Creek (Swann Creek Lake), Whipping Creek (Whipping Creek Lake), Grapevine Bay, Rattlesnake Bay, The Straits, The Frying Pan, Coopers Creek, Babbitt Bay, Goose Creek, Milltail Creek, Boat Bay, Sandy Ridge Gut (Sawyer Lake) and Second Creek, but excluding the Intracoastal Waterway (Pungo River-Alligator River Canal) and all other tributary streams and canals.
- (7) In the following designated waterbodies, the only type of new or expanded marina that shall be allowed shall be those marinas located in upland basin areas, or those with less than 10 slips, having no boats over 21 feet in length and no boats with heads. The only new or expanded NPDES permitted discharges that shall be allowed shall be non-domestic, non-process industrial discharges.
- (A) The Northeast Swanquarter Bay Area including all waters northeast of a line from a point at Lat. 35E 23N 51O and Long. 76E 21N 02O thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the

- 1935 Presidential Proclamation) to Drum Point.
- (B) The Neuse-Southeast Pamlico Sound Area (Southeast Pamlico Sound Section of the Southeast Pamlico, Core and Back Sound Area); (Neuse River Basin) including all waters within an area defined by a line extending from the southern shore of Ocracoke Inlet northwest to the Tar-Pamlico River and Neuse River basin boundary, then southwest to Ship Point.
- (C) The Core Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin), including all waters of Core Sound and its tributaries, but excluding Nelson Bay, Little Port Branch and Atlantic Harbor at its mouth, and those tributaries of Jarrett Bay that are closed to shellfishing.
- (D) The Western Bogue Sound Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from Bogue Inlet to the mainland at SR 1117 to a line across Bogue Sound from the southwest side of Gales Creek to Rock Point, including Taylor Bay and the Intracoastal Waterway.
- (E) The Stump Sound Area (Cape Fear River Basin) including all waters of Stump Sound and Alligator Bay from marker Number 17 to the western end of Permuda Island, but excluding Rogers Bay, the Kings Creek Restricted Area and Mill Creek.
- (F) The Topsail Sound and Middle Sound Area (Cape Fear River Basin) including all estuarine waters from New Topsail Inlet to Mason Inlet, including the Intracoastal Waterway and Howe Creek, but excluding Pages Creek and Futch Creek.
- (8) In the following designated waterbodies, no new or expanded NPDES permitted discharges and only new or expanded marinas with less than 10 slips, having no boats over 21 feet in length and no boats with heads shall be allowed.
- (A) The Swanquarter Bay and Juniper Bay Area (Tar-Pamlico River Basin) including all waters within a line beginning at Juniper Bay Point and running south and then west below Great Island, then northwest to Shell Point and including Shell Bay, Swanquarter and Juniper Bays and their tributaries, but excluding all waters northeast of a line from a point at Lat. 35E 23N 51O and Long. 76E 21N 02O thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the 1935 Presidential Proclamation) to Drum Point and also excluding the Blowout Canal, Hydeland Canal, Juniper Canal and Quarter Canal.
- (B) The Back Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin) including that area of Back Sound extending from Core Sound west along Shackleford Banks, then north to the western most point of Middle Marshes and along the northwest shore of Middle Marshes (to include all of Middle Marshes), then west to Rush Point on Harker's Island, and along the southern shore of Harker's Island back to Core Sound.
- (C) The Bear Island Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from the western most point on Bear Island to the northeast mouth of Goose Creek on the mainland, east to the southwest mouth of Queen Creek, then south to green marker No. 49, then northeast to the northern most point on Huggins Island, then southeast along the shoreline of Huggins Island to the southeastern most point of Huggins Island, then south to the northeastern most point on Dudley Island, then southwest along the shoreline of Dudley Island to the eastern tip of Bear Island.
- (D) The Masonboro Sound Area (Cape Fear River Basin) including all waters between the Barrier Islands and the mainland from Carolina Beach Inlet to Masonboro Inlet.
- (9) Black and South Rivers ORW Area (Cape Fear River Basin) [Index Nos. 18-68-(0.5), 18-68-(3.5), 18-68-(11.5), 18-68-12-(0.5), 18-68-12-(11.5), and 18-68-2]: the following management strategies, in addition to the discharge requirements specified in Subparagraph (c)(1) of this Rule, shall be applied to protect the designated ORW areas:
- (A) Stormwater controls described in Subparagraph (c)(1) of this Rule shall apply to land within one mile of and

- that drains to the designated ORW areas;
- (B) New or expanded NPDES permitted wastewater discharges located one mile upstream of the stream segments designated ORW (upstream on the designated mainstem and upstream into direct tributaries to the designated mainstem) shall comply with the following discharge restrictions:
- (i) Oxygen Consuming Wastes: Effluent limitations shall be as follows: BOD = 5 mg/l and NH₃-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) shall be limited to effluent concentrations of 20 mg/l;
 - (iii) Emergency Requirements: Failsafe treatment designs shall be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;
 - (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, effluent limitations shall be set for phosphorus or nitrogen, or both.
 - (v) Toxic substances: In cases where complex discharges (those containing or potentially containing toxicants) may be currently present in the discharge, a safety factor shall be applied to any chemical or whole effluent toxicity allocation. The limit for a specific chemical constituent shall be allocated at one-half of the normal standard at design conditions. Whole effluent toxicity shall be allocated to protect for chronic toxicity at an effluent concentration equal to twice that which is acceptable under flow design criteria (pursuant to 15A NCAC 02B .0206).
- (10) Lake Waccamaw ORW Area (Lumber River Basin) [Index No. 15-2]: all undesignated waterbodies that are tributary to Lake Waccamaw shall comply with Paragraph (c) of

- (11) this Rule in order to protect the designated waters as per Rule .0203 of this Section. Swift Creek and Sandy Creek ORW Area (Tar-Pamlico River Basin) [portion of Index No. 28-78-(0.5) and Index No. 28-78-1-(19)]: all undesignated waterbodies that drain to the designated waters shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section and to protect outstanding resource values found in the designated waters as well as in the undesignated waters that drain to the designated waters.

History Note: Authority G.S. 143-214.1; Eff. October 1, 1995; Amended Eff. August 1, 2003 (see S.L. 2003-433, s.2); August 1, 2000; April 1, 1996; January 1, 1996; Temporary Amendment Eff. October 7, 2003; Amended Eff. June 1, 2004.

15A NCAC 02B .0316 TAR-PAMLICO RIVER BASIN

- (a) The schedule may be inspected at the following places:
- (1) Clerk of Court:
 - Beaufort County
 - Dare County
 - Edgecombe County
 - Franklin County
 - Granville County
 - Halifax County
 - Hyde County
 - Martin County
 - Nash County
 - Pamlico County
 - Person County
 - Pitt County
 - Vance County
 - Warren County
 - Washington County
 - Wilson County
 - (2) North Carolina Department of Environment and Natural Resources:
 - (A) Raleigh Regional Office
3800 Barrett Drive
Raleigh, North Carolina
 - (B) Washington Regional Office
943 Washington Square Mall
Washington, North Carolina.
- (b) Unnamed Streams. All drainage canals not noted in the schedule are classified "C Sw," except the main drainage canals to Pamlico Sound and its bays which shall be classified "SC."
- (c) The Tar-Pamlico River Basin Schedule of Classification and Water Quality Standards was amended effective:
- (1) March 1, 1977;
 - (2) November 1, 1978;
 - (3) June 8, 1980;
 - (4) October 1, 1983;
 - (5) June 1, 1984;
 - (6) August 1, 1985;
 - (7) February 1, 1986;

- (8) August 1, 1988;
- (9) January 1, 1990;
- (10) August 1, 1990;
- (11) August 3, 1992;
- (12) April 1, 1994;
- (13) January 1, 1996;
- (14) September 1, 1996;
- (15) October 7, 2003;
- (16) June 1, 2004.

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

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

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

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

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

(h) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective April 1, 1994 with the reclassification of Blounts Creek from Herring Run to Blounts Bay [Index No. 29-9-1-(3)] from Class SC NSW to Class SB NSW.

(i) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective January 1, 1996 with the reclassification of Tranters Creek [Index Numbers 28-103- (4.5), 28-103- (13.5), 28-103- (14.5) and 28-103-(16.5)] from a point 1.5 miles upstream of Turkey Swamp to the City of Washington's former auxiliary water

supply intake, including tributaries, from Class WS-IV Sw NSW and Class WS-IV CA Sw NSW to Class C Sw NSW.

(j) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was amended effective September 1, 1996 with the addition of Huddles Cut (previously unnamed in the schedule) classified as SC NSW with an Index No. of 29-25.5.

(k) The Schedule of Classifications and Water Quality Standards for the Tar-Pamlico River Basin was temporarily amended effective October 7, 2003 and permanently amended June 1, 2004 with the reclassification of a portion of Swift Creek [Index Number 28-78-(0.5)] and a portion of Sandy Creek [Index Number 28-78-1-(19)] from Nash County SR 1004 to Nash County SR 1003 from Class C NSW to Class C ORW NSW, and the waters that drain to these two creek portions to include only the ORW management strategy as represented by "+". The "+" symbol as used in this paragraph means that all undesignated waterbodies that drain to the portions of the two creeks referenced in this Paragraph shall comply with Paragraph (c) of Rule .0225 of this Subchapter in order to protect the designated waters as per Rule .0203 of this Subchapter and to protect outstanding resource values found in the designated waters as well as in the undesignated waters that drain to the designated waters.

History Note: Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1); Eff. February 1, 1976; Amended Eff. August 1, 2003 (see S.L. 2003-433, s.1); September 1, 1996; January 1, 1996; April 1, 1994; August 3, 1992; August 1, 1990; Temporary Amendment Eff. October 7, 2003; Amended Eff. June 1, 2004.

SECTION .0100 - DEFINITIONS AND REFERENCES

15A NCAC 02D .0101 DEFINITIONS

The definition of any word or phrase used in Rules of this Subchapter is the same as given in Article 21, G.S. 143, as amended. The following words and phrases, which are not defined in the article, have the following meaning:

- (1) "Act" means "The North Carolina Water and Air Resources Act."
- (2) "Air pollutant" means an air pollution agent or combination of such agents, including any physical, chemical, biological, radiative substance or matter emitted into or otherwise entering the ambient air.
- (3) "Ambient air" means that portion of the atmosphere outside buildings or other enclosed structures, stacks or ducts, and that surrounds human, animal or plant life, or property.
- (4) "Approved" means approved by the Director of the Division of Air Quality according to these Rules.
- (5) "Capture system" means the equipment (including hoods, ducts, fans, etc.) used to contain, capture, or transport a pollutant to a control device.
- (6) "CFR" means "Code of Federal Regulations."

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| <p>(7) "Combustible material" means any substance that, when ignited, will burn in air.</p> <p>(8) "Construction" means change in method of operation or any physical change, including on-site fabrication, erection, installation, replacement, demolition, or modification of a source, that results in a change in emissions or affects the compliance status.</p> <p>(9) "Control device" means equipment (fume incinerator, adsorber, absorber, scrubber, filter media, cyclone, electrostatic precipitator, or the like) used to destroy or remove air pollutant(s) before discharge to the ambient air.</p> <p>(10) "Day" means a 24-hour period beginning at midnight.</p> <p>(11) "Director" means the Director of the Division of Air Quality unless otherwise specified.</p> <p>(12) "Division" means Division of Air Quality.</p> <p>(13) "Dustfall" means particulate matter that settles out of the air and is expressed in units of grams per square meter per 30-day period.</p> <p>(14) "Emission" means the release or discharge, whether directly or indirectly, of any air pollutant into the ambient air from any source.</p> <p>(15) "Facility" means all of the pollutant emitting activities, except transportation facilities as defined under Rule .0802 of this Subchapter, that are located on one or more adjacent properties under common control.</p> <p>(16) "FR" means Federal Register.</p> <p>(17) "Fugitive emission" means those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.</p> <p>(18) "Fuel burning equipment" means equipment whose primary purpose is the production of energy or power from the combustion of any fuel. The equipment is generally used for, but not limited to, heating water, generating or circulating steam, heating air as in warm air furnace, or furnishing process heat by transferring energy by fluids or through process vessel walls.</p> <p>(19) "Garbage" means any animal and vegetable waste resulting from the handling, preparation, cooking and serving of food.</p> <p>(20) "Incinerator" means a device designed to burn solid, liquid, or gaseous waste material.</p> <p>(21) "Opacity" means that property of a substance tending to obscure vision and is measured as percent obscuration.</p> <p>(22) "Open burning" means any fire whose products of combustion are emitted directly into the outdoor atmosphere without passing through a stack or chimney, approved incinerator, or other similar device.</p> <p>(23) "Owner or operator" means any person who owns, leases, operates, controls, or supervises</p> | <p>(24) "Particulate matter" means any material except uncombined water that exists in a finely divided form as a liquid or solid at standard conditions.</p> <p>(25) "Particulate matter emissions" means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by methods specified in this Subchapter.</p> <p>(26) "Permitted" means any source subject to a permit under this Subchapter or Subchapter 15A NCAC 02Q.</p> <p>(27) "Person" means any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, or any other legal entity, or its legal representative, agent or assigns.</p> <p>(28) "PM10" means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured by methods specified in this Subchapter.</p> <p>(29) "PM10 emissions" means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted to the ambient air as measured by methods specified in this Subchapter.</p> <p>(30) "PM2.5" means particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured by methods specified in this Subchapter.</p> <p>(31) "Refuse" means any garbage, rubbish, or trade waste.</p> <p>(32) "Rubbish" means solid or liquid wastes from residences, commercial establishments, or institutions.</p> <p>(33) "Rural area" means an area that is primarily devoted to, but not necessarily limited to, the following uses: agriculture, recreation, wildlife management, state park, or any area of natural cover.</p> <p>(34) "Salvage operation" means any business, trade, or industry engaged in whole or in part in salvaging or reclaiming any product or material, including, but not limited to, metal, chemicals, motor vehicles, shipping containers, or drums.</p> <p>(35) "Smoke" means small gas-borne particles resulting from incomplete combustion, consisting predominantly of carbon, ash, and other burned or unburned residue of combustible materials that form a visible plume.</p> <p>(36) "Source" means any stationary article, machine, process equipment, or other contrivance; or any combination; or any tank-truck, trailer, or railroad tank car; from which</p> |
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- air pollutants emanate or are emitted, either directly or indirectly.
- (37) "Sulfur oxides" means sulfur dioxide, sulfur trioxide, their acids and the salts of their acids. The concentration of sulfur dioxide is measured by the methods specified in this Subchapter.
- (38) "Total suspended particulate" means any finely divided solid or liquid material, except water in uncombined form, that is or has been airborne as measured by methods specified in this Subchapter.
- (39) "Trade wastes" means all solid, liquid, or gaseous waste materials or rubbish resulting from combustion, salvage operations, building operations, or the operation of any business, trade, or industry including, but not limited to, plastic products, paper, wood, glass, metal, paint, grease, oil and other petroleum products, chemicals, and ashes.
- (40) "ug" means micrograms.

History Note: Authority G.S. 143-213; 143-215.3(a)(1); Eff. February 1, 1976; Amended Eff. December 1, 1989; July 1, 1988; July 1, 1984; Temporary Amendment Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. June 1, 2004; July 1, 1998; July 1, 1996; July 1, 1994.

15A NCAC 02D .0521 CONTROL OF VISIBLE EMISSIONS

- (a) Purpose. The intent of this Rule is to prevent, abate and control emissions generated from fuel burning operations and industrial processes where an emission can reasonably be expected to occur, except during startup, shutdowns, and malfunctions approved according to procedures set out in Rule .0535 of this Section.
- (b) Scope. This Rule shall apply to all fuel burning sources and to other processes that may have a visible emission. However, sources subject to a visible emission standard in Rules .0506, .0508, .0524, .0543, .0544, .1110, .1111, .1205, .1206, or .1210 of this Subchapter shall meet that standard instead of the standard contained in this Rule. This Rule does not apply to engine maintenance, rebuild, and testing activities where controls are infeasible, except it does apply to the testing of peak shaving and emergency generators. (In deciding if controls are infeasible, the Director shall consider emissions, capital cost of compliance, annual incremental compliance cost, and environmental and health impacts.)
- (c) For sources manufactured as of July 1, 1971, visible emissions shall not be more than 40 percent opacity when averaged over a six-minute period. However, except for sources required to comply with Paragraph (g) of this Rule, six-minute averaging periods may exceed 40 percent opacity if:
- (1) No six-minute period exceeds 90 percent opacity;
 - (2) No more than one six-minute period exceeds 40 percent opacity in any hour; and

- (3) No more than four six-minute periods exceed 40 percent opacity in any 24-hour period.
- (d) For sources manufactured after July 1, 1971, visible emissions shall not be more than 20 percent opacity when averaged over a six-minute period. However, except for sources required to comply with Paragraph (g) of this Rule, six-minute averaging periods may exceed 20 percent opacity if:
- (1) No six-minute period exceeds 87 percent opacity;
 - (2) No more than one six-minute period exceeds 20 percent opacity in any hour; and
 - (3) No more than four six-minute periods exceed 20 percent opacity in any 24-hour period.
- (e) Where the presence of uncombined water is the only reason for failure of an emission to meet the limitations of Paragraph (c) or (d) of this Rule, those requirements shall not apply.
- (f) Exception from Opacity Standard in Paragraph (d) of this Rule. Sources subject to Paragraph (d) of this Rule may be allowed to comply with Paragraph (c) of this Rule if:
- (1) The owner or operator of the source demonstrates compliance with applicable particulate mass emissions standards; and
 - (2) The owner or operator of the source submits data necessary to show that emissions up to those allowed by Paragraph (c) of this Rule shall not violate any national ambient air quality standard.

The burden of proving these conditions shall be on the owner or operator of the source and shall be approached in the following manner. The owner or operator of a source seeking an exception shall apply to the Director requesting this modification in its permit. The applicant shall submit the results of a source test within 90 days of application. Source testing shall be by the appropriate procedure as designated by rules in this Subchapter. During this 90-day period the applicant shall submit data necessary to show that emissions up to those allowed by Paragraph (c) of this Rule will not contravene ambient air quality standards. This evidence shall include, as a minimum, an inventory of past and projected emissions from the facility. In its review of ambient air quality, the Division may require additional information that it considers necessary to assess the resulting ambient air quality. If the applicant can thus show that it will be in compliance both with particulate mass emissions standards and ambient air quality standards, the Director shall modify the permit to allow emissions up to those allowed by Paragraph (c) of this Rule.

- (g) For sources required to install, operate, and maintain continuous opacity monitoring systems (COMS), compliance with the numerical opacity limits in this Rule shall be determined as follows excluding startups, shutdowns, maintenance periods when fuel is not being combusted, and malfunctions approved as such according to procedures approved under Rule .0535 of this Section:
- (1) No more than 10 six-minute periods shall exceed the opacity standard in any one day; and
 - (2) The percent of excess emissions (defined as the percentage of monitored operating time in a calendar quarter above the opacity limit) shall not exceed 0.8 percent of the total

operating hours. If a source operates less than 500 hours during a calendar quarter, the percent of excess emissions shall be calculated by including hours operated immediately previous to this quarter until 500 operational hours are obtained.

In no instance shall excess emissions exempted under this Paragraph cause or contribute to a violation of any emission standard in this Subchapter or 40 CFR Part 60, 61, or 63 or any ambient air quality standard in Section 15A NCAC 02D .0400 or 40 CFR Part 50.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); Eff. February 1, 1976; Amended Eff. June 1, 2004; April 1, 2003; April 1, 2001; July 1, 1998; July 1, 1996; December 1, 1992; August 1, 1987; January 1, 1985; May 30, 1978.

15A NCAC 02D .0538 CONTROL OF ETHYLENE OXIDE EMISSIONS

(a) For purposes of this Rule, "medical devices" means instruments, apparatus, implements, machines, implants, in vitro reagents, contrivances, or other similar or related articles including their components, parts, and accessories, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or intended to affect the structure or any function of the body of man or other animals.

(b) This Rule applies to emissions of ethylene oxide resulting from use as a sterilant in:

- (1) the production and subsequent storage of medical devices; or
- (2) the packaging and subsequent storage of medical devices for sale;

at facilities for which construction began after August 31, 1992.

(c) This Rule does not apply to hospital or medical facilities.

(d) Facilities subject to this Rule shall comply with the following standards:

- (1) For sterilization chamber evacuation, a closed loop liquid ring vacuum pump, or equipment demonstrated to be as effective at reducing emissions of ethylene oxide shall be used;
- (2) For sterilizer exhaust, a reduction in the weight of uncontrolled emissions of ethylene oxide of at least 99.8 percent by weight shall be achieved;
- (3) For sterilizer unload and backdraft valve exhaust, a reduction:
 - (A) in uncontrolled emissions of ethylene oxide of at least 99 percent by weight shall be achieved; or
 - (B) to no more than one part per million by volume of ethylene oxide shall be achieved;
- (4) Sterilized product ethylene oxide residual shall be reduced by:
 - (A) a heated degassing room to aerate the products after removal from the sterilization chamber; the temperature of the degassing room shall be

maintained at a minimum of 95 degrees Fahrenheit during the degassing cycle, and product hold time in the aeration room shall be at least 24 hours; or

(B) a process demonstrated to be as effective as Part (d)(4)(A) of this Rule.

(5) Emissions of ethylene oxide from the degassing area (or equivalent process) shall be vented to a control device capable of reducing uncontrolled ethylene oxide emissions by at least 99 percent by weight or to no more than one part per million by volume of ethylene oxide.. The product aeration room and the product transfer area shall be maintained under a negative pressure.

(e) Before installation of the controls required by Paragraph (d) of this Rule, and annually thereafter, a written description of waste reduction, elimination, or recycling plan shall be submitted [as specified in G.S. 143-215.108(g)] to determine if ethylene oxide use can be reduced or eliminated through alternative sterilization methods or process modifications.

(f) The owner or operator of the facility shall conduct a performance test to verify initial efficiency of the control devices. The owner or operator shall maintain temperature records to demonstrate proper operation of the degassing room. Such records shall be retained for a period of at least two calendar years and shall be made available for inspection by Division personnel.

(g) If the owner or operator of a facility subject to the Rule demonstrates, using the procedures in Rule .1106 of this Section, that the emissions of ethylene oxide from all sources at the facility do not cause the acceptable ambient level of ethylene oxide in Rule .1104 of this Section to be exceeded, then the requirements of Paragraphs (d) through (e) of this Rule shall not apply. This demonstration shall be at the option of the owner or operator of the facility. If this option is chosen, the Director shall write the facility's permit to satisfy the requirements of Rule .1104(a) of this Section.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(4),(5); 143-215.108(c); Eff. September 1, 1992; Amended Eff. June 1, 2004; August 1, 2002.

15A NCAC 02D .1404 RECORDKEEPING: REPORTING: MONITORING:

(a) General requirements. The owner or operator of any source shall comply with the monitoring, recordkeeping and reporting requirements in Section .0600 of this Subchapter and shall maintain all records necessary for determining compliance with all applicable limitations and standards of this Section for five years.

(b) Submittal of information to show compliance status. The owner or operator of any source shall maintain and, when requested by the Director, submit any information required by these Rules to determine the compliance status of an affected source.

(c) Excess emissions reporting. The owner or operator shall report excess emissions following the procedures under Rule .0535 of this Subchapter.

(d) Continuous emissions monitors.

- (1) The owner or operator shall install, operate, and maintain a continuous emission monitoring system according to 40 CFR Part 75, Subpart H, with such exceptions as may be allowed under 40 CFR Part 75, Subpart H or 40 CFR Part 96 if:
 - (A) a source is covered under Rules .1416, .1417, or .1418 of this Section except internal combustion engines; or
 - (B) any source that opts into the nitrogen oxide budget trading program under Rule .1419 of this Section.
- (2) The owner or operator of a source that is subject to the requirements of this Section but not covered under Subparagraph (1) of this Paragraph and that uses a continuous emissions monitoring system to measure emissions of nitrogen oxides shall operate and maintain the continuous emission monitoring system according to 40 CFR Part 60, Appendix B, Specification 2, and Appendix F or Part 75, Subpart H. If diluent monitoring is required, 40 CFR Part 60, Appendix B, Specification 3, shall be used. If flow monitoring is required, 40 CFR Part 60, Appendix B, Specification 6, shall be used.
- (3) The owner or operator of the following sources shall not be required to use continuous emission monitors unless the Director determines that a continuous emission monitor is necessary under Rule .0611 of this Subchapter to show compliance with the rules of this Section:
 - (A) a boiler or indirect-fired process heater covered under Rule .1407 of this Section with a maximum heat input less than or equal to 250 million Btu per hour;
 - (B) stationary internal combustion engines covered under Rule .1409 of this Section except for engines covered under Rules .1409(b) and .1418 of this Section.

(e) Missing data.

- (1) If data from continuous emission monitoring systems required to meet the requirements of 40 CFR Part 75 are not available at a time that the source is operated, the procedures in 40 CFR Part 75 shall be used to supply the missing data.
- (2) For continuous emissions monitors not covered under Subparagraph (1) of this Paragraph, data shall be available for at least 95 percent of the emission sources operating hours for the applicable averaging period,

where four equally spaced readings constitute a valid hour. If data from continuous emission monitoring systems are not available for at least 95 percent of the time that the source is operated, the procedures in 40 CFR 75.33 through 75.37 shall be used to supply the missing data.

(f) Quality assurance for continuous emissions monitors.

- (1) The owner or operator of a continuous emission monitor required to meet 40 CFR Part 75, Subpart H, shall follow the quality assurance and quality control requirements of 40 CFR Part 75, Subpart H.
- (2) For a continuous emissions monitor not covered under Subparagraph (1) of this Paragraph, the owner or operator of the continuous emissions monitor shall follow the quality assurance and quality control requirements of 40 CFR Part 60, Appendix F, if the monitor is required to be operated annually under another rule. If the continuous emissions monitor is being operated only to satisfy the requirements of this Section, then the quality assurance and quality control requirements of 40 CFR Part 60, Appendix F, shall apply except that:
 - (A) A relative accuracy test audit shall be conducted after January 1 and before May 1 of each year;
 - (B) One of the following shall be conducted at least once between May 1 and September 30 of each year:
 - (i) a linearity test, according to 40 CFR Part 75, Appendix A, Section 3.2, 6.2, and 7.1;
 - (ii) a relative accuracy audit, according to 40 CFR Part 60, Appendix F, Section 5 and 6; or
 - (iii) a cylinder gas audit according to 40 CFR Part 60, Appendix F, Section 5 and 6; and
 - (C) A daily calibration drift test shall be conducted according to 40 CFR Part 60, Appendix F, Section 4.0.

(g) Interim reporting for large sources. The owner or operator of a source covered under Rules .1416, .1417, or .1418 of this Section shall report to the Director no later than July 30 the tons of nitrogen oxides emitted during the previous May and June. No later than October 30, the owner or operator shall report to the Director the tons of nitrogen oxides emitted during the previous ozone season. The Division of Air Quality shall make this information publicly available.

(h) Recordkeeping and reporting requirements for large sources. The owner or operator of a source covered under Rules .1416, .1417, or .1418 of this Section shall comply with the recordkeeping and reporting requirements of 40 CFR Part 96, Budget Trading Program for State Implementation Plans.

(i) Averaging time for continuous emissions monitors. When compliance with a limitation established for a source subject to the requirements of this Section is determined using a continuous emissions monitoring system, a 24-hour block average as described under Rule .0606 of this Subchapter shall be recorded for each day beginning May 1 through September 30 unless a specific rule requires a different averaging time or procedure. Sources covered under Rules .1416, .1417, or .1418 of this Section shall comply with the averaging time requirements of 40 CFR Part 75. A 24-hour block average described in Rule .0606 of this Subchapter shall be used when a continuous emissions monitoring system is used to determine compliance with a short-term pounds-per-million-Btu standard in Rule .1418 of this Section.

(j) Heat input. Heat input shall be determined:

- (1) for sources required to use a monitoring system meeting the requirements of 40 CFR Part 75, using the procedures in 40 CFR Part 75; or
- (2) for sources not required to use a monitoring system meeting the requirements of 40 CFR Part 75, using:
 - (A) a method in 15A NCAC 02D .0501; or
 - (B) the best available heat input data.

(k) Source testing. When compliance with a limitation established for a source subject to the requirements of this Section is determined using source testing, the source testing shall follow the procedures of Rule .1415 of this Section.

(l) Alternative monitoring and reporting procedures. The owner or operator of a source covered under this Rule, except for sources covered under Rule .1419 of this Section, may request alternative monitoring or reporting procedures under Rule .0612, Alternative Monitoring and Reporting Procedures.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(5), (7), (10); Eff. April 1, 1995; Amended Eff. April 1, 1999; Temporary Amendment Eff. November 1, 2000; Amended Eff. April 1, 2001; Temporary Amendment Eff. August 1, 2001; Amended Eff. June 1, 2004; July 18, 2002.

15A NCAC 02D .1409 STATIONARY INTERNAL COMBUSTION ENGINES

(a) The owner or operator of a stationary internal combustion engine having a rated capacity of 650 horsepower or more that is not covered under Paragraph (b) of this Rule or Rule .1418 of this Section shall not allow emissions of NO_x from the stationary internal combustion engine to exceed the following limitations:

MAXIMUM ALLOWABLE NO_x EMISSION RATES FOR STATIONARY INTERNAL COMBUSTION ENGINES (GRAMS PER HORSEPOWER HOUR)

Engine Type	Fuel Type	Limitation
Rich-burn	Gaseous	2.5
Lean-burn	Gaseous	2.5
Comp Ignition	Liquid	8.0

(b) Engines identified in the table in this Paragraph shall not exceed the emission limit in the table during the ozone season; for the 2002 and 2003 ozone season, there shall not be any restrictions on emissions of nitrogen oxides from these engines under this Rule.

SUM OF MAXIMUM ALLOWABLE OZONE SEASON NO_x EMISSIONS (tons per ozone season)

FACILITY	REGULATED SOURCES	ALLOWABLE EMISSIONS 2004	ALLOWABLE EMISSIONS 2005	ALLOWABLE EMISSIONS 2006 and later
Transcontinental Pipeline Station 150	Gas Mainline engines #12, 13, 14, and 15	311	189	76
Transcontinental Pipeline Station 155	Gas Mainline engines #2, 3, 4, 5, and 6	509	314	127
Transcontinental Pipeline Station 160	Gas Mainline engines #11, 12, 13, 14, and 15	597	367	149

Compliance shall be determined by summing the actual emissions from the engines listed in the table at each facility for the ozone season and comparing those sums to the limits in the table. Compliance may be achieved through trading under Paragraph (g) of this Rule if the trades are approved before the ozone season.

(c) If this Rule becomes applicable to a stationary internal combustion engine pursuant to Rule .1402(d), then, if after reasonable effort as defined in Rule .1401 of this Section, the emissions from that stationary internal combustion engine are greater than the applicable limitation in Paragraph (a) of this Rule, or if the requirements of this Rule are not RACT for the

particular stationary internal combustion engine, the owner or operator may petition the Director for an alternative limitation or standard according to Rule .1412 of this Section.

(d) For the engines identified in Paragraph (b) of this Rule and any engine involved in emissions trading with one or more of the engines identified in Paragraph (b) of this Rule, the owner or operator shall determine compliance using:

- (1) a continuous emissions monitoring system which meets the applicable requirements of Appendices B and F of 40 CFR part 60 and Rule .1404 of this Section; or

- (2) an alternate monitoring and recordkeeping procedure based on actual emissions testing and correlation with operating parameters.

- (4) a description of the monitoring, recordkeeping, and reporting that shall be used to show compliance; and

- (5) documentation that the offset is an actual decrease in emissions that has not previously been relied on to comply with Subchapter 02D or 02Q of this Title or Title 40 of the Code of Federal Regulations.

The installation, implementation, and use of this alternate procedure allowed under Subparagraph (d)(2) of this Paragraph shall be approved by the Director before it may be used. The Director may approve the alternative procedure if he finds that it can show the compliance status of the engine.

(e) If a stationary internal combustion engine is permitted to operate more than 475 hours during the ozone season, compliance with the limitation established for a stationary internal combustion engine under Paragraph (a) of this Rule shall be determined using annual source testing according to Rule .1415 of this Section. If a source covered under this rule can burn more than one fuel, then the owner or operator of the source may choose not to burn one or more of these fuels during the ozone season. If the owner or operator chooses not to burn a particular fuel, the source testing required under this Rule shall not be required for that fuel.

(f) If a stationary internal combustion engine is permitted to operate no more than 475 hours during the ozone season, the owner or operator of the stationary internal combustion engine shall show compliance with the limitation under Paragraph (a) of this Rule with source testing during the first ozone season of operation according to Rule .1415 of this Section. Each year after that, the owner or operator of the stationary internal combustion engine shall comply with the annual tune-up requirements of Rule .1414 of this Section.

(g) The owner or operator of a source covered under Paragraph (b) of this Rule may offset part or all of the emissions of that source by reducing the emissions of another stationary internal combustion engine at that facility by an amount equal to or greater than the emissions being offset. Only actual decreased emissions that have not previously been relied on to comply with Subchapter 02D or 02Q of this Title or Title 40 of the Code of Federal Regulations can be used to offset the emissions of another source. The person requesting the offset shall submit the following information to the Director:

- (1) identification of the source, including permit number, providing the offset and what the new allowable emission rate for the source will be;
- (2) identification of the source, including permit number, receiving the offset and what the new allowable emission rate for the source will be;
- (3) the amount of allowable emissions in tons per ozone season being offset;

The Director may approve the offset if he finds that all the information required by this Paragraph has been submitted and that the offset is an actual decrease in emissions that have not previously been relied on to comply with Subchapter 02D or 02Q of this Title or Title 40 of the Code of Federal Regulations. If the Director approves the offset, he shall put the new allowable emission rates in the respective permits.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.66; 143-215.107(a)(5), (7), (10); Eff. April 1, 1995; Temporary Amendment Eff. August 1, 2001; November 1, 2000; Amended Eff. June 1, 2004; July 18, 2002.

15A NCAC 02D .1416 EMISSION ALLOCATIONS FOR UTILITY COMPANIES

(a) After November 1, 2000 but before the EPA promulgation of revisions to 40 CFR Part 51, Subpart G, revising the nitrogen oxide budget for North Carolina, the following limits apply:

- (1) Carolina Power & Light. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Carolina Power & Light Company's Asheville, Cape Fear, Lee, Mayo, Roxboro, Sutton, and Weatherspoon facilities shall not exceed:
 - (A) 12,019 tons per ozone season for 2004;
 - (B) 15,566 tons per ozone season for 2005;
 - (C) 14,355 tons per ozone season for 2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS	EMISSION ALLOCATIONS	EMISSION ALLOCATIONS
		(tons/ozone season) 2004	(tons/ozone season) 2005	(tons/ozone season) 2006 and later
Asheville, Buncombe Co.	1	551	714	659
	2	538	697	643
Cape Fear Chatham Co	5	286	371	342
	6	406	526	485
Lee Wayne Co	1	145	188	173
	2	159	206	190
	3	465	603	556

APPROVED RULES

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/ozone season) 2005	EMISSION ALLOCATIONS (tons/ozone season) 2006 and later
Mayo Person Co	1	1987	2572	2373
Roxboro Person Co	1	861	1115	1028
	2	1602	2075	1914
	3	1773	2295	2116
	4	1698	2199	2028
L V Sutton New Hanover Co.	1	182	236	217
	2	198	256	236
	3	806	1044	962
Weatherspoon Robeson Co.	1	85	110	102
	2	97	125	116
	3	180	234	215

(2) Duke Power. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Duke Power Company's Allen, Belevs Creek, Buck, Cliffside, Dan River, Marshall, and Riverbend facilities shall not exceed:

- (A) 17,816 tons per ozone season for 2004;
- (B) 23,072 tons per ozone season for 2005;

(C) 21,278 tons per ozone season for .2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/season) 2005	EMISSION ALLOCATIONS (tons/season) 2006 and later
G G Allen Gaston Co.	1	350	453	418
	2	355	460	424
	3	590	764	705
	4	528	683	630
	5	678	748	690
Belevs Creek Stokes Co.	1	2591	3356	3095
	2	3020	3911	3608
Buck Rowan Co.	5	66	86	79
	6	73	95	87
	7	78	101	93
	8	319	413	381
	9	337	437	403
Cliffside Cleveland and Rutherford Co.	1	76	98	91
	2	82	106	98
	3	107	138	128
	4	120	156	144
	5	1326	1717	1584
Dan River Rockingham Co.	1	132	171	157
	2	144	186	172
	3	304	394	363
Marshall Catawba Co.	1	1011	1309	1207
	2	1056	1367	1261
	3	1784	2311	2131
	4	1764	2285	2107

APPROVED RULES

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/season) 2005	EMISSION ALLOCATIONS (tons/season) 2006 and later
Riverbend Gaston Co.	10	299	387	357
	7	216	280	258
	8	225	291	268
	9	285	369	340

(b) After November 1, 2000, and after any EPA promulgation of revisions to 40 CFR Part 51, Subpart G, revising the nitrogen oxide budget for North Carolina, the following limits apply:

(1) Carolina Power & Light. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Carolina Power & Light Company's Asheville, Cape Fear, Lee, Mayo, Roxboro, Sutton, and Weatherspoon facilities shall not exceed:

(A) 12,019 tons per ozone season in 2004;

(B) 15,024 tons per ozone season for 2005;

(C) 11,320 tons per ozone season for 2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/ozone season) 2005	EMISSION ALLOCATIONS (tons/ozone season) 2006 and later
Asheville Buncombe Co	1	551	689	519
	2	538	672	507
Cape Fear Chatham Co	5	286	358	270
	6	406	508	382
Lee Wayne Co.	1	145	182	137
	2	159	199	150
	3	465	582	438
Mayo Person Co	1	1987	2483	1872
Roxboro Person Co	1	861	1076	811
	2	1602	2003	1509
	3	1773	2215	1669
	4	1698	2122	1599
L V Sutton New Hanover Co.	1	182	228	171
	2	198	247	186
	3	806	1007	759
Weatherspoon Robeson Co.	1	85	107	80
	2	97	121	91
	3	180	225	170

(2) Duke Power. The total emissions from all the coal-fired boilers and combustion turbines that are not listed in Rule .1417 of this Section at Duke Power Company's Allen, Belews Creek, Buck, Cliffside, Dan River, Marshall, and Riverbend facilities shall not exceed:

(A) 17,816 tons per ozone season;
 (B) 22,270 tons per ozone season for 2005;

(C) 16,780 tons per ozone season for 2006 and each year thereafter until revised according to Rule .1420 of this Section; and

Furthermore, except as allowed under Paragraph (d) of this Rule, individual sources at these facilities named in the table in this Subparagraph shall not exceed during the ozone season the nitrogen oxide emission allocations in the table.

FACILITY	SOURCE	EMISSION ALLOCATIONS (tons/ozone season) 2004	EMISSION ALLOCATIONS (tons/ozone season) 2005	EMISSION ALLOCATIONS (tons/ozone season) 2006 and later
G G Allen Gaston Co.	1	350	437	329
	2	355	444	334
	3	590	737	556
	4	528	660	497
	5	578	722	544
Belews Creek Stokes Co.	1	2591	3239	2441
	2	3020	3775	2846
Buck Rowan Co.	5	66	83	63
	6	73	91	69
	7	78	97	73
	8	319	399	300
	9	337	422	318
Cliffside Cleveland and Rutherford Co.	1	76	95	71
	2	82	102	77
	3	107	134	101
	4	120	150	113
	5	1326	1658	1249
Dan River Rockingham Co.	1	132	165	124
	2	144	180	135
	3	304	380	286
Marshall Catawba Co.	1	1011	1263	952
	2	1056	1320	994
	3	1784	2230	1680
	4	1764	2206	1662
Riverbend Gaston Co.	10	299	374	282
	7	216	270	204
	8	225	281	212
	9	285	356	268

(c) Posting of emission allocation. The Director shall post the emission allocations for sources covered under this Rule on the Division's web page.

(d) Trading. Sources shall comply with the requirements of this Rule using the nitrogen oxide budget trading program set out in Rule .1419 of this Section.

(e) Monitoring. The owner or operator of a source subject to this Rule shall show compliance using a continuous emission monitor that meets the requirements of 40 CFR Part 75, Subpart H, with such exceptions as allowed under 40 CFR Part 75, Subpart H or 40 CFR Part 96.

(f) Operation of control devices. All emission control devices and techniques installed to comply with this Rule shall be operated during the ozone season in the manner in which they are designed and permitted to be operated.

(g) Days of violations. For the purposes of this Rule, the number of days of violation for a source shall be determined after the end of the ozone season as follows:

- (1) To the source's allocation in this Rule, the allocations acquired before December 1 of that year under Rule .1419 of this Section are added and the allocations transferred before

December 1 of that year under Rule .1419 of this Section are subtracted.

- (2) The value calculated under Subparagraph (1) of this Paragraph is compared to the actual emissions from the source for the ozone season. If the value calculated under Subparagraph (1) of this Paragraph is greater than or equal to the actual emissions from the source for the ozone season, the source is in compliance. If the value calculated under Subparagraph (1) of this Paragraph is less than the actual emissions from the source for the ozone season, the source is not in compliance.
- (3) If the source is not in compliance, beginning with September 30, the actual emissions for that day and each preceding day are subtracted from the actual emissions for the ozone season until the value calculated under Subparagraph (1) of this Paragraph is greater than or equal to the actual emissions. Each day that the source operated after this day to September 30 is a day of violation.

(h) Modification and reconstruction. The modification or reconstruction of a source covered under this Rule shall not make that source a "new" source under this Rule. A source that is modified or reconstructed shall retain its emission allocations under Paragraph (a) or (b) of this Rule.

(i) Additional controls. The Environmental Management Commission may specify through rulemaking a specific emission limit lower than that established under this Rule for a specific source if compliance with the lower emission limit is required as part of the State Implementation Plan to attain or maintain the ambient air quality standard for ozone.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5), (7), (10); Temporary Adoption Eff. November 1, 2000; Eff. April 1, 2001; Temporary Amendment Eff. August 1, 2001; Amended Eff. June 1, 2004; July 18, 2002.

15A NCAC 2D .1422 COMPLIANCE SUPPLEMENT POOL CREDITS

(a) Purpose. The purpose of this Rule is to regulate North Carolina's eligibility for and use of the Compliance Supplement Pool under 40 CFR 51.121(e)(3).

(b) Eligibility. Sources covered under Rule .1416 of this Section may earn Compliance Supplement Pool Credits for those nitrogen oxide emissions reductions required by Rule .1416 of this Section that are achieved during the ozone season after September 30, 1999 and are demonstrated using baseline and current emissions determined according to 40 CFR Part 75 before May 1, 2003, and are beyond the total emission reductions required under 40 CFR Part 76 or any other provision of the federal Clean Air Act.

(c) Credits. The Compliance Supplement Pool Credits earned under this Rule shall be tabulated in tons of nitrogen oxides reduced per ozone season. The control device, modification, or change in operational practice that enables the combustion source or sources to achieve the emissions reductions shall be permitted. The facility shall provide the Division of Air Quality with written notification certifying the installation and operation of the control device or the modification or change in operational practice that enables the combustion source or sources to achieve the emissions reduction. Only emission reductions that are beyond emission reductions required under 40 CFR Part 76 or any other provision of the federal Clean Air Act are creditable Compliance Supplement Pool Credits. Credits are counted in successive seasons through May 1, 2003. Seasonal credits shall be recorded in a Division of Air Quality database and will accumulate in this database until May 1, 2003. At that point a cumulative total of all the Compliance Supplement Pool Credits earned during the entire period shall be tabulated. These credits will then be available for use by the State of North Carolina to achieve compliance with the State ozone season NOx budget.

(d) Requesting credits. In order to earn Compliance Supplement Pool Credits, the owner or operator of the facility shall provide the following written documentation to the Director before January 1, 2003.

- (1) the combustion source or sources involved in the emissions reduction;

- (2) the start date of the emissions reduction;
- (3) a description of the add-on control device, modification, or change in operational practice that enables the combustion source or sources to achieve the emissions reduction;
- (4) the current and baseline emissions of nitrogen oxides of the combustion source or sources involved in this reduction in terms of tons of nitrogen oxides per season;
- (5) the amount of reduction of emissions of nitrogen oxides achieved by this action in tons of nitrogen oxides per season per combustion source involved;
- (6) the total reduction of nitrogen oxides achieved by this action in tons of nitrogen oxides per season for all the combustion sources involved;
- (7) a demonstration that the proposed action has reduced the emissions of nitrogen oxides from the combustion sources involved by the amount specified in Subparagraphs (d)(5) and (d)(6) of this Rule; and
- (8) a description of the monitoring, recordkeeping, and reporting plan used to ensure continued compliance with the proposed emissions reduction activity; continuous emissions monitors shall be used to monitor emissions.

(e) Approving requests. Before any Compliance Supplement Pool Credits can be allocated, the Director shall have to approve them. The Director shall approve credits if he finds that:

- (1) early emissions reductions are demonstrated using baseline and current emissions determined according to 40 CFR Part 75 to be beyond the reductions required under 40 CFR Part 76, Acid Rain Nitrogen Oxides Emission Reduction Program and any other requirement of the federal Clean Air Act;
- (2) the emission reductions are achieved after September 30, 1999, and before May 1, 2003, and
- (3) all the information and documentation required under Paragraph (d) of this Rule have been submitted.

The Director shall notify the owner or operator of the source and EPA of his approval or disapproval of a request and of the amount of Compliance Supplement Pool Credits approved. If the Director disapproves a request or part of a request, he shall explain in writing to the owner or operator of the source the reasons for disapproval.

(f) Compliance supplement pool. The Director shall verify that the Compliance Supplement Pool Credits do not exceed a statewide total of 10,737 tons for all the ozone seasons of the years 2003, 2004, and 2005.

(g) Interim report. The owner or operators of the facility shall submit to the Director by January 1, 2001 and January 1, 2002 an interim report that contains the information in Paragraph (d) of this Rule for the previous ozone season.

(h) Recording credits. Based on the interim reports submitted under Paragraph (g) of this Rule, the Division shall record the Compliance Supplement Pool Credits earned under this Rule in a

central database. The Division of Air Quality shall maintain this database. These credits shall be recorded in tons of emissions of nitrogen oxides reduced per season with the actual start date of the reduction activity. Based on the final formal request submitted under Paragraph (d) of this Rule as approved under Paragraph (e) of this Rule, the Director shall finalize the Compliance Supplement Pool Credits earned and record the final earned credits in the Division's database. .

(i) Use of credits. Final earned Compliance Supplement Pool Credits shall be available for Carolina Power & Light Co. and Duke Power Co. to use in 2003. The allocations of Carolina Power & Light Co.'s sources and Duke Power Co.'s sources in Rule .1416 of this Section shall be reduced for 2004 or 2005 by the amount of Compliance Supplement Pool Credits used in 2003 using the procedures in Paragraph (k) of this Rule. Compliance Supplement Pool Credits not used in 2003 shall be available for use by the Director of the Division of Air Quality to offset excess emissions of nitrogen oxides in order to achieve compliance with the North Carolina ozone season NOx budget after May 30, 2004, but no later than September 30, 2005. The credits shall be used on a one for one basis, that is, one ton per season of credit can be used to offset one ton, or less, per season of excess emissions to achieve compliance with the requirements of Rule .1416 or .1417 of this Section. All credits shall expire and will no longer be available for use after November 30, 2005.

(j) Reporting. The Director shall report:

- (1) to the EPA, Carolina Power & Light Co. and Duke Power Co. by:
 - (A) March 1, 2003 the Compliance Supplement Pool Credits earned by Carolina Power & Light Co. and by Duke Power Co.; and
 - (B) March 1, 2004 the reductions in allocations calculated under Paragraphs (k) and (l) of this Rule; and
- (2) to the EPA by:
 - (A) December 1, 2003, the Compliance Supplement Pool Credits used beginning May 1 through September 30, 2003;
 - (B) December 1, 2004, the Compliance Supplement Pool Credits used beginning May 31 through September 30, 2004; and
 - (C) December 1, 2005, the Compliance Supplement Pool Credits used beginning May 1 through September 30, 2005.

(k) Using Compliance Supplement Pool Credits in 2003. Carolina Power & Light Co. and Duke Power Co. may use Compliance Supplement Pool Credits in 2003. If they do use Compliance Supplement Pool Credits in 2003, then the allocations for their sources in Rule .1416 of this Section shall be reduced for 2004 or 2005 by the amount of Compliance Supplement Pool Credits used in 2003. Before the Director approves the use of Compliance Supplement Pool Credits in 2003, the company shall identify the sources whose allocations are to be reduced to offset the Compliance Supplement Pool Credits requested for 2003 and the year (2004 or 2005) in which

the allocation is reduced. The Director shall approve no more than 4,295 tons for Carolina Power & Light Co. and no more than 6,442 tons for Duke Power Co. The Director shall approve no more than 5,771 tons being offset by reductions in allocations in 2004 and no more than 4,966 tons being offset by reductions in allocations in 2005.

(l) Failure to receive sufficient credits. If the sum of Compliance Supplement Pool Credits received by Carolina Power & Light Co. and Duke Power Co. are less than 10,737 tons, the following procedure shall be used to reduce the allocations in Rule .1416 of this Section:

- (1) If the Compliance Supplement Pool Credits received by Carolina Power & Light Co. are less than 4,295 tons, and the Compliance Supplement Pool Credits received by Duke Power Co. are greater than or equal to 6,442 tons, the allocation for Carolina Power & Light Co.'s sources shall be reduced by the amount obtained by subtracting from 10,737 tons the sum of Compliance Supplement Pool Credits received by Carolina Power & Light Co. and Duke Power Co. The allocations of Carolina Power & Light Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph.
- (2) If the Compliance Supplement Pool Credits received by Duke Power Co. are less than 6,442 tons, and the Compliance Supplement Pool Credits received by Carolina Power & Light Co. are greater than or equal to 4,295 tons, the allocation for Duke Power Co.'s sources shall be reduced by the amount obtained by subtracting from 10,737 tons the sum of Compliance Supplement Pool Credits received by Carolina Power & Light Co. and Duke Power Co. The allocations of Duke Power Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph.
- (3) If the Compliance Supplement Pool Credits received by Carolina Power & Light Co. are less than 4,295 tons, and the Compliance Supplement Pool Credits received by Duke Power Co. are less than 6,442 tons:
 - (A) The allocation for Carolina Power & Light Co.'s sources shall be reduced by the amount obtained by subtracting from 4,295 tons the Compliance Supplement Pool Credits received by Carolina Power & Light Co. The allocations of Carolina Power & Light Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph; and
 - (B) The allocation for Duke Power Co.'s sources shall be reduced by the amount obtained by subtracting from 6,442 tons the Compliance Supplement Pool Credits received by

- Duke Power Co. The allocations of Duke Power Co.'s sources shall be reduced using the procedure in Subparagraph (4) of this Paragraph.
- (4) When the allocations in Rule .1416 of this Section for Carolina Power & Light Co.'s sources or for Duke Power Co.'s sources are required to be reduced, the following procedure shall be used:
- (A) If the reduction required is less than or equal to 4,966 tons, then following procedure shall be used:
- (i) The allocation of all sources listed in Rule .1416 of this Section for 2005 for Carolina Power & Light Co. or Duke Power Co. are summed.
 - (ii) The reduction required under Subparagraph (1), (2), or (3) of this Paragraph is subtracted from the sum computed under Subpart (i) of this Part.
 - (iii) The allocation of each source listed in Rule .1416 of this Section for 2005 for Carolina Power & Light Co. or Duke Power Co. is multiplied by the value computed under Subpart (ii) of this Part and divided by the value computed under Subpart (i) of this Part. The result is the revised allocation for that source.
- (B) If the reduction required is more than 4,966 tons, then the following procedure shall be used:
- (i) The reduction for the allocations for 2005 is determined using the procedure under Part (A) of this Subparagraph and substituting 4,966 as the reduction required under Subpart (A)(ii) of this Subparagraph.
 - (ii) The reduction for the allocations for 2004 shall be determined using the following procedure:
 - (I) The reduction required under Subparagraph (1), (2), or (3) of this Paragraph is subtracted from 4,966.
- (II) The allocations of all sources listed in Rule .1416 of this Section for 2004 for Carolina Power & Light Co. or Duke Power Co. for 2004 are summed.
- (III) The allocation of each source listed in Rule .1416 of this Section for 2004 for Carolina Power & Light Co. or Duke Power Co. is multiplied by the value computed under Sub-Subpart (I) of this Subpart and divided by the value computed Sub-Subpart (II) of this Subpart. The result is the revised allocation for that source
- (m) If allocations are reduced in 2004 or 2005 for Carolina Power & Light Co. or Duke Power Co. under Paragraph (k) or (l) of this Rule, the company whose allocations are reduced shall reduce its allocations by returning allowances through the use of allowance transfers to the State following the procedures in 40 CFR Part 96. These allowances shall be retired.

History Note: Authority G.S. 143-215.3(a)(1);143-215.65; 143-215.66; 143-215.107(a)(5), (7), (10); Temporary Adoption Eff. August 1, 2001; Eff. July 18, 2002; Amended Eff. June 1, 2004.

15A NCAC 2D .1903 PERMISSIBLE OPEN BURNING WITHOUT AN AIR QUALITY PERMIT

- (a) All open burning is prohibited except open burning allowed under Paragraph (b) of this Rule or Rule .1904 of this Section. Except as allowed under Paragraphs (b)(3) through (b)(7), or (b)(9) of this Rule, open burning shall not be initiated in an ozone forecast area that the Department, or the Forsyth County Environmental Affairs Department for the Triad ozone forecast area, has forecasted to be in an Ozone Action Day Code "Orange" as defined in 40 CFR Part 58, Appendix G status or above during the time period covered by that forecast.
- (b) The following types of open burning are permissible without an air quality permit:
- (1) open burning of leaves, tree branches or yard trimmings, excluding logs and stumps, if the following conditions are met:
 - (A) The material burned originates on the premises of private residences and is burned on those premises;
 - (B) There are no public pickup services available;

- (C) Non-vegetative materials, such as household garbage, lumber, or any other synthetic materials are not burned;
 - (D) The burning is initiated no earlier than 8:00 a.m. and no additional combustible material is added to the fire between 6:00 p.m. on one day and 8:00 a.m. on the following day;
 - (E) The burning does not create a nuisance; and
 - (F) Material is not burned when the Division of Forest Resources has banned burning for that area.
- (2) open burning for land clearing or right-of-way maintenance if the following conditions are met:
- (A) The wind direction at the time that the burning is initiated and the wind direction as forecasted by the National Weather Service during the time of the burning are away from any area, including public road within 250 feet of the burning as measured from the edge of the pavement or other roadway surface, which may be affected by smoke, ash, or other air pollutants from the burning;
 - (B) The location of the burning is at least 1,000 feet from any dwelling, group of dwellings, or commercial or institutional establishment, or other occupied structure not located on the property on which the burning is conducted. The regional office supervisor shall grant exceptions to the setback requirements if:
 - (i) a signed, written statement waiving objections to the open burning associated with the land clearing operation is obtained and submitted to and the exception granted by the regional office supervisor before the burning begins from a resident or an owner of each dwelling, commercial or institutional establishment, or other occupied structure within 1,000 feet of the open burning site. In the case of a lease or rental agreement, the lessee or renter shall be the person from whom permission shall be gained prior to any burning; or
 - (ii) an air curtain burner that complies with Rule .1904 of this Section, is utilized at the open burning site;
- (C) Only land cleared plant growth is burned. Heavy oils, asphaltic materials such as shingles and other roofing materials, items containing natural or synthetic rubber, or any materials other than plant growth shall not be burned; however, kerosene, distillate oil, or diesel fuel may be used to start the fire;
 - (D) Initial burning begins only between the hours of 8:00 a.m. and 6:00 p.m., and no combustible material is added to the fire between 6:00 p.m. on one day and 8:00 a.m. on the following day, except that, under meteorological conditions that are conducive to the rise and dispersion of smoke, deviation from these hours of burning shall be granted by the regional office supervisor. The landowner or operator of the open burning operation shall be responsible for obtaining written approval for burning during periods other than those specified in this Part;
 - (E) No fires are initiated or vegetation added to existing fires when the Division of Forest Resources has banned burning for that area; and
 - (F) Materials are not carried off-site or transported over public roads for open burning unless the materials are carried off-site or transported over public roads to facilities permitted according to Rule .1904 of this Section for the operation of an air curtain burner at a permanent site;
- (3) camp fires and fires used solely for outdoor cooking and other recreational purposes, or for ceremonial occasions, or for human warmth and comfort and which do not create a nuisance and do not use synthetic materials or refuse or salvageable materials for fuel;
 - (4) fires purposely set to forest land for forest management practices for which burning is acceptable to the Division of Forest Resources;
 - (5) fires purposely set to agricultural lands for disease and pest control and fires set for other agricultural or apicultural practices for which burning is currently acceptable to the Department of Agriculture;
 - (6) fires purposely set for wildlife management practices for which burning is currently acceptable to the Wildlife Resource Commission;
 - (7) fires for the disposal of dangerous materials when it is the safest and most practical method of disposal;

- (8) fires for the disposal of material generated as a result of a natural disaster, such as tornado, hurricane, or flood, if the regional office supervisor grants permission for the burning. The person desiring to do the burning shall document and provide written notification to the regional office supervisor of the appropriate regional office that there is no other practical method of disposal of the waste. Factors that the regional office supervisor shall consider in granting permission for the burning include type, amount, location of the burning, and nature of combustible substances. The regional office supervisor shall not grant permission for the burning if the primary purpose of the fire is to dispose of synthetic materials or refuse or recovery of salvageable materials. Fires authorized under this Subparagraph shall comply with the conditions of Subparagraph (b)(2) of this Rule.
- (9) fires purposely set by manufacturers of fire extinguishing materials or equipment, testing laboratories, or other persons, for the purpose of testing or developing these materials or equipment in accordance with a standard qualification program;
- (10) fires purposely set for the instruction and training of fire-fighting personnel, including fires at permanent fire-fighting training facilities, or when conducted under the supervision of or with the cooperation of one or more of the following agencies:
 - (A) the Division of Forest Resources;
 - (B) the North Carolina Insurance Department;
 - (C) North Carolina technical institutes; or
 - (D) North Carolina community colleges, including:
 - (i) the North Carolina Fire College; or
 - (ii) the North Carolina Rescue College; and
- (11) fires not described in Subparagraph (10) of this Paragraph, purposely set for the instruction and training of fire-fighting personnel, provided that:
 - (A) The regional office supervisor of the appropriate regional office and the HHCB have been notified according to the procedures and deadlines contained in the appropriate regional notification form. This form may be obtained by writing the appropriate regional office at the address in Rule .1905 of this Section and requesting it, and
 - (B) The regional office supervisor has granted permission for the burning. Factors that the regional office

supervisor shall consider in granting permission for the burning include type, amount, and nature of combustible substances. The regional office supervisor shall not grant permission for the burning of salvageable items, such as insulated wire and electric motors or if the primary purpose of the fire is to dispose of synthetic materials or refuse. The regional office supervisor of the appropriate regional office shall not consider previously demolished structures as having training value. However, the regional office supervisor of the appropriate regional office may allow an exercise involving the burning of motor vehicles burned over a period of time by a training unit or by several related training units. Any deviations from the dates and times of exercises, including additions, postponements, and deletions, submitted in the schedule in the approved plan shall be communicated verbally to the regional office supervisor of the appropriate regional office at least one hour before the burn is scheduled.

(c) The authority to conduct open burning under this Section does not exempt or excuse any person from the consequences, damages or injuries that may result from this conduct. It does not excuse or exempt any person from complying with all applicable laws, ordinances, rules or orders of any other governmental entity having jurisdiction even though the open burning is conducted in compliance with this Section.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); Eff. July 1, 1996; Amended Eff. June 1, 2004; July 1, 1998.

15A NCAC 02Q .0702 EXEMPTIONS

- (a) A permit to emit toxic air pollutants shall not be required under this Section for:
 - (1) residential wood stoves, heaters, or fireplaces;
 - (2) hot water heaters that are used for domestic purposes only and are not used to heat process water;
 - (3) maintenance, structural changes, or repairs that do not change capacity of that process, fuel-burning, refuse-burning, or control equipment, and do not involve any change in quality or nature or increase in quantity of emission of any regulated air pollutant or toxic air pollutant;
 - (4) housekeeping activities or building maintenance procedures, including painting buildings, resurfacing floors, roof repair,

- (5) washing, portable vacuum cleaners, sweeping, use and associated storage of janitorial products, or non-asbestos bearing insulation removal;
- (5) use of office supplies, supplies to maintain copying equipment, or blueprint machines;
- (6) paving parking lots;
- (7) replacement of existing equipment with equipment of the same size, type, and function if the new equipment:
 - (A) does not result in an increase to the actual or potential emissions of any regulated air pollutant or toxic air pollutant;
 - (B) does not affect compliance status; and
 - (C) fits the description of the existing equipment in the permit, including the application, such that the replacement equipment can be operated under that permit without any changes to the permit;
- (8) comfort air conditioning or comfort ventilation systems that do not transport, remove, or exhaust regulated air pollutants to the atmosphere;
- (9) equipment used for the preparation of food for direct on-site human consumption;
- (10) non-self-propelled non-road engines, except generators, regulated by rules adopted under Title II of the federal Clean Air Act;
- (11) stacks or vents to prevent escape of sewer gases from domestic waste through plumbing traps;
- (12) use of fire fighting equipment;
- (13) the use for agricultural operations by a farmer of fertilizers, pesticides, or other agricultural chemicals containing one or more of the compounds listed in 15A NCAC 02D .1104 if such compounds are applied according to agronomic practices acceptable to the North Carolina Department of Agriculture;
- (14) asbestos demolition and renovation projects that comply with 15A NCAC 02D .1110 and that are being done by persons accredited by the Department of Health and Human Services under the Asbestos Hazard Emergency Response Act;
- (15) incinerators used only to dispose of dead animals or poultry as identified in 15A NCAC 02D .1201(c)(4) or incinerators used only to dispose of dead pets as identified in 15A NCAC 02D .1208(a)(2)(A);
- (16) refrigeration equipment that is consistent with Section 601 through 618 of Title VI (Stratospheric Ozone Protection) of the federal Clean Air Act, 40 CFR Part 82, and any other regulations promulgated by EPA under Title VI for stratospheric ozone protection, except those units used as or with air pollution control equipment;
- (17) laboratory activities:
 - (A) bench-scale, on-site equipment used exclusively for chemical or physical analysis for quality control purposes, staff instruction, water or wastewater analyses, or non-production environmental compliance assessments;
 - (B) bench scale experimentation, chemical or physical analyses, training or instruction from nonprofit, non-production educational laboratories;
 - (C) bench scale experimentation, chemical or physical analyses, training or instruction from hospital or health laboratories pursuant to the determination or diagnoses of illnesses; and
 - (D) research and development laboratory activities that are not required to be permitted under Section .0500 of this Subchapter provided the activity produces no commercial product or feedstock material;
- (18) combustion sources as defined in 15 NCAC 02Q .0703 until 18 months after promulgation of the MACT or GACT standards for combustion sources. (Within 18 months following promulgation of the MACT or GACT standards for combustion sources, the Commission shall decide whether to keep or remove the combustion source exemption. If the Commission decides to remove the exemption, it shall initiate rulemaking procedures to remove this exemption.)
- (19) storage tanks used only to store:
 - (A) inorganic liquids with a true vapor pressure less than 1.5 pounds per square inch absolute;
 - (B) fuel oils, kerosene, diesel, crude oil, used motor oil, lubricants, cooling oils, natural gas, liquefied petroleum gas, or petroleum products with a true vapor pressure less than 1.5 pounds per square inch absolute;
- (20) dispensing equipment used solely to dispense diesel fuel, kerosene, lubricants or cooling oils;
- (21) portable solvent distillation systems that are exempted under 15A NCAC 02Q .0102(c)(1)(I).
- (22) processes:
 - (A) electric motor burn-out ovens with secondary combustion chambers or afterburners;
 - (B) electric motor bake-on ovens;
 - (C) burn-off ovens for paint-line hangers with afterburners;

- (D) hosiery knitting machines and associated lint screens, hosiery dryers and associated lint screens, and hosiery dyeing processes where bleach or solvent dyes are not used;
 - (E) blade wood planers planing only green wood;
 - (F) saw mills that saw no more than 2,000,000 board feet per year provided only green wood is sawed;
 - (G) perchloroethylene drycleaning processes with 12-month rolling total consumption of:
 - (i) less than 1366 gallons of perchloroethylene per year for facilities with dry-to-dry machines only;
 - (ii) less than 1171 gallons of perchloroethylene per year for facilities with transfer machines only; or
 - (iii) less than 1171 gallons of perchloroethylene per year for facilities with both transfer and dry-to-dry machines;
 - (23) wood furniture manufacturing operations as defined in 40 CFR 63.801(a) that comply with the emission limitations and other requirements of 40 CFR Part 63 Subpart JJ, provided that the terms of this exclusion shall not affect the authority of the Director under 15A NCAC 02Q .0712;
 - (24) wastewater treatment systems at pulp and paper mills for hydrogen sulfide and methyl mercaptan only;
 - (25) gasoline dispensing facilities or gasoline service station operations that comply with 15A NCAC 02D .0928 and .0932 and that receive gasoline from bulk gasoline plants or bulk gasoline terminals that comply with 15A NCAC 02D .0524, .0925, .0926, .0927, .0932, and .0933 via tank trucks that comply with 15A NCAC 02D .0932;
 - (26) the use of ethylene oxide as a sterilant in the production and subsequent storage of medical devices or the packaging and subsequent storage of medical devices for sale if the emissions from all new and existing sources at the facility described in 15A NCAC 02D .0538(d) are controlled at least to the degree described in 15A NCAC 02D .0538(d) and the facility complies with 15A NCAC 02D .0538(e) and (f);
 - (27) bulk gasoline plants, including the storage and handling of fuel oils, kerosenes, and jet fuels but excluding the storage and handling of other organic liquids, that comply with 15A NCAC 02D .0524, .0925, .0926, .0932, and .0933; unless the Director finds that a permit to emit toxic air pollutants is required under Paragraph (b) of this Rule or Rule .0712 of this Section for a particular bulk gasoline plant; or
 - (28) bulk gasoline terminals, including the storage and handling of fuel oils, kerosenes, and jet fuels but excluding the storage and handling of other organic liquids, that comply with 15A NCAC 02D .0524, .0925, .0927, .0932, and .0933 if the bulk gasoline terminal existed before November 1, 1992; unless:
 - (A) the Director finds that a permit to emit toxic air pollutants is required under Paragraph (b) of this Rule or Rule .0712 of this Section for a particular bulk gasoline terminal, or
 - (B) the owner or operator of the bulk gasoline terminal meets the requirements of 15A NCAC 02D .0927(i).
- (b) Emissions from the activities identified in Subparagraphs (a)(25) through (a)(28) of this Rule shall be included in determining compliance with the toxic air pollutant requirements in this Section and shall be included in the permit if necessary to assure compliance. Emissions from the activities identified in Subparagraphs (a)(1) through (a)(24) of this Rule shall not be included in determining compliance with the toxic air pollutant requirements in this Section.
- (c) The addition or modification of an activity identified in Paragraph (a) of this Rule shall not cause the source or facility to be evaluated for emissions of toxic air pollutants.
- (d) Because an activity is exempted from being required to have a permit does not mean that the activity is exempted from any applicable requirement or that the owner or operator of the source is exempted from demonstrating compliance with any applicable requirement.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.108; 143B-282; S.L. 1989, c. 168, s. 45; Rule originally codified as part of 15A NCAC 02H .0610; Eff. July 1, 1998; Amended Eff. April 1, 2005; July 1, 2002; July 1, 2000.

15A NCAC 02Q .0711 EMISSION RATES REQUIRING A PERMIT

A permit to emit toxic air pollutants shall be required for any facility whose actual (or permitted if higher) rate of emissions from all sources are greater than any one of the following toxic air pollutant permitting emissions rates:

Pollutant (CAS Number)	Carcinogens	Chronic Toxicants	Acute Systemic Toxicants	Acute Irritants
	lb/yr	lb/day	lb/hr	lb/hr

APPROVED RULES

Pollutant (CAS Number)	Carcinogens	Chronic Toxicants	Acute Systemic Toxicants	Acute Irritants
	lb/yr	lb/day	lb/hr	lb/hr
acetaldehyde (75-07-0)				6.8
acetic acid (64-19-7)				0.96
acrolein (107-02-8)				0.02
acrylonitrile (107-13-1)	10			
ammonia (7664-41-7)				0.68
aniline (62-53-3)			0.25	
arsenic and inorganic arsenic compounds	0.016			
asbestos (1332-21-4)	1.9 X 10 ⁻⁶			
aziridine (151-56-4)		0.13		
benzene (71-43-2)	8.1			
benzidine and salts (92-87-5)	0.0010			
benzo(a)pyrene (50-32-8)	2.2			
benzyl chloride (100-44-7)			0.13	
beryllium (7440-41-7)	0.28			
beryllium chloride (7787-47-5)	0.28			
beryllium fluoride (7787-49-7)	0.28			
beryllium nitrate (13597-99-4)	0.28			
bioavailable chromate pigments, as chromium (VI) equivalent	0.0056			
bis-chloromethyl ether (542-88-1)	0.025			
bromine (7726-95-6)				0.052
1,3-butadiene (106-99-0)	12			
cadmium (7440-43-9)	0.37			
cadmium acetate (543-90-8)	0.37			
cadmium bromide (7789-42-6)	0.37			
carbon disulfide (75-15-0)		3.9		
carbon tetrachloride (56-23-5)	460			
chlorine (7782-50-5)		0.79		0.23
chlorobenzene (108-90-7)		46		
chloroform (67-66-3)	290			
chloroprene (126-99-8)		9.2	0.89	
cresol (1319-77-3)			0.56	
p-dichlorobenzene (106-46-7)				16.8
dichlorodifluoromethane (75-71-8)		5200		
dichlorofluoromethane (75-43-4)		10		
di(2-ethylhexyl)phthalate (117-81-7)		0.63		
dimethyl sulfate (77-78-1)		0.063		
1,4-dioxane (123-91-1)		12		
epichlorohydrin (106-89-8)	5600			
ethyl acetate (141-78-6)			36	
ethylenediamine (107-15-3)		6.3	0.64	
ethylene dibromide (106-93-4)	27			
ethylene dichloride (107-06-2)	260			
ethylene glycol monoethyl ether (110-80-5)		2.5	0.48	
ethylene oxide (75-21-8)	1.8			
ethyl mercaptan (75-08-1)			0.025	
fluorides		0.34	0.064	
formaldehyde (50-00-0)				0.04
hexachlorocyclopentadiene (77-47-4)		0.013	0.0025	
hexachlorodibenzo-p-dioxin (57653-	0.0051			

APPROVED RULES

Pollutant (CAS Number)	Carcinogens lb/yr	Chronic Toxicants lb/day	Acute Systemic Toxicants lb/hr	Acute Irritants lb/hr
85-7)				
n-hexane (110-54-3)		23		
hexane isomers except n-hexane				92
hydrazine (302-01-2)		0.013		
hydrogen chloride (7647-01-0)				0.18
hydrogen cyanide (74-90-8)		2.9	0.28	
hydrogen fluoride (7664-39-3)		0.63		0.064
hydrogen sulfide (7783-06-4)		1.7		
maleic anhydride (108-31-6)		0.25	0.025	
manganese and compounds		0.63		
manganese cyclopentadienyl tricarbonyl (12079-65-1)		0.013		
manganese tetroxide (1317-35-7)		0.13		
mercury, alkyl		0.0013		
mercury, aryl and inorganic compounds		0.013		
mercury, vapor (7439-97-6)		0.013		
methyl chloroform (71-55-6)		250		64
methylene chloride (75-09-2)	1600		0.39	
methyl ethyl ketone (78-93-3)		78		22.4
methyl isobutyl ketone (108-10-1)		52		7.6
methyl mercaptan (74-93-1)			0.013	
nickel carbonyl (13463-39-3)		0.013		
nickel metal (7440-02-0)		0.13		
nickel, soluble compounds, as nickel		0.013		
nickel subsulfide (12035-72-2)	0.14			
nitric acid (7697-37-2)				0.256
nitrobenzene (98-95-3)		1.3	0.13	
n-nitrosodimethylamine (62-75-9)	3.4			
non-specific chromium (VI) compounds, as chromium (VI) equivalent	0.0056			
pentachlorophenol (87-86-5)		0.063	0.0064	
perchloroethylene (127-18-4)	13000			
phenol (108-95-2)			0.24	
phosgene (75-44-5)		0.052		
phosphine (7803-51-2)				0.032
polychlorinated biphenyls (1336-36- 3)	5.6			
soluble chromate compounds, as chromium (VI) equivalent		0.013		
styrene (100-42-5)			2.7	
sulfuric acid (7664-93-9)		0.25	0.025	
tetrachlorodibenzo-p-dioxin (1746- 01-6)	0.00020			
1,1,1,2-tetrachloro-2,2,- difluoroethane (76-11-9)		1100		
1,1,2,2-tetrachloro-1,2- difluoroethane (76-12-0)		1100		
1,1,2,2-tetrachloroethane (79-34-5)	430			
toluene (108-88-3)		98		14.4
toluene diisocyanate,2,4-(584-84-9) and 2,6- (91-08-7) isomers		0.003		

Pollutant (CAS Number)	Carcinogens lb/yr	Chronic Toxicants lb/day	Acute Systemic Toxicants lb/hr	Acute Irritants lb/hr
trichloroethylene (79-01-6)	4000			
trichlorofluoromethane (75-69-4)			140	
1,1,2-trichloro-1,2,2-trifluoroethane (76-13-1)				240
vinyl chloride (75-01-4)	26			
vinylidene chloride (75-35-4)		2.5		
xylene (1330-20-7)		57		16.4

History Note: Authority G.S. 143-215.3(a)(1); 143-215.108; 143B-282; S L. 1989, c. 168, s. 45;
 Rule originally codified as part of 15A NCAC 02H .0610;
 Eff. July 1, 1998;
 Amended Eff. April 1, 2005; April 1, 2001.

15A NCAC 02Q .0809 CONCRETE BATCH PLANTS

- (a) This Rule applies to concrete batch plants that use fabric filters or equivalently effective control devices to control particulate emissions from the storage silos and the weigh hopper that receives materials from the cement and cement supplemental (mineral admixture) silos.
- (b) For the purpose of this Rule, potential emissions shall be determined using actual cubic yards of wet concrete produced.
- (c) Any concrete batch plant that produces less than 1,210,000 cubic yards of wet concrete per year shall be exempted from the requirements of Section .0500 of this Subchapter.
- (d) The owner or operator of any concrete batch plant exempted by this Rule from Section .0500 of this Subchapter shall submit to the regional supervisors of the appropriate Division regional office by March 1 of each year a report containing the following information:
 - (1) name and location of the concrete batch plant;
 - (2) current air permit number;
 - (3) number of cubic yards of wet concrete produced during the previous calendar year; and
 - (4) signature of the appropriate official as identified in Rule .0304(j) of this Subchapter certifying as to the truth and accuracy of the report.
- (e) The owner or operator of any concrete batch plant exempted by this Rule from Section .0500 of this Subchapter shall provide documentation of the cubic yards of wet concrete produced to the Director upon request. The owner or operator of a concrete batch plant exempted by this Rule from Section .0500 of this Subchapter shall retain records to document the cubic yards of wet concrete produced per year for the previous three years.
- (f) For concrete batch plants covered by this Rule, the owner or operator shall report to the Director any exceedance of a requirement of this Rule within one week of its occurrence.

History Note: Authority G.S. 143-215.3(a); 143-215.107(a)(10); 143-215.108;
 Eff. June 1, 2004.

15A NCAC 10B .0409 SALE OF LIVE FOXES AND COYOTES TO CONTROLLED FOX HUNTING PRESERVES

Licensed trappers may, subject to the restrictions on taking foxes in G.S.113- 291.4, live-trap foxes and coyotes during any open trapping season for foxes and coyotes, and sell them to licensed controlled fox hunting preserves in accordance with the following conditions:

- (1) Licensed trappers are exempt from caging, captivity permit or captivity license requirements set forth in 15A NCAC 10H .0300 for any live-trapped foxes or coyotes trapped for the purpose of sale to controlled hunting preserves. This exemption shall apply during the trapping season and for a period of 10 days after the trapping season.
- (2) Licensed trappers are exempt from tagging requirements set forth in this Section so long as the foxes are kept alive.
- (3) Live foxes and coyotes taken under a depredation permit may be sold to controlled hunting preserves.

History Note: Authority G.S. 113-134; 113-273(g);113-291.4;
 Eff. January 1, 1992.
 Amended Eff. June 1, 2004.

15A NCAC 10F .0333 MECKLENBURG AND GASTON COUNTIES

(a) Regulated Areas. This Rule applies to the following waters of Lake Wylie in Mecklenburg and Gaston Counties:

- (1) McDowell Park – The waters of the coves adjoining McDowell Park and the Southwest Nature Preserve in Mecklenburg County, including the entrances to the coves on either side of Copperhead Island;
- (2) Gaston County Wildlife Club Cove – The waters of the cove at the Gaston County Wildlife Club on South Point Peninsula in Gaston County;
- (3) Buster Boyd Bridge- The areas 250 feet to the north and 150 feet to the south of the Buster Boyd Bridge;
- (4) Highway 27 Bridge – The area beginning 50 yards north of the NC 27 Bridge and extending 50 yards south of the southernmost of two

railroad trestles immediately downstream from the NC 27 Bridge;

- (5) Brown's Cove – The area beginning at the most narrow point of the entrance to Brown's Cove and extending 250 feet in both directions; and
- (6) Paradise Point Cove – The waters of the Paradise Point Cove between Paradise Circle and Lakeshore Drive as delineated by appropriate markers.
- (7) Withers Cove - The area 50 feet on either side of Withers Bridge.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any public boat-launching ramp, dock, pier, marina, boat storage structure or boat service area..

(c) Speed Limit in Marked Swimming or Mooring Areas. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked mooring area or marked swimming area.

(d) Placement and Maintenance of Markers. The Lake Wylie Marine Commission is designated a suitable agency for placement and maintenance of markers implementing this Rule.

History Note: Authority G.S. 75A-3; 75A-15; Eff. July 1, 1980; Amended Eff. July 1, 1994; June 1, 1985; June 1, 1984; March 1, 1983; Temporary Amendment Eff. January 1, 1998; Amended Eff. July 1, 1998; Temporary Amendment Eff. February 4, 2000; Amended Eff. June 1, 2004; July 1, 2000.

15A NCAC 12K .0103 FUNDING CYCLE

Annual funding schedule dates shall be the following:

- (1) An announcement letter describing the funding schedule and how to apply shall be mailed to all eligible applicants by September 30. This information shall be made available to other interested parties who contact the Department of Environment and Natural Resources (Department) at: NC Division of Parks and Recreation, PO Box 27687, Raleigh, North Carolina 27611-7687.
- (2) Local governments may request a maximum of five hundred thousand dollars (\$500,000) in PARTF assistance with each application.
- (3) Applications shall be received by the Department or its designee by 5:00 p.m. on January 31. If the deadline falls on a weekend or holiday, applications are due by 5:00 p.m. on the following business day.
- (4) The Authority shall meet within 120 days of the application deadline to select projects for funding. The Authority shall meet within 30 days after the end of the fiscal year to select projects for funding using revenues credited to PARTF during the fourth quarter.

History Note: Authority G.S. 113-44.15;

Temporary Adoption Eff. November 1, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Eff. April 1, 1995;

Amended Eff. June 1, 2004; August 1, 1998.

15A NCAC 12K .0105 EVALUATION OF APPLICATIONS

(a) Each completed application shall be evaluated by the Department or its designee on the information provided in the application and in accordance with the PARTF criteria described in Paragraph (d) of this Rule.

(b) The Authority shall review the project evaluations and other relevant data prepared by the applicant and by Department staff. The Authority shall approve projects for funding.

(c) All general criteria in Paragraph (d) of this Rule shall be addressed by the applicant. The Department or its designee shall review all applications for completeness. Incomplete applications shall be returned to the applicant.

(d) The following general criteria shall be used to evaluate projects.

- (1) New public recreation facilities provided by the project;
- (2) The degree of local recreational planning for the project and how the specific elements in the project conform to the plan(s);
- (3) The acquisition or the conservation of unique natural, cultural, recreational, or scenic resources;
- (4) The level of public involvement in developing and supporting the project;
- (5) The applicant's commitment to operating and maintaining the project;
- (6) The suitability of the site for the proposed project development;
- (7) The level of compliance with prior grant agreements; and
- (8) Other factors, such as the geographic distribution of projects, the presence or absence of other funding sources, the population of the applicant, the amount of funds available, and the amount of funds requested.

History Note: Authority G.S. 113-44.15; Temporary Adoption Eff. November 1, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Eff. April 1, 1995;

Amended Eff. June 1, 2004; August 1, 1998.

15A NCAC 18A .3506 SANITATION

Primitive experience camps may conduct cookouts, overnight trips or similar primitive camping activities provided accepted sanitation standards are maintained in accordance with the provisions of this Section. Written procedures regarding sanitation standards shall be posted or made readily available for inspection by the Department. It is the responsibility of the primitive experience camp to ensure that the approved procedures are being practiced, utilized and maintained.

Minimum sanitation requirements for Primitive Experience Camps are as follows:

- (1) Off Site Food: Storage, Preparation and Cooking shall meet the following requirements.
 - (a) Temperature control, food preparation and food protection methods shall be implemented to ensure all potentially hazardous foods stored and prepared for off-site cooking maintain temperatures of 45 degrees or less or 140 degrees or higher and are protected from contamination. Written procedures describing the specific off site cooking activity and the proposed temperature control methods shall be submitted to the Department for approval. Any proposed changes to current procedures shall be submitted at least 10 working days prior to the scheduled activity. Specific approvals will remain valid so long as the activity remains part of the camp program unless the Department determines that procedures are not being maintained in accordance with the approval. The owner may request modifications to the original approval by submitting the request at least 10 working days prior to the scheduled activity. Where potentially hazardous foods are prepared off site, written procedures shall also include methods to prevent cross contamination. For the purpose of off-site food storage coolers with ice or ice packs are considered an approved method of temperature control. Off site potentially hazardous foods once cooked shall be consumed within two hours or discarded. Poultry stuffings, stuffed meats, and stuffings containing meat shall not be used.
 - (b) Potentially hazardous foods shall be thawed:
 - (i) in cold holding units at a temperature not to exceed 45° F (7°C);
 - (ii) under potable running water of a temperature of 70° F (21°C), or below, with sufficient water velocity to agitate and float off loose food particles into the overflow; or
 - (iii) as a part of the conventional cooking process.
 - (c) Potentially hazardous foods requiring cooking shall be cooked to heat all

parts of the food to a temperature of at least 140° F (60° C) except as follows:

- (i) poultry shall be cooked to at least 165° F (74°C) with no interruption of the cooking process; and
- (ii) pork and any food containing pork shall be cooked to heat all parts of the food to at least 150° F (66° C); and
- (iii) ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C); and
- (iv) rare roast beef shall be cooked to an internal temperature of at least 130° F (54° C); and
- (v) rare beef steak shall be cooked to a temperature of 130° F (54°C) unless otherwise ordered by the immediate consumer.
- (d) Liquid eggs, uncooked frozen dry eggs and egg products shall be cooked before consumption. This Paragraph does not apply to pasteurized products.
- (e) A food thermometer accurate to +/- 2 degrees F (+/- 1 degree C) shall be available to check food temperatures.
- (2) Off-Site Drinking Water
 - (a) Water transported for off site drinking shall be from an approved source and shall be transported and stored in clean, sanitized containers designated solely for this purpose. Where it is not practical to transport drinking water for off site activities, bactericidal treatment measures shall be provided to ensure that drinking water is free from disease causing organisms.
 - (b) Water shall be taken from free-flowing streams, springs and wells, however, water may be taken from still sources when free-flowing sources are unavailable. Water to be treated shall be visibly clear and free from debris, trash and organic matter.
- (3) Approved Methods of Bactericidal Treatment of Off-Site Drinking Water
 - (a) Boiling: Water shall be brought to a rolling boil for a minimum of 5 minutes.
 - (b) Chlorine: A minimum of 2 ppm free chlorine residual must be maintained

- for a minimum of 30 minutes. This method shall be used in conjunction with Subitem (3)(a) or (d) of this Rule.
- (c) Iodine: A minimum of 5 drops of 2% tincture of iodine per liter of water. For commercially prepared tablets, use per manufacturer's directions. This method shall be used in conjunction with Subitem (3)(a) or (d) of this Rule.
- (d) Filtration: Filter systems shall be capable of removing bacteria, cysts, and viruses. Filters shall have an absolute pore size of one micron or smaller.
- (4) Utensils and Equipment shall meet the following requirements:
 - (a) All eating, drinking, and cooking utensils, and other items used in connection with the preparation of food shall be kept clean and in good repair.
 - (b) All surfaces intended for multi use between campers or staff with which food or drink comes in contact shall consist of smooth, not readily corrodible, non-toxic materials in which there are no open cracks or joints that will collect food particles, slime, and be kept clean.
 - (c) Multi-use drinking and eating utensils intended for individual use shall be constructed of not readily corrodible, non toxic materials. Those multi-use drinking and eating utensils which do not meet all the construction provisions of Subitem (4)(b) of this Rule, shall be used by only one person and not reassigned to or reused by another individual.
 - (d) Where multi-use utensils are used, they shall be assigned to one individual and not shared until cleaned and sanitized by approved methods.
- (5) Cleaning of Utensils and Equipment shall meet the following requirements:
 - (a) Utensils and equipment shall be kept clean.
 - (b) Water used for cleaning shall meet the requirements of Items (2) and (3) of this Rule.
 - (c) Where an approved sanitizing process can not be implemented, each individual's multi-use utensils shall be cleaned separately to prevent cross contamination.
 - (d) Multi-use utensils may be cleaned together provided they are washed,

- rinsed, and sanitized by approved methods.
- (6) Handwashing for food preparers shall be in compliance with Rule .3515(c) of this Section.
- (7) Toxic materials shall be labeled and stored to prevent contamination of food, equipment and utensils.
- (8) Where permanent human waste disposal facilities which meet the requirements of 15A NCAC 18A .1900 are not provided at an off site activity, written procedures for waste disposal shall be provided to and approved by the Department. Disposal of human waste shall be in a hole that is at least six inches deep and has a diameter of at least four inches located at least 200 feet from any surface water. After use the hole shall be back filled with a soil to a depth of six inches.

History Note: Authority G.S. 130A-248; Eff. June 1, 2004.

TITLE 19A - DEPARTMENT OF TRANSPORTATION

19A NCAC 03G .0207 RENEWAL OF CERTIFICATION

Every driver must be re-certified at the time of the expiration of his Commercial Driver License upon passing the four written tests (general knowledge, passenger transport, school bus, and air brakes), a pre-trip inspection observation, a driving observation, and an eye screening. A driver shall be exempted from the written tests, provided he has accumulated no more than three points on his driving record since his last certification and has had at least one hour of in-service training for each year since his last certification. A driver whose certification expires may be re-certified within 30 days in the same manner as though his certification had not expired. Any driver whose certification expires for more than 30 days may be re-certified within the next year following the expiration upon passing the four written tests (general knowledge, passenger transport, school bus, and air brakes), the three skills tests (pre-trip inspection, basic skills, and road), and an eye screening. If more than one year has elapsed since the expiration of the most recent certification, the applicant must complete the full training course required of a beginning driver.

History Note: Authority G.S. 20-39(b); 20-218; Eff. April 1, 1989; Amended Eff. June 1, 2004; August 1, 2000; July 1, 1994; August 1, 1991.

19A NCAC 03G .0209 CANCELLATION OF CERTIFICATION

- (a) The Division of Motor Vehicles shall cancel the school bus driver certificate of any driver for the following reasons:
 - (1) Any determination that the certificate was issued on the basis of misinformation, false statements, or fraud.
 - (2) A suspension, revocation, or cancellation of the driver license.

- (3) Conviction of any of the following motor vehicle moving offenses:
 - (A) Driving while impaired;
 - (B) Passing a stopped school bus;
 - (C) Hit and run;
 - (D) Careless and reckless driving;
 - (E) Excessive speeding involving a single charge of speeding more than 15 miles per hour above the posted speed limit;
 - (F) Two convictions within a period of 12 months;
 - (G) A violation committed while operating a school bus.
 - (H) A violation of any State or local law relating to motor vehicle traffic control, other than a parking violation, arising in connection with a fatal accident;
 - (I) Improper or erratic lane changes;
 - (J) Following the vehicle ahead too closely;
 - (K) Driving a commercial motor vehicle without obtaining a commercial drivers license;
 - (L) Driving a commercial motor vehicle without a commercial drivers license in the driver's possession. However, a person shall not be convicted of failing to carry a commercial drivers license if by the date the person is required to appear in court for the violation he or she produces to the court a commercial drivers license that was valid on the date of the offense;
 - (M) Driving a commercial motor vehicle without the proper class of commercial drivers license or endorsements for the specific vehicle group being operated or for the passenger or type of cargo being transported.
- (4) A determination of physical or mental inadequacy under the provisions of the physical requirements noted in Rule .0205 of this Section.
- (5) A local cancellation of certification, in the discretion of the local administrative unit, for violation of local regulations, submitted to the Driver Education Specialist for cancellation at the state level. If there is not an offense or conviction that would require a mandatory cancellation by the Section, the Driver Education Specialist shall handle the cancellation locally by canceling the certificate at the garage and retain the pocket card in his files.

- (6) A driving record which in its overall character arouses question about the reliability, judgment, or emotional stability of the driver.
- (7) Conviction of a violation of G.S. 20-142.1 through 20-142.5 when the driver is operating a commercial motor vehicle. The driver shall be disqualified from driving a commercial motor vehicle as follows:
 - (A) For a period of 60 days if convicted of a first violation of a railroad grade crossing offense listed in this Subparagraph;
 - (B) For a period of 120 days if convicted during any three-year period of a second violation of any combination of railroad grade crossing offenses listed in this subparagraph;
 - (C) For a period of one year if convicted during any three-year period of a third or subsequent violation of any combination of railroad grade crossing offenses listed in this Subparagraph.

(b) Upon recommendation of the Driver Education Specialist or local school officials, the Division of Motor Vehicles shall require re-examination of any certified driver whose qualifications become questionable or who exhibits evidence of improper or unsafe driving practices and driving procedures. If such a re-examination reveals a problem, the Driver Education Specialist shall suspend the certified driver from driving any school bus pending re-training of the driver. If the problem cannot be corrected, the Driver Education Specialist shall cancel the certification of the school bus driver.

History Note: Authority G.S. 20-39(b); 20-218; Eff. April 1, 1989; Amended Eff. June 1, 2004; August 1, 2000; December 1, 1993; August 1, 1991; September 1, 1990.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

CHAPTER 46 - BOARD OF PHARMACY

21 NCAC 46 .1604 WHEN NEW PERMIT NOT REQUIRED

- (a) A new pharmacy, device or medical equipment permit is not required in the following situations:
 - (1) the permit holder is a publicly-traded corporation and continues to hold the permit; or
 - (2) the permit holder is a corporation which is a wholly-owned subsidiary, and any change in the ownership of any corporation in the chain of ownership above the permit holder is due to the stock of such corporation being publicly-traded.
- (b) A permit which has been served with a notice of hearing for a pending disciplinary proceeding before the Board may not be surrendered.

History Note: Authority G.S. 90-85.6; 90-85.21; 90-85.22; Eff. May 1, 1989; Amended Eff. June 1, 2004; April 1, 2001; August 1, 1998; May 1, 1997; September 1, 1995.

21 NCAC 46.1806 TRANSFER OF PRESCRIPTION INFORMATION

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

- (1) the transfer is communicated directly from either a pharmacist or certified technician to either a pharmacist or certified technician and not by only one pharmacist or certified technician gaining access to an information file containing data for several locations, unless all locations accessed are under common ownership or accessed pursuant to contractual agreement of the pharmacies;
- (2) the transferring pharmacist or certified technician invalidates the prescription and any remaining refills at the transferring pharmacy by marking the word "void" on the face of the prescription or its equivalent;
- (3) the transferring pharmacist or certified technician records the name and address of the pharmacy to which it was transferred and the name of the pharmacist or certified technician receiving the prescription information on the reverse of the invalidated prescription;
- (4) the transferring pharmacist or certified technician records the date of the transfer and the name of the pharmacist or certified technician transferring the information.

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

- (1) The word "transfer" on the face of the transferred prescription;
- (2) All information required to be on a prescription, including:
 - (A) Date of issuance of original prescription;
 - (B) Number of refills authorized on original prescription;
 - (C) Date and time of transfer;
 - (D) Number of valid refills remaining and date of last refill;
 - (E) Pharmacy's name, address and original prescription number from which the prescription information was transferred;
 - (F) Name of transferring pharmacist or certified technician; and
 - (G) Manufacturer or brand of drug dispensed.

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

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

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

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

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

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

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

History Note: Authority G.S. 90-85.6(a); 90-85.32; Eff. December 31, 1985; Amended Eff. June 1, 2004; September 1, 1995; July 1, 1992; May 1, 1989.

21 NCAC 46.2504 PATIENT COUNSELING

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

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

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

(c) In order to counsel patients effectively, a reasonable effort shall be made to obtain, record, and maintain significant patient information, including:

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

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

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

- (1) therapeutic duplication;
- (2) drug-disease contraindication;

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

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

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

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

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

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

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

History Note: Authority G.S. 90-85.6; 90-85.22; 90-85.32; 42 U.S.C. 1396r-8(g); Eff. January 4, 1993; Amended Eff. June 1, 2004; July 1, 1996; September 1, 1995.

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. For the purposes of this rule, an agreement between licensees to cooperate or share compensation shall not be considered an agreement for brokerage services and, except as required by Rule .1807 of this Subchapter, need not be memorialized in writing.

(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. For the purposes of this Rule, "first substantial contact" shall include contacts between a broker or salesperson and a consumer where the consumer or broker or salesperson begins to act as though an agency relationship exists and the consumer begins to disclose to the broker or salesperson personal or confidential information.

(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); 41A-4(a); 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; 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 .0105 ADVERTISING

(a) **Blind Ads.** A licensee shall not advertise the sale, purchase, exchange, rent or lease of real estate, for another or others, in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the licensee's principal only. Every such advertisement shall conspicuously indicate that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, or street address.

(b) **Registration of Assumed Name.** In the event that any licensee shall advertise in any manner using a firm name or an assumed name which does not set forth the surname of the licensee, the licensee shall first file the appropriate certificate with the office of the county register of deeds in compliance with G.S. 66-68 and notify the Commission in writing of the use of such a firm name or assumed name.

(c) **Authority to Advertise.**

- (1) A salesperson shall not advertise the sale, purchase, exchange, rent or lease of real estate for another or others without his or her broker's consent and without including in the advertisement the name of the broker or firm with whom the salesperson is associated.
- (2) A licensee shall not advertise or display a "for sale" or "for rent" sign on any real estate without the consent of the owner or his or her authorized agent.

(d) **Business names.** A licensee shall not include the name of a salesperson or an unlicensed person in the name of a sole proprietorship, partnership or non-corporate business formed for the purpose of real estate brokerage.

(e) A person licensed as a limited nonresident commercial broker or salesperson shall comply with the provisions of Rule .1809 of this Subchapter in connection with all advertising concerning or relating to his or her status as a North Carolina licensee.

History Note: Authority G.S. 55B-5; 66-68; 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; October 1, 2000; August 1, 1998; April 1, 1997; July 1, 1989; February 1, 1989.

21 NCAC 58A .0107 HANDLING AND ACCOUNTING OF FUNDS

(a) All monies received by a licensee acting in his or her fiduciary capacity shall be deposited in a trust or escrow account maintained by a broker not later than three banking days following receipt of such monies except that earnest money deposits paid by means other than currency which are received on offers to purchase real estate and tenant security deposits paid

by means other than currency which are received in connection with real estate leases shall be deposited in a trust or escrow account not later than three banking days following acceptance of such offer to purchase or lease; the date of acceptance of such offer to purchase or lease shall be set forth in the purchase or lease agreement. All monies received by a salesperson shall be delivered immediately to the broker by whom he or she is employed, except that all monies received by nonresident commercial licensees shall be delivered as required by Rule .1808 of this Subchapter.

(b) In the event monies received by a licensee while acting in a fiduciary capacity are deposited in a trust or escrow account which bears interest, the broker having custody over such monies shall first secure from all parties having an interest in the monies written authorization for the deposit of the monies in an interest-bearing account. Such authorization shall specify how and to whom the interest will be disbursed, and, if contained in an offer, contract, lease, or other transaction instrument, such authorization shall be set forth in a conspicuous manner which shall distinguish it from other provisions of the instrument.

(c) Closing statements shall be furnished to the buyer and the seller in the transaction at the closing or not more than five days after closing.

(d) Trust or escrow accounts shall be so designated by the bank or savings and loan association in which the account is located, and all deposit tickets and checks drawn on said account as well as the monthly bank statement for the account shall bear the words "Trust Account" or "Escrow Account."

(e) A licensee shall maintain and retain records sufficient to identify the ownership of all funds belonging to others. Such records shall be sufficient to show proper deposit of such funds in a trust or escrow account and to verify the accuracy and proper use of the trust or escrow account. The required records shall include:

- (1) bank statements;
- (2) canceled checks which shall be referenced to the corresponding journal entry or check stub entries and to the corresponding sales transaction ledger sheets or for rental transactions, the corresponding property or owner ledger sheets. Checks shall conspicuously identify the payee and shall bear a notation identifying the purpose of the disbursement. When a check is used to disburse funds for more than one sales transaction, owner, or property, the check shall bear a notation identifying each sales transaction, owner, or property for which disbursement is made, including the amount disbursed for each, and the corresponding sales transaction, property, or owner ledger entries. When necessary, the check notation may refer to the required information recorded on a supplemental disbursement worksheet which shall be cross-referenced to the corresponding check. In lieu of retaining canceled checks, a licensee may retain digitally imaged copies of the canceled checks provided that such images are legible reproductions of the front and back of the

original instruments with no more than four instruments per page and no smaller images than 2.25 x 5.0 inches, and provided that the licensee's bank retains the original checks on file for a period of at least five years and makes them available to the licensee and the Commission upon request;

- (3) deposit tickets. For a sales transaction, the deposit ticket shall identify the purpose and remitter of the funds deposited, the property, the parties involved, and a reference to the corresponding sales transaction ledger entry. For a rental transaction, the deposit ticket shall identify the purpose and remitter of the funds deposited, the tenant, and the corresponding property or owner ledger entry. For deposits of funds belonging to or collected on behalf of a property owner association, the deposit ticket shall identify the property or property interest for which the payment is made, the property or interest owner, the remitter, and the purpose of the payment. When a single deposit ticket is used to deposit funds collected for more than one sales transaction, property owner, or property, the required information shall be recorded on the ticket for each sales transaction, owner, or property, or the ticket may refer to the same information recorded on a supplemental deposit worksheet which shall be cross-referenced to the corresponding deposit ticket;
- (4) a payment record sheet for each property or interest for which funds are collected and deposited into a property owner association trust account as required by Paragraph (i) of this Rule. Payment record sheets shall identify the amount, date, remitter, and purpose of payments received, the amount and nature of the obligation for which payments are made, and the amount of any balance due or delinquency;
- (5) a separate ledger sheet for each sales transaction and for each property or owner of property managed by the broker identifying the property, the parties to the transaction, the amount, date, and purpose of the deposits and from whom received, the amount, date, check number, and purpose of disbursements and to whom paid, and the running balance of funds on deposit for the particular sales transaction or, in a rental transaction, the particular property or owner of property. Monies held as tenant security deposits in connection with rental transactions may be accounted for on a separate tenant security deposit ledger for each property or owner of property managed by the broker. For each security deposit the tenant security deposit ledger shall identify the remitter, the date the deposit was paid, the amount, the tenant, landlord, and subject

property. For each disbursement of tenant security deposit monies, the ledger shall identify the check number, amount, payee, date, and purpose of the disbursement. The ledger shall also show a running balance. When tenant security deposit monies are accounted for on a separate ledger as provided herein, deposit tickets, canceled checks and supplemental worksheets shall reference the corresponding tenant security deposit ledger entries when appropriate;

- (6) a journal or check stubs identifying in chronological sequence each bank deposit and disbursement of monies to and from the trust or escrow account, including the amount and date of each deposit and a reference to the corresponding deposit ticket and any supplemental deposit worksheet, and the amount, date, check number, and purpose of disbursements and to whom paid. The journal or check stubs shall also show a running balance for all funds in the account;
- (7) copies of contracts, leases and management agreements;
- (8) closing statements and property management statements;
- (9) covenants, bylaws, minutes, management agreements and periodic statements relating to the management of a property owner association; and
- (10) invoices, bills, and contracts paid from the trust account, and any documents not otherwise described herein necessary and sufficient to verify and explain record entries.

Records of all receipts and disbursements of trust or escrow monies shall be maintained in such a manner as to create an audit trail from deposit tickets and canceled checks to check stubs or journals and to the ledger sheets. Ledger sheets and journals or check stubs must be reconciled to the trust or escrow account bank statements on a monthly basis. To be sufficient, records of trust or escrow monies must include a worksheet for each such monthly reconciliation showing the ledger sheets, journals or check stubs, and bank statements to be in agreement and balance.

(f) All trust or escrow account records shall be made available for inspection by the Commission or its authorized representatives in accordance with Rule 21 NCAC 58A .0108.

(g) In the event of a dispute between the seller and buyer or landlord and tenant over the return or forfeiture of any deposit other than a residential tenant security deposit held by a licensee, the licensee shall retain said deposit in a trust or escrow account until the licensee has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction. If it appears to a broker holding a disputed deposit that a party has abandoned his or her claim, the broker may disburse the money to the other claiming parties according to their written agreement provided that the broker first makes a reasonable effort to notify the party who has apparently abandoned his or her claim and provides that party with an opportunity to renew his or her claim to the disputed

funds. Tenant security deposit monies shall be disposed of in accordance with the requirements of G.S. 42-50 through 56 and G.S. 42A-18.

(h) A broker may transfer earnest money deposits in his or her possession collected in connection with a sales transaction from his or her trust account to the closing attorney or other settlement agent not more than ten days prior to the anticipated settlement date. A licensee shall not disburse prior to settlement any earnest money in his or her possession for any other purpose without the written consent of the parties.

(i) The funds of a property owner association, when collected, maintained, disbursed or otherwise controlled by a licensee, are trust monies and shall be treated as such in the manner required by this Rule. Such funds must be deposited into and maintained in a trust or escrow account or accounts dedicated exclusively for funds belonging to a single property owners association and may not be commingled with funds belonging to other property owner associations or other persons or parties. A licensee who undertakes to act as manager of a property owner association or as the custodian of funds belonging to a property owner association shall provide the association with periodic statements which report the balance of association funds in the licensee's possession or control and which account for the funds the licensee has received and disbursed on behalf of the association. Such statements must be made in accordance with the licensee's agreement with the association, but in no event shall the statements be made less frequently than every 90 days.

(j) Every licensee shall safeguard the money or property of others coming into his or her possession in a manner consistent with the requirements of the Real Estate License Law and the rules adopted by the Commission. A licensee shall not convert the money or property of others to his or her own use, apply such money or property to a purpose other than that for which it was paid or entrusted to him or her, or permit or assist any other person in the conversion or misapplication of such money or property.

(k) In addition to the records required by Paragraph (e) of this Rule, a licensee acting as agent for the landlord of a residential property used for vacation rentals shall create and maintain a subsidiary ledger sheet for each property or owner of such properties onto which all funds collected and disbursed are identified in categories by purpose. On a monthly basis, the licensee shall reconcile the subsidiary ledger sheets to the corresponding property or property owner ledger sheet.

(l) In lieu of maintaining a subsidiary ledger sheet, the licensee may maintain an accounts payable ledger sheet for each owner or property and each vendor to whom trust monies are due for monies collected on behalf of the owner or property identifying the date of receipt of the trust monies, from whom the monies were received, rental dates, and the corresponding property or owner ledger sheet entry including the amount to be disbursed for each and the purpose of the disbursement. The licensee may also maintain an accounts payable ledger sheet in the format described in Paragraph (k) of this Rule for vacation rental tenant security deposit monies and vacation rental advance payments.

History Note: Authority G.S. 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; July 1, 2003; September 1, 2002;

August 1, 2000; August 1, 1998; July 1, 1996; July 1, 1993; May 1, 1990.

21 NCAC 58A .0108 RETENTION OF RECORDS

Licensees shall retain records of all sales, rental, and other transactions conducted in such capacity, whether the transaction is pending, completed or terminated prior to its successful conclusion. The licensee shall retain such records for three years after all funds held by the licensee in connection with the transaction have been disbursed to the proper party or parties or until the successful or unsuccessful conclusion of the transaction, whichever occurs later. Such records shall include contracts of sale, written leases, agency contracts, options, offers to purchase, trust or escrow records, earnest money receipts, disclosure documents, closing statements, brokerage cooperation agreements, declarations of affiliation, and any other records pertaining to real estate transactions. All such records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

History Note: Authority G.S. 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; September 1, 2002; August 1, 1998; February 1, 1989; February 1, 1988.

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 or branch office. 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, on 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 principal or 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.

(g) A nonresident commercial real estate broker licensed under the provisions of Section .1800 of this Subchapter shall not act as or serve in the capacity of a broker-in-charge of a firm or office in North Carolina.

History Note: Authority G.S. 93A-2; 93A-3(c); 93A-4; 93A-9;

Eff. September 1, 1983;

Amended Eff. July 1, 2004; 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 .0503 LICENSE RENEWAL; PENALTY FOR OPERATING WHILE LICENSE EXPIRED

(a) **(Effective until 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 prescribed by the Commission and submitting with the application the required renewal fee of forty dollars (\$40.00).

(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 or .1711 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-6.

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; July 1, 2004; December 4, 2002;

April 1, 1997; July 1, 1996; August 1, 1995.

21 NCAC 58A .0504 ACTIVE AND INACTIVE LICENSE STATUS

(a) Except for licenses that have expired or that have been revoked, suspended or surrendered, all licenses issued by the Commission shall be designated as being either on active status or inactive status. The holder of a license on active status may engage in any activity requiring a real estate license and may be compensated for the provision of any lawful real estate brokerage service. The holder of a license on inactive status may not engage in any activity requiring a real estate license, including the referral for compensation of a prospective seller, buyer, landlord or tenant to another real estate licensee or any other party. A licensee holding a license on inactive status must renew such license and pay the prescribed license renewal fee in order to continue to hold such license. The Commission may take disciplinary action against a licensee holding a license on inactive status for any violation of G.S. 93A or any rule promulgated by the Commission, including the offense of engaging in an activity for which a license is required while a license is on inactive status.

(b) Except as provided by Rule .1804 of this Subchapter, a salesperson's license shall, upon initial licensure, be assigned to inactive status. The license of a broker or firm shall be assigned to active status. Except for persons licensed under the provisions of Section .1800 of this Subchapter, a broker or salesperson may change the status of his or her license from active to inactive status by submitting a written request to the Commission. Except for salespersons licensed under Section .1800 of this Subchapter, a salesperson's license shall be assigned by the Commission to inactive status when the salesperson is not under the active, personal supervision of a broker-in-charge. A firm's license shall be assigned by the Commission to inactive status when the firm does not have a principal broker. Except for persons licensed under the provisions of Section .1800 of this Subchapter, a broker or salesperson shall also be assigned to inactive status if, upon the second renewal of his or her license following initial licensure, or upon any subsequent renewal, he or she has not satisfied the continuing education requirement described in Rule .1702 of this Subchapter.

(c) A salesperson with an inactive license who desires to have such license placed on active status must comply with the procedures prescribed in Rule .0506 of this Section.

(d) A broker with an inactive license who desires to have such license placed on active status shall file with the Commission a request for license activation on a form prescribed by the Commission containing identifying information about the broker, a statement that the broker has satisfied the continuing

education requirements prescribed by Rule .1703 of this Subchapter, the date of the request, and the signature of the broker. Upon the mailing or delivery of this form, the broker may engage in real estate brokerage activities requiring a license; however, if the broker does not receive from the Commission a written acknowledgment of the license activation within 30 days of the date shown on the form, the broker shall immediately terminate his or her real estate brokerage activities pending receipt of the written acknowledgment from the Commission. If the broker is notified that he or she is not eligible for license activation due to a continuing education deficiency, the broker must terminate all real estate brokerage activities until such time as the continuing education deficiency is satisfied and a new request for license activation is submitted to the Commission.

(e) A firm with an inactive license which desires to have its license placed on active status shall file with the Commission a request for license activation on a form prescribed by the Commission containing identifying information about the firm and its principal broker. If the principal broker has an inactive license, he or she must satisfy the requirements of Paragraph (d) of this Rule. Upon the mailing or delivery of the completed form by the principal broker, the firm may engage in real estate brokerage activities requiring a license; however, if the firm's principal broker does not receive from the Commission a written acknowledgment of the license activation within 30 days of the date shown on the form, the firm shall immediately terminate its real estate brokerage activities pending receipt of the written acknowledgment from the Commission. If the principal broker is notified that the firm is not eligible for license activation due to a continuing education deficiency on the part of the principal broker, the firm must terminate all real estate brokerage activities until such time as the continuing education deficiency is satisfied and a new request for license activation is submitted to the Commission.

(f) A person licensed as a broker or salesperson under Section .1800 of this Subchapter shall maintain his or her license on active status at all times as required by Rule .1804 of this Subchapter.

History Note: Authority G.S. 93A-3(c); 93A-4(d); 93A-4A; 93A-6; 93A-9;
Eff. February 1, 1976;
Readopted Eff. September 30, 1977;
Amended Eff. July 1, 2004; October 1, 2000; April 1, 1997;
July 1, 1996; July 1, 1995; July 1, 1994; February 1, 1989;
December 1, 1985.

21 NCAC 58A .1802 DEFINITIONS

For the purposes of this Section:

- (1) "Commercial Real Estate" means any real property or interest therein, whether freehold or non-freehold, which at the time the property or interest is made the subject of an agreement for brokerage services:
 - (a) is lawfully used primarily for sales, office, research, institutional, warehouse, manufacturing, industrial or mining purposes or for multifamily

- (b) residential purposes involving five or more dwelling units; may lawfully be used for any of the purposes listed in Subitem (1)(a) of this Rule by a zoning ordinance adopted pursuant to the provisions of G.S. 153A, Article 18 or G.S. 160A, Article 19 or which is the subject of an official application or petition to amend the applicable zoning ordinance to permit any of the uses listed in Subitem (1)(a) of this Rule which is under consideration by the government agency with authority to approve the amendment; or
- (c) is in good faith intended to be immediately used for any of the purposes listed in Subitem (1)(a) of this Rule by the parties to any contract, lease, option, or offer to make any contract, lease, or option.

- (2) "Qualifying state" means the state or territory of the United States where an applicant for, and the holder of, a limited nonresident commercial license issued under this Section is licensed in good standing as a real estate broker or salesperson. The qualifying state must be the state or territory where the applicant or limited nonresident commercial licensee maintains his or her primary place of business as a real estate broker or salesperson. Under no circumstances may North Carolina be a qualifying state.

History Note: Authority G.S. 93A-4; 93A-9;
Eff. July 1, 2004.

21 NCAC 58A .1803 REQUIREMENTS FOR LICENSURE; APPLICATION AND FEE

(a) A person desiring to obtain a broker or salesperson license under this Section shall demonstrate to the Real Estate Commission that:

- (1) he or she is a resident of a state or territory of the United States other than North Carolina;
- (2) he or she is licensed as a real estate broker or salesperson in a qualifying state and that said license is on active status and not in abeyance for any reason. If licensed as a salesperson, he or she shall also demonstrate that he or she is acting under the supervision of a broker in accordance with the applicable governing statutes or regulations in the qualifying state; and
- (3) he or she possesses the requisite honesty, truthfulness, integrity, and moral character for licensure as a broker or salesperson in North Carolina.

A person applying for licensure under this Section shall not be required to show that the state or territory where he or she is

currently licensed offers reciprocal licensing privileges to North Carolina brokers and salespersons.

(b) A person desiring to be licensed under this Section shall submit an application on a form prescribed by the Commission and shall show the Commission that he or she has satisfied the requirements set forth in Paragraph (a) of this Rule. In connection with his or her application a person applying for licensure under this Rule shall provide the Commission with a certification of license history from the qualifying state where he or she is licensed. He or she shall also provide the Commission with a report of his or her criminal history from the service designated by the Commission. An applicant for licensure under this Section shall be required to update his or her application as required by Rule .0302(c) of this Subchapter.

(c) The fee for persons applying for licensure under this Section shall be one hundred dollars (\$100.00) and shall be paid in the form of a certified check, bank check, cashier's check, money order, or by credit card. Once paid, the application fee shall be non-refundable.

(d) If the Commission has received a complete application and the required application fee and if the Commission is satisfied that the applicant possesses the moral character necessary for licensure, the Commission shall issue to the applicant a limited nonresident commercial real estate broker or salesperson license corresponding to the license the applicant possesses in the qualifying state.

History Note: Authority G.S. 93A-4; 93A-9; Eff. July 1, 2004.

21 NCAC 58A .1807 AFFILIATION WITH RESIDENT BROKER

(a) No person licensed under this Section shall enter North Carolina to perform any act or service for which licensure as a real broker or salesperson is required unless he or she has first entered into a brokerage cooperation agreement and declaration of affiliation with an individual who is a resident in North Carolina licensed as a North Carolina real estate broker.

(b) A brokerage cooperation agreement as contemplated by this Rule shall be in writing and signed by the resident North Carolina broker and the non-resident commercial licensee. It shall contain:

- (1) the material terms of the agreement between the signatory licenses;
- (2) a description of the agency relationships, if any, which are created by the agreement among the nonresident commercial licensee, the resident North Carolina broker, and the parties each represents;
- (3) a description of the property or the identity of the parties and other information sufficient to identify the transaction which is the subject of the affiliation agreement; and
- (4) a definite expiration date.

(c) A declaration of affiliation shall be written and on the form prescribed by the Commission and shall identify the nonresident commercial licensee and the affiliated resident North Carolina licensee. It shall also contain a description of the duties and obligations of each as required by the North Carolina Real Estate License Law and rules duly adopted by the Commission. The declaration of affiliation may be a part of the brokerage cooperation agreement or separate from it.

(d) A nonresident commercial licensee may affiliate with more than one resident North Carolina broker at any time. However, a nonresident commercial licensee may be affiliated with only one resident North Carolina broker in a single transaction.

(e) A resident North Carolina broker who enters into a brokerage cooperation agreement and declaration of affiliation with a nonresident commercial licensee shall:

- (1) verify that the nonresident commercial licensee is licensed in North Carolina;
- (2) actively and personally supervise the nonresident commercial licensee in a manner which reasonably insures that the nonresident commercial licensee complies with the North Carolina Real Estate License Law and rules adopted by the Commission; and
- (3) promptly notify the Commission if the nonresident commercial licensee violates the Real Estate License Law or rules adopted by the Commission; and
- (4) insure that records are retained in accordance with the requirements of the Real Estate License Law and rules adopted by the Commission.

(f) The nonresident commercial licensee and the affiliated resident North Carolina broker shall each retain in his or her records a copy of brokerage cooperation agreements and declarations of affiliation from the time of their creation and for at least three years following their expiration. Such records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

History Note: Authority G.S. 93A-4; 93A-9; Eff. July 1, 2004.

21 NCAC 58A .1809 ADVERTISING

In all advertising involving a nonresident commercial licensee's conduct as a North Carolina real estate broker or salesperson and in any representation of such person's licensure in North Carolina, the advertising or representation shall conspicuously identify the nonresident commercial licensee as a "Limited Nonresident Commercial Real Estate Broker (or Salesperson)."

History Note: Authority G.S. 93A-4; 93A-9; Eff. July 1, 2004.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday, July 22, 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, July 16, 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

Jim R. Funderburke - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Thomas Hilliard, III
Robert Saunders
Jeffrey P. Gray

Appointed by House

Jennie J. Hayman - Chairman
Graham Bell
Lee Settle
Dana E. Simpson
Dr. John Tart

RULES REVIEW COMMISSION MEETING DATES

July 22, 2004
August 19, 2004 September 16, 2004
October 21, 2004 November 18, 2004
December 16, 2004

Commission Review/Administrative Rules

Log of Filings (Log #211)
May 21, 2004 through June 21, 2004

DEPARTMENT OF ADMINISTRATION

Responsibility	1 NCAC 41C .0101	Adopt
Scope	1 NCAC 41C .0102	Adopt
Rule Making Authority	1 NCAC 41C .0103	Adopt
Definitions	1 NCAC 41C .0104	Adopt
Eligibility	1 NCAC 41C .0201	Adopt
Criteria for Energy Conservation Loans	1 NCAC 41C .0202	Adopt
Conditions and Limitations	1 NCAC 41C .0203	Adopt
Pre-Application Conference	1 NCAC 41C .0204	Adopt
Application Procedures	1 NCAC 41C .0205	Adopt
Application Review	1 NCAC 41C .0206	Adopt
Loan Approval	1 NCAC 41C .0207	Adopt
Loan Agreement and promissory Note	1 NCAC 41C .0208	Adopt
Reports	1 NCAC 41C .0209	Adopt
Monitoring	1 NCAC 41C .0210	Adopt
Default	1 NCAC 41C .0211	Adopt
Technical Analysis Required	1 NCAC 41C .0301	Adopt
Technical Analyst Qualifications	1 NCAC 41C .0302	Adopt
Report Required	1 NCAC 41C .0303	Adopt

BANKING COMMISSION

Petitions	4 NCAC 03B .0101	Amend
Notice	4 NCAC 03B .0102	Amend
Hearings	4 NCAC 03B .0103	Amend
Declaratory Rulings	4 NCAC 03B .0105	Amend
Banking Commission Hearings	4 NCAC 03B .0201	Repeal
Hearings Before the Commissioner of Banks	4 NCAC 03B .0202	Repeal
Request for Hearing	4 NCAC 03B .0203	Repeal
Notice	4 NCAC 03B .0204	Repeal
Written Answer to Notice	4 NCAC 03B .0205	Repeal

Representation by an Attorney	4 NCAC 03B .0206	Repeal
Discovery	4 NCAC 03B .0209	Repeal
Rules of Evidence	4 NCAC 03B .0210	Repeal
Pre-Hearing Conference	4 NCAC 03B .0211	Repeal
Place and Forum for Contested Cases	4 NCAC 03B .0212	Repeal
Failure to Appear for a Contested Case	4 NCAC 03B .0213	Repeal
Consolidation of Contested Cases	4 NCAC 03B .0214	Repeal
Intervention of a New Party Into a Contested Case	4 NCAC 03B .0215	Repeal
Disqualification of Hearing Officer	4 NCAC 03B .0216	Repeal
Subpoenas	4 NCAC 03B .0217	Repeal
Public Inspection of Files	4 NCAC 03B .0218	Repeal
Definitions	4 NCAC 03B .0219	Adopt
Hearings	4 NCAC 03B .0220	Adopt
Application of the Rules of Civil Procedure	4 NCAC 03B .0221	Adopt
Filing of Documents	4 NCAC 03B .0222	Adopt
Request for a Hearing	4 NCAC 03B .0223	Adopt
Date Time and Location of the Hearing Motions to	4 NCAC 03B .0224	Adopt
Motions	4 NCAC 03B .0225	Adopt
Pre-Hearing Conference	4 NCAC 03B .0226	Adopt
Hearings	4 NCAC 03B .0227	Adopt
Stipulations	4 NCAC 03B .0228	Adopt
Appointment of Appellate Panel	4 NCAC 03B .0301	Adopt
Record on Appeal Hearing Date Memoranda of Law	4 NCAC 03B .0302	Adopt
Oral Argument	4 NCAC 03B .0303	Adopt
Commission Review of Appellate Panel's Recommended	4 NCAC 03B .0304	Adopt

DHHS/MEDICAL CARE COMMISSION

Filing Applications	10A NCAC 14C .0203	Amend
Definitions	10A NCAC 14C .3801	Adopt
Information Required of Applicant	10A NCAC 14C .3802	Adopt
Performance Standards	10A NCAC 14C .3803	Adopt
Support Services	10A NCAC 14C .3804	Adopt
Staffing and Staff Training	10A NCAC 14C .3805	Adopt

DEPARTMENT OF INSURANCE

Request for Hearing	11 NCAC 01 .0403	Amend
Duties of the Hearing Officer	11 NCAC 01 .0416	Amend
Settlement Conference	11 NCAC 01 .0418	Amend
Intervention	11 NCAC 01 .0425	Amend
Rights and Responsibilities of Parties	11 NCAC 01 .0427	Amend
Evidence	11 NCAC 01 .0429	Amend
Applicability and Scope	11 NCAC 11F .0301	Amend
Definitions	11 NCAC 11F .0302	Amend
General Requirements	11 NCAC 11F .0303	Amend
Required Opinions	11 NCAC 11F .0304	Repeal
Opinion Without Asset Adequacy Analysis	11 NCAC 11F .0305	Repeal
Opinion Based on Asset Adequacy Analysis	11 NCAC 11F .0306	Amend
Actuarial Memorandum with Asset Adequacy Analysis	11 NCAC 11F .0307	Amend
Additional Considerations for Analysis	11 NCAC 11F .0308	Amend
Free Look Provision	11 NCAC 12 .0447	Repeal

NC PRIVATE PROTECTIVE SERVICES BOARD

Requirements for a Firearms Trainer Certificate	12 NCAC 07D .0901	Amend
Fees for Trainer Certificate	12 NCAC 07D .0903	Amend
Unarmed Guard Trainer Certificate	12 NCAC 07D .0909	Adopt
Application for an Unarmed Guard Trainer Certificate	12 NCAC 07D .0910	Adopt
Renewal of an Unarmed Guard Trainer Certificate	12 NCAC 07D .0911	Adopt

DENR/ENVIRONMENTAL HEALTH

Availability of Loans	15A NCAC 01N .0201	Amend
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RULES REVIEW COMMISSION

Maximum Loan Amount	15A NCAC 01N .0304	Repeal
Source Protection and Management	15A NCAC 01N .0606	Amend
Determination of Awards and Bypass	15A NCAC 01N .0701	Amend
DENR/COASTAL RESOURCES COMMISSION		
Exemption/Accessory Uses/Maintenance Repair/Replacement	15A NCAC 07K .0209	Amend
WATER TREATMENT FACILITY OPERATORS CERTIFICATION BOARD		
Organization	15A NCAC 18D .0102	Amend
Definitions	15A NCAC 18D .0105	Amend
Grades of Certification	15A NCAC 18D .0201	Amend
Certified Operator Required	15A NCAC 18D .0206	Amend
Application for Exam	15A NCAC 18D .0301	Amend
Application for Reciprocity	15A NCAC 18D .0302	Amend
Application for Temporary Certificate	15A NCAC 18D .0303	Amend
Fee Schedule	15A NCAC 18D .0304	Amend
Expiration and Revocation of Certificate	15A NCAC 18D .0307	Amend
Professional Growth Hours	15A NCAC 18D .0308	Amend
Certification Reinstatement	15A NCAC 18D .0309	Amend
Issuance of grad Certificate	15A NCAC 18D .0403	Amend
BOARD OF COSMETIC ART EXAMINERS		
Changes of Location Ownership or Management	21 NCAC 14G .0111	Amend
Water Supply	21 NCAC 14H .0107	Amend
NC BOARD OF PHARMACY		
Hours Records Providers Correspondence Reciprocity	21 NCAC 46 .2201	Amend
BUILDING CODE COUNCIL		
Continuous Structural Panel sheathing	R602.10.5	Adopt
General Exterior Windows and Glass Doors Flashing	R613.1	Amend
Coping flashing	R903.3	Amend
Crickets and saddles flashing	R905.2.8.3	Amend
NC Accessibility Code	031209	Amend

AGENDA
RULES REVIEW COMMISSION
July 22, 2004

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters
 - A. Department of Administration – 1 NCAC 41B .0301; .0306; .0401; .0402; .0502; .0504 (DeLuca)
 - B. NC Structural Pest Control Committee – 2 NCAC 34 .0605 (DeLuca)
 - C. Environmental Management Commission – 15A NCAC 2D .0543 (DeLuca)
 - D. Environmental Management Commission – 15A NCAC 2D .0902 (DeLuca)
 - E. Environmental Management Commission – 15A NCAC 2D .1104 (DeLuca)
 - F. Environmental Management Commission – 15A NCAC 2D .1904 (Bryan)
 - G. Environmental Management Commission – 15A NCAC 2Q .0706; .0714 (Bryan)
 - H. NC State Board of Chiropractic Examiners - 21 NCAC 10 .0202 (DeLuca)
 - I. NC Board of Funeral Services - 21 NCAC 34A .0102-.0104; .0117; .0118; .0122; .0123 (DeLuca)
 - J. NC Board of Funeral Services – 21 NCAC 34C .0103-.0105; .0302; .0303 (DeLuca)
 - K. NC State Board of Community Colleges – 23 NCAC 2D .0202 (DeLuca)
 - L. State Personnel Commission – 25 NCAC 1D .0518; .1402 – (DeLuca)
 - M. State Personnel Commission – 25 NCAC 1I .2005 – (DeLuca)

- IV. Review of Rules (Log Report #211)
- V. Review of Temporary Rules (if any)
- VI. Commission Business
- VII. Next meeting: August 19, 2004

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Sammie Chess Jr.
Beecher R. Gray
Melissa Owens Lassiter

James L. Conner, II
Beryl E. Wade
A. B. Elkins II

RULES DECLARED VOID

04 NCAC 02S .0212 CONSUMPTION: INTOXICATION BY PERMITTEE PROHIBITED
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge James L. Conner, II declared 04 NCAC 02S .0212(b) void as applied in NC Alcoholic Beverage Control Commission v. Midnight Sun Investments, Inc. t/a Tiki Cabaret (03 ABC 1732).

20 NCAC 02B .0508 FAILURE TO RESPOND
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge Melissa Owens Lassiter declared 20 NCAC 02B .0508 void as applied in Burton L. Russell v. Department of State Treasurer, Retirement Systems Division (03 DST 1715).

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>HEALTH AND HUMAN SERVICES</u>				
Walter Ray Nelson, Jr., Karen Marie Nelson v. DHHS	03 DHR 0884	Lassiter	05/18/04	
Olufemi Augustine Ohome v. DHHS, Div. of Facility Services	03 DHR 1062	Lassiter	05/24/04	
Bio-Medical Applications of North Carolina, Inc v. DHHS, Div of Facility Services, CON Section and Total Renal Care of NC, LLC	03 DHR 1553	Chess	06/02/04	
Rebecca Stephens Short v. DHHS, Div of Facility Services	03 DHR 1806	Conner	06/11/04	
Mooresville Hospital Management Assoc, Inc d/b/a Lake Norman Reg.	03 DHR 2404	Conner	06/08/04	
Medical Center v. DHHS, Div of Facility Services, CON Section and Novant Health, Inc. (Lessor) and Forsyth Memorial Hospital (Lessee) d/b/a Forsyth Medical Center				
Louvenia Jones, Sheryl Willie – General Power of Attorney v. DHHS, Div of Child Development	03 DHR 2445	Gray	06/15/04	
LaDunna K. Brewington v. DHHS, Div of Medical Assistance	04 DHR 0192	Mann	06/09/04	
Martha Williams, Kidtz Town v Div of Child Development	04 DHR 0200	Elkins	06/11/04	
Nathan E. Lang vs DHHS	04 DHR 0439	Conner	06/23/04	
Terry William Waddell v. Medicaid/NC Health Choice	04 DHR 0335	Mann	06/04/04	
Sabrina Betts v. NC Health Personnel Registry	04 DHR 0644	Lassiter	06/02/04	
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
<u>DEPARTMENT OF JUSTICE</u>				
Larry Mitchel Batton, Jr. v. Crimianl Justice Education & Training Standards Commission	03 DOJ 1067	Lassiter	06/15/04	
Steve A. Matthews v. Sheriff's Education & Training Standards Commission	03 DOJ 1702	Conner	05/10/04	
Bernard Cotton vs. DOJ	04 DOJ 0063	Chess	06/03/04	
<u>DEPARTMENT OF PUBLIC INSTRUCTION</u>				
Alice Bins Rainey, Michele R Rotosky and Madeline Davis Tucker	02 EDC 2310	Lassiter	06/01/04	19:01 NCR 153
<u>ENVIRONMENT AND NATURAL RESOURCES</u>				
Beltex Corporation, a Debtor-in Possession v. DENR, Div of Air Quality	00 EHR 1706	Gray	06/18/04	
J.L. Marsh Smith Farms, Inc v. DENR, Div of Air Quality	00 EHR 2116	Gray	06/04/04	

CONTESTED CASE DECISIONS

Raymond Wallace, The Golden Mirror vs. Div of Radiation Protection	01 EHR 1558	Mann	06/17/04
Ronald Frye v DENR	03 EHR 1636	Gray	06/23/04
Robert I. Swinson Sr. v. DENR, Div of Marine Fisheries	03 EHR 2248	Chess	06/10/04
Jimmy Mathis, Mathis Pump & Well v. DENR	03 EHR 2336	Wade	05/25/04

Big Beaver Drilling Rig v. UST Trust Fund Section Final Agency Decision	04 EHR 0612	Wade	05/25/04
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MISCELLENEOUS

Alesia Braswell Al Wahshi v. Deborah Mcintyre, Wayne Co, Dept. of Social Services	04 MIS 0146	Gray	06/18/04
O'marr S. Reid v. Gaston Co. Judicial System and Defendants 1,2,3,4,5,6, 7,8,9,10	04 MIS 0682	Elkins	06/22/04

DEPARTMENT OF INSURANCE

Speros J. Fleggas vs. DOI	04 INS 0251	Elikins	06/10/04
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OFFICE OF STATE PERSONNEL

James A. Ray v. Mr. Don Shore, Human Resources, UNC Greensboro	03 OSP 2451	Elkins	06/01/04
James A. Ray v. Sherry Stevens and Facility Services Management., UNC Greensboro	03 OSP 2452	Elkins	06/01/04
James A. Ray v. Hoyte Phifer and Facility Services Management, UNC Greensboro	03 OSP 2453	Elkins	06/01/04
Samuel Williams v. DOC, Div of Alcoholism, Chemical Dependency Programs	04 OSP 0194	Mann	06/09/04
Jerry William Wiley v. Div of Public Health and DHHS	04 OSP 0210	Elkins	06/23/04
Phyllis Holt v. UNC Chapel Hill	04 OSP 0486	Chess	06/01/04

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 EDC 2310

Alice Bins Rainey, Michele R Rotosky and Madeline Davis Tucker)	
)	
Petitioner)	
)	
vs.)	
)	
North Carolina Department of Public Instruction)	
)	
Respondent)	

DECISION

Pursuant to N.C. Gen. Stat. §§ 150B-23 through 37, on December 1 through December 3, 2003, Administrative Law Judge Melissa Owens Lassiter conducted a contested case hearing in this matter in Raleigh, North Carolina. On March 1, 2004, the parties submitted and filed proposed Decisions.

APPEARANCES

For Petitioners: Pamela A. Scott
 Thomas R. West
 Poyner & Spruill, LLP
 Post Office Box 10096
 Raleigh, North Carolina 27605

For Respondent: Laura E. Crumpler
 Assistant Attorney General
 North Carolina Department of Justice
 P. O. Box 629
 Raleigh, North Carolina 27602

BURDEN OF PROOF

Petitioners have the burden of proof by a preponderance of the evidence. N.C. Gen. Stat. §§ 150B-23(a) and 150B-29(a) (2003).

ISSUES

Whether Respondent deprived Petitioners of property or otherwise substantially prejudiced their rights and whether Respondent:

- (a) exceeded its authority or jurisdiction;
- (b) acted erroneously;
- (c) failed to use proper procedure;
- (d) acted arbitrarily or capriciously; or
- (e) failed to act as required by law or rule;

when it denied Petitioners a statutorily authorized 12% salary increase for National Board for Professional Teaching Standards ("NBPTS") certified teachers?

RECORD OF THE CASE

At the hearing, the following testimony was received:

<u>Transcript Volume Number</u>	<u>Witness</u>	<u>Affiliation</u>	<u>Pages</u>
Volume I	Michele Rotosky	Petitioner	35-95
	Alice Rainey	Petitioner	96-131
	Karen Garr	NBPTS	132-174
	Madeline Davis Tucker	Petitioner	175-242

	Michele Rotosky	Petitioner	245-248
	Alice Rainey	Petitioner	248-252
Volume II	Kenneth Smith	Respondent	259-308
	Philip Price	Respondent	313-381
	Gary Jarrett	Respondent	381-485
	Alexis Schauss	Respondent	486-545
Volume III	Alexis Schauss	Respondent	554-580
	Marie Houston	Respondent	581-595

The following exhibits were admitted into evidence:

Exhibits Admitted Through Official Notice

1. N.C.G.S. § 115C-296.2
2. N.C.G.S. § 115C-325(a)(6)
3. Respondent Rule re CEUs
4. Session Laws re NBPTS
33. State Board Web Site (July 19, 2002)
34. Attorney General's Opinion (August 1997)

Petitioners' Exhibits

5. Rotosky Licenses
6. Rotosky Lesson Planning Docs
7. Speech/Language Instruction
8. Rotosky Teacher Evaluations
9. Rotosky Classroom
10. Rotosky Applications for NBPTS (September 2000)
11. Correspondence re: Rotosky Eligibility
12. Rotosky Pay, CEU
13. Letter to Respondent Requesting Relief (June 11, 2002)
14. Letter to Respondent Requesting Ruling (July 25, 2002)
15. Letter to Respondent Requesting Ruling (September 4, 2002)
16. Letter from Sneed Denying Relief (October 29, 2002)
17. Rainey's Licenses and Pay Stubs
18. Rainey Lesson Planning Docs
- 18A. Rainey General Weekly Schedule
19. Rainey Classroom
20. Rainey Application for NBPTS
- 20A. Rainey CEU History Report
- 20B. N.C. Guidelines for Speech-Language Pathology Services in Schools – Draft 8-24-03
21. Correspondence re Rainey Eligibility
22. Tucker Licenses
23. Tucker Job Description
24. Tucker Classroom
25. Tucker Pay Stubs
26. Tucker Application for NBPTS
27. Respondent Conference (October 29-30, 1999)
28. NBPTS Certification Overviews
29. Tucker CEU Credits
30. Letter to Tucker from Bennett Denying Relief (May 23, 2001)
31. Letter to Kirk from Tucker (June 27, 2001)
32. Guidelines Created by Schauss
35. Respondent's Answers to Discovery

Respondent's Exhibits

2. Licensure Salary Page for Alice Rainey
3. Licensure Salary Page for Michele Rotosky
4. Licensure Salary Page for Madeline Tucker
13. N.C. Public School Personnel Employee Salary and Benefits Manual 2002-2003 Part I

- 15. N.C. Public Schools Uniform Chart of Accounts
- 17. Job Description for Speech Language Specialists

FINDINGS OF FACT

1. By letter dated October 29, 2002, Respondent notified Petitioners that it was denying Petitioners, the salary incentives authorized for NBPTS Certified teachers (“Denial Letter”). (Pet. Exh. 16). Respondent’s Denial Letter is the document constituting agency action at issue in this contested case. (See Document Constituting Agency Action filed by Respondent on January 30, 2003)

2. Each Petitioner is a North Carolina public school teacher who completed the NBPTS Certification program and obtained NBPTS Certification in the area in which she teaches.

A. NORTH CAROLINA’S NBPTS PROGRAM

3. At the administrative hearing, Karen Garr, Manager of NBPTS’ Southeast Regional Office, explained NBPTS, and the history and objectives of North Carolina’s NBPTS program. Ms. Garr has worked with the North Carolina program since its inception, first as Education Advisor to Governor James B. Hunt from 1993-2001, and since then, in her current position as a regional manager for NBPTS. Prior to becoming Governor Hunt’s teacher advisor, Ms. Garr was an elementary school teacher for many years. (T. Vol. I, Garr, pp. 132-40).

4. In 1994, North Carolina’s NBPTS program was initially implemented through a special provision of the budget bill. In 2000, the program was codified pursuant to N.C. Gen. Stat. § 115C-296.2(a). When North Carolina’s NBPTS certification program first began, there were two areas of certification available. Each year since that time, NBPTS has added several additional areas of certification. In 2003, NBPTS added a certification area for guidance counseling. (T. Vol. I, Garr, pp. 136-39).

5. During the eight years she served as Education Advisor to Governor Hunt, part of Ms. Garr’s job responsibilities was to lobby for, and help implement North Carolina’s NBPTS program. She worked with Respondent to develop procedures for funding the North Carolina program and the promissory note to be signed by teachers participating in the program. She also worked with the N.C. Association of Educators to establish a support program for teachers pertaining to NBPTS certification. (T. Vol. I, Garr, pp. 139-40).

6. In N.C. Gen. Stat. § 115C-296.2(a), the General Assembly declared the public policy underlying the NBPTS Certification program in North Carolina – “to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession.” This statement of the goal of North Carolina’s NBPTS program is the best evidence of the legislative intent underlying the program and N.C. Gen. Stat. § 115C-296.2.

7. N.C. Gen. Stat. § 115C-296.2 requires the State to pay “a significant salary differential to teachers who attain national certification from [NBPTS].” N.C. Gen. Stat. § 115C-296.2(a) (2003).

8. Ms. Garr explained that the purpose of North Carolina’s NBPTS program at its inception, and currently, is to “identify, recognize, and reward accomplished teachers who met those standards of the National Board.” (T. Vol. I, Garr, p. 140).

9. N.C. Gen. Stat. § 115C-296.2(a) provides that:

the State shall support the efforts of teachers to achieve national certification by providing approved paid leave time for teachers participating in the process, paying the participation fee, and paying a significant salary differential to teachers who attain national certification from the National Board for Professional Teaching Standards (NBPTS).

In addition to these benefits provided by statute, Respondent has adopted a rule which provides that each teacher earning NBPTS certification will receive 15 units of continuing education renewal credit. 16 NCAC 06C .0307 (2003).

10. N.C. Gen. Stat. § 115C-296.2(b)(2) defines a “teacher” as a person who:

- a. Either:
 - 1. Is certified to teach in North Carolina; or
 - 2. Holds a certificate or license issued by the State Board of Education that meets the professional license requirement for NBPTS certification;
- b. Is a State-paid employee of a North Carolina public school;
- c. Is paid on the teacher salary schedule; and
- d. Spends at least seventy percent (70%) of his or her work time:
 - 1. In classroom instruction, if the employee is employed as a teacher. Most of the teacher’s remaining time shall be spent in one or more of the following: mentoring teachers, doing

- demonstration lessons for teachers, writing curricula, developing and leading staff development programs for teachers; or
2. In work within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

Thus, in N.C. Gen. Stat. § 115C-296.2(b), the General Assembly recognizes two different categories of teachers who are eligible to participate in the State's NBPTS program: (i) teachers who are employed as teachers and engaged in classroom instruction, and (ii) teachers who work in areas of NBPTS certification other than direct classroom instruction.

11. Although North Carolina's NBPTS program distinguishes between classroom and non-classroom teachers, NBPTS does not categorize its certification areas as applying to either "direct classroom instruction" or "other than direct classroom instruction." The requirements for achieving NBPTS certification in every area, including counseling, library and media, and career and technical education, include teaching and classroom components. The National Board for Professional Teaching Standards construes the concept of the "classroom" broadly to include learning environments other than the traditional classroom in which a teacher teaches the same assigned students every day. (T. Vol. I, Garr, pp. 142-43, 153-57; Pet. Exh. 28).

12. The substantive terms of the NBPTS Certification application forms ("NBPTS Application") that Petitioners completed and filed with Respondent are virtually identical. (Pet. Exhs. 10, p. 3; 20, p. 5; and 26).

- (a) The NBPTS Application listed the following eligibility criteria which NBPTS candidates must meet in order to receive State funding:
 - (i) be paid entirely from State funds;
 - (ii) have at least three full years' experience teaching in North Carolina public schools;
 - (iii) hold a valid, clear and continuing North Carolina teaching license; and
 - (iv) have not previously received State funds for participating in the NBPTS assessment.
- (b) The NBPTS Application listed the following benefits public school teachers participating in the State's NBPTS program would receive:
 - (i) assessment fee paid by Respondent,
 - (ii) three leave days provided to allow candidate to prepare;
 - (iii) 12% salary increase for teachers earning NBPTS Certification; and
 - (iv) credit for one full renewal cycle of continuing education provided to candidates who submit a complete portfolio.

With regard to the salary incentive, the NBPTS Application stated, "Teachers holding National Board Certification will be paid, on an annual basis, a salary appropriate to the certification. (Currently this is a 12% premium)." (emphasis added) (Pet. Exh. 10, p. 3; Pet Exh 20, p 4).

13. Earning NBPTS certification is a rigorous and time-consuming process which requires a teacher to first develop an extensive portfolio of her work over a period of several months, and then pass a multi-part assessment exam. The portfolio must include at least two video tapes of lessons in a small group and a large group. A candidate teacher is also required to submit, as part of her portfolio: examples of her students' work, evidence of student achievement over time, and evidence of contribution to the profession and involvement with parents and the community. North Carolina has the highest percentage of NBPTS certified teachers in the United States. (T. Vol. I, Garr, pp. 144-46; Tucker, pp. 231-32; Vol. II, Jarrett, p. 396).

B. PETITIONER MICHELE ROTOSKY

14. Ms. Rotosky teaches exceptional needs elementary school students who have moderate to severe impairments in their ability to understand and use spoken language. She teaches 29 students every week, but the particular students she teaches each day vary depending upon the individual students' educational needs. Ms. Rotosky spends all but approximately 30 minutes of her time each work day in direct instruction of students. Ms. Rotosky teaches her exceptional need students either in a regular classroom setting, or in her resource classroom setting. (T. Vol. I, Rotosky, pp. 37-38, 49-53; Pet. Exhs. 6 and 8).

15. In addition to teaching, Ms. Rotosky helps evaluate students who may need exceptional children's services, helps develop individualized education plans ("IEP's") for students who need special education, and works with other teachers and the students' parents to monitor and implement these IEP's. She is also responsible for routine supervision of students before school hours for car pool duty every morning. (T. Vol. I, Rotosky, pp. 52-54).

16. Ms. Rotosky maintains a Master's level N.C. Teaching License in Speech Language Pathology, a Class M Certificate, and is paid on the schedule for speech language pathologists. This salary schedule begins at the fifth step of the teacher's "M" salary

schedule. She has six years experience teaching in the Durham Public Schools, and is employed in a full-time, permanent teaching position. (T. Vol. I, Rotosky, pp. 36-40, 76-77; Pet. Exhs. 5 and 12, pp. 1-6).

17. Like other teachers in her school, Ms. Rotosky's performance is evaluated periodically by administrators in her school. These evaluations are based upon the standard teacher evaluation form used to evaluate all other teachers in her school system. Part of these evaluations involves identifying how the lessons correlate with the standard courses of study for the academic subjects at issue. (T. Vol. I, Rotosky, pp. 54-57).

18. Ms. Rotosky develops her own lesson plans for her students. Her lesson plans "relate to the standard course of study objectives that are being taught for each individual lesson." (Vol I, T p 47)

19. Before submitting her application for NBPTS Certification, Ms. Rotosky contacted the three NBPTS coordinators identified in the application materials. The State NBPTS coordinators were: Karen Garr, then Education Advisor to Governor Hunt; Chris Godwin with Respondent; and Marian Stallings Cook with the National Education Association. (Pet. Exh. 10, p. 1.) Ms. Rotosky asked these coordinators whether she was eligible as a speech-language pathologist for North Carolina's NBPTS program and the related salary increase.

20. Before Ms. Rotosky submitted her NBPTS Certification application, Ms. Garr and Ms. Cook informed Ms. Rotosky that she was eligible to receive the salary incentive under the Exceptional Needs certification area. NBPTS also informed Ms. Rotosky that she was eligible to pursue certification in the Exceptional Needs area. Respondent's Mr. Godwin and David Howell told Ms. Rotosky it was questionable whether speech language pathologists were eligible to participate in the State's NBPTS program. Mr. Godwin suggested that Ms. Rotosky contact Ms. Garr for further clarification. Ms. Garr repeatedly told Ms. Rotosky that she was eligible to participate in the program. (Pet. Exh. 11, pp. 1-3; T. Vol. I, Rotosky, pp. 59-62).

21. The following NBPTS Certification application materials that Respondent provided to Ms. Rotosky, represented in pertinent part:

The State of North Carolina will pay – up front – the candidate assessment fee for eligible (definition on back) teachers. Teachers do not have to repay the fee as long as they complete the full National Board Certification process and teach the year following completion. The state also provides up to three days of release time to work on the [certification] process, provides a 12% salary increase to those achieving National Board Certification, and grants full renewal credit to those completing the assessment process."

(Pet. Exh. 10, p. 1)

22. To complete her NBPTS Certification application, Ms. Rotosky submitted the following along with her NBPTS application: a copy of her N.C. teaching license (showing her licensure as a "Speech Language Pathologist"), a verification of her 3 years teaching experience in N.C. public schools, and an agreement to teach the following year in North Carolina. Ms. Rotosky's school system verified that she was teaching in a State-funded position. (Pet. Exhs. 10 and 11, p. 7; T. Vol. I, Rotosky, pp. 63-64).

23. Ms. Rotosky signed her NBPTS application on May 19, 2000, and submitted such application for NBPTS certification in late May 2000. Because she received conflicting information regarding her eligibility for North Carolina's NBPTS program from the above-noted State coordinators, Ms. Rotosky submitted copies of her e-mail communication with these coordinators, with her NBPTS application to Respondent. (Pet. Exh. 11, pp. 1-2). She also submitted an e-mail from NBPTS confirming her eligibility. Ms. Rotosky submitted copies of these e-mail communications with her application, to allow Respondent to make an ultimate decision regarding her eligibility for the North Carolina NBPTS program, by either approving or not approving her application and paying or not paying the NBPTS assessment fee for her. (T. Vol. I, Rotosky, pp. 61-62, 247).

24. Respondent approved Ms. Rotosky's application for funding to complete the Certification process in the area of Exceptional Needs – Mild to Moderate Disabilities. In June 2001, Ms. Rotosky completed and passed the NBPTS Certification program. (Pet. Exh. 11, pp. 7-8; T. Vol. I, Rotosky, p. 65).

25. Consistent with the terms of the NBPTS Application, Respondent paid the \$2,300.00 NBPTS assessment fee for Ms. Rotosky, and provided Ms. Rotosky three paid leave days to allow her to complete the NBPTS Certification program. Respondent furnished Ms. Rotosky renewal credit for one full renewal cycle of continuing education. (Pet. Exh. 12, p. 7; T. Vol. I, Rotosky, pp. 42, 69-70).

26. However, Respondent refused to pay Ms. Rotosky the 12% salary incentive after she earned her NBPTS Certification. The Durham Public Schools Human Resources Department advised Rotosky that they could not adjust her salary, because Respondent did not authorize an adjustment her salary, as she was a speech-language pathologist. Rotosky attempted to obtain this authorization from Jeanne Washburn, Respondent's designated NBPTS Certification contact person, and Respondent's Cecil Banks. Ms. Washburn had processed Rotosky's Certification application. In December 2001, Mr. Banks told Rotosky that she was not eligible for the salary increase, because she was a speech-language pathologist. (T. Vol. I, Rotosky, pp. 65-67; Pet. Exh. 11, pp. 9-10).

27. By letter dated January 18, 2002, Ms. Rotosky contacted Brad Sneed, Respondent's Deputy Superintendent, and requested his assistance in resolving the NBPTS salary increase issue. By letter dated February 25, 2002, Mr. Sneed advised Ms. Rotosky that based on discussions with legislative staff, she was not eligible for the 12% salary increase for NBPTS Certification, because (1) she was not paid on the teacher salary schedule, and (2) the salary schedule on which she was paid, did not include provisions for NBPTS Certification. (Pet. Exh. 11, pp. 12-13; T. Vol. I, Rotosky, p. 67).

28. When Ms. Rotosky applied for NBPTS certification, and when she became NBPTS certified, Ms. Rotosky's paycheck still indicated that she was paid as an "exceptional teacher." It was not until Rotosky's August 29, 2003 paycheck that her employer indicated that she was paid as a "speech pathologist." (Petitioner's Exh 10; Vol I, T p 42)

29. Ms. Rotosky's responsibilities as a Durham County School employee did not change from the time she signed the NBPTS promissory note on May 19, 2000 until the date of this administrative hearing. (Vol I, T p 245)

C. PETITIONER ALICE BINS RAINEY

30. Ms. Rainey teaches exceptional needs middle school students who have moderate to severe impairments in their ability to understand and use spoken language, have fluency disorders such as stuttering, and/or have speech sound disorders which impair their intelligibility and ability to communicate effectively in the school environment. (T. Vol. I, Rainey, pp. 102-03, ; Pet. Exhs. 18, 18A).

31. Ms. Rainey teaches 42 exceptional needs students every week in language arts and math. The particular students Rainey teaches each day vary depending upon the individual students' educational needs. Included in her students are the same five 8th grade students and the same five 6th grade students each week. (Vol I, T p 252) Rainey co-teaches in a number of classrooms in her school, plus teaches students in her own classroom. (Vol I, p 106) Rainey spends at least 85% of her work time each week in direct instruction of students. (T. Vol. I, Rainey, pp. 105-08, 110-11, 250-52) When Rainey is absent from school, she leaves lesson plans that she has developed, for her students. (Vol I, T p 102,104)

32. In addition to teaching, Ms. Rainey helps evaluate students who may need exceptional children's services, helps develop IEP's for students who need special education, and works with other teachers and the students' parents to monitor and implement these IEP's. She is also responsible for routine supervision of students before, during, and after school hours for such things as bus, hall, cafeteria and athletic event duty on a rotating basis with other teachers. Ms. Rainey also serves as a mentor teacher to younger teachers in her school. (Vol. I, Rainey, T pp. 108-110).

33. Ms. Rainey maintains an Advanced level N.C. Teaching License in Speech Language Pathology, a Class M Certificate, as well as provisional Bachelor's level teaching licenses in two areas of exceptional needs education – mentally disabled and learning disabled. She is paid on the salary schedule for masters' level speech pathologists, which begins at the fifth step of the teacher's "M" salary schedule. Ms. Rainey has taught in the Lee County Public Schools for 17 years, and is employed in a full-time, permanent position. (T. Vol. I, Rainey, p. 97, 99-102; Pet. Exh. 17).

34. On September 3, 1999, Ms. Rainey signed her NBPTS application and the attached promissory note. On or about September 13, 1999, Ms. Rainey submitted such application for NBPTS certification. In completing her NBPTS certification application, Ms. Rainey also submitted the following: a copy of her N.C. teaching license (showing licensure as a teacher in the area of "Speech Language Impaired"), a verification of 11 years teaching experience in N.C. public schools, and an agreement to teach the following year in North Carolina. Ms. Rainey's school system also verified that she was teaching in a State-funded position.

35. Respondent approved Ms. Rainey's application for funding to complete the Certification process in the area of Exceptional Needs – Mild to Moderate Disabilities.

36. In April 2001, Ms. Rainey completed the NBPTS Certification program. (T. Vol. I, Rainey, pp. 112, 118; Pet. Exh. 20).

37. Ms. Rainey chose to seek NBPTS certification in the area of Exceptional Needs – Mild to Moderate Disabilities, because most of her students have mild to moderate speech and language disabilities. (T. Vol. I, Rainey, p. 116).

38. The NBPTS Certification application materials, prepared and provided by Respondent to Ms. Rainey represented, in pertinent part, that the State would pay the \$2,000 NBPTS assessment fee, provide up to three days of leave time to candidates, pay NBPTS Certified teachers a salary differential of 12% of their State salary for the life of the Certificate (10 years); and grant complete licensure renewal credit for completion of the NBPTS assessment process. (Pet. Exh. 20, p. 4).

39. Consistent with the terms of the NBPTS Application, Respondent paid the \$2,000.00 NBPTS assessment fee for Ms. Rainey, and provided Ms. Rainey three paid leave days to allow her to complete the NBPTS Certification program. Respondent furnished Ms. Rainey credit for one full renewal cycle of continuing education. (T. Vol. I, Rainey, pp. 114-16; Pet. Exh. 20A).

40. However, Respondent refused to pay Ms. Rainey the 12% salary incentive after she earned her NBPTS Certification. In December 2001, Ms. Rainey learned from the Lee County Schools Payroll Office that although her name was on the list of NBPTS certified teachers, Respondent did not certify a new salary for her. Later that same month, Cecil Banks, Manager of Recruitment and Retention for Respondent's Division of Human Resource Management, informed Ms. Rainey that according to legislative staff, she was not eligible for the salary increase as a speech language pathologist, because she was not paid on the teacher salary schedule. Specifically, Mr. Banks said she was paid on salary schedule part labeled "School Psychologist Scale," rather than the schedule labeled "M Scale." (T. Vol. I, Rainey, pp. 120-23; Pet. Exh. 21).

41. Until July 1, 2003, Ms. Rainey was a State-paid teacher. From the time Rainey applied for NBPTS certification in September 1999 until July 1, 2003, Ms. Rainey's paycheck indicated that she was paid as a "teacher." (Pet Exh 17, p 3)

42. Since July 1, 2003, Rainey's position has been paid for by federal funds. (T. Vol. I, Rainey, pp. 100-01; Vol. III, pp. 551-53).

43. When Ms. Rainey applied for NBPTS certification in September 1999, her North Carolina teaching license was titled "exceptional needs speech." On July 8, 2003, Respondent renewed her NC teaching license, and issued her a new teaching license. However, Respondent changed the name of her renewed license from "exceptional needs speech" to "speech language pathologist." (Vol I, p 125)

D. PETITIONER MADELINE DAVIS TUCKER

44. Ms. Tucker is a career and technical education teacher, and curriculum instruction coordinator with the Onslow County Schools. She spends 100% of her work time providing career development and education services to students and teachers in all of the career and technical education program areas in the Onslow County Public Schools. (T. Vol. I, Tucker, pp. 175-77, 215).

45. As a curriculum instruction coordinator, Ms. Tucker serves as a lead teacher. Her job responsibilities include: helping career and technical education teachers develop and implement their lesson plans; mentoring and co-teaching with career and technical education teachers; working with students to help them develop and meet a four-year education and career development plan, explore their career interests, and perform career assessments; coordinating efforts to teach students employment-related skills; and developing and implementing a program for students, parents and the business community to publicize the placement program in vocational education. Her position requires completion of a master's degree, a minimum of five years teaching experience in career and technical education, and current teacher licensure in Career and Technical Education. (T. Vol. I, Tucker, pp. 182-83, 187-90, 208-215; Pet. Exh. 23).

46. Ms. Tucker's office is located at the school system's central office so that she has ready and equal access to all of the schools where she works. Although Ms. Tucker is based at the Onslow County School's central office, she works and is paid as a teacher, not an administrator. (T. Vol. I, Tucker, pp. 183-85; Pet. Exh. 25).

47. Ms. Tucker maintains a Master's level N.C. Teaching License in Business Education (Grades 9-12), and Bachelor's level teaching licenses in the areas of career development coordinator, career exploration (Grades 6-9), and mentoring. She is paid on the schedule for masters' level teachers, the teacher's "M" salary schedule. Ms. Tucker has taught in North Carolina public schools for 12 years, and is employed in a full-time, permanent teaching position. (Pet. Exhs. 22, 23, p. 1, and 25; T. Vol. I, Tucker, pp. 175-80).

48. Career and technical education is a diverse area which includes many different programs aimed at helping students explore, identify and progress toward their desired vocations and careers. Much of the instruction provided by career and technical education

teachers occurs outside of the classroom setting, where students learn by observing and practicing the skills necessary to work in their chosen fields. (T. Vol. I, Tucker, pp. 187-204).

For example, many career and technical education courses include job-shadowing and internship components. This component allows students to work with local businesses to observe, and begin learning and practicing how to perform jobs in the students' selected trades or professions. Career and technical education teachers supervise the students' participation in these on-the-job learning opportunities, and work with the students and the students' employers to ensure that these opportunities are educational, and achieve identified learning objectives. (T. Vol. I, Tucker, pp. 193-99, 204-06; Vol. II, Smith, pp. 266-68).

49. Career and technical education teachers also work with special needs students to help them transition from high school to the work place. (T. Vol. I, Tucker, pp. 200-01; Vol. II, Smith, pp. 272-73).

50. Under North Carolina's recently revised graduation requirements, ninth-grade students are required to choose a pathway to earn one of four different diplomas available: career preparation, college technical preparation, college/university preparation, and occupational preparation. (See 16 NCAC 6D.0503 (2003)). Career and technical education teachers play an important role in helping students choose one of these four pathways, and fulfill the requirements of their selected pathway. (T. Vol. I, Tucker, pp. 190-92, 197-98, 202-03).

51. In 1999, Ms. Tucker applied to participate in North Carolina's NBPTS program, the first year NBPTS offered certification in the area of vocational education (now career and technical education). (T. Vol. I, Tucker, pp. 186-87).

52. In May 1999, Ms. Tucker and other curriculum instruction coordinators attended an informational seminar sponsored by the Association for Career and Technical Education. Ms. Tucker and the other curriculum instruction coordinators explained their job responsibilities to the seminar faculty, and asked whether they would qualify to participate in North Carolina's NBPTS program. The faculty included representatives from NBPTS and the North Carolina Association of Educators ("CAE"). The faculty repeatedly told Tucker and her colleagues that if they had three years' teaching experience, a salary code beginning with a "1," and were paid on the teacher salary schedule, then they were eligible to participate, even if they did not teach in a traditional classroom. (T. Vol. I, Tucker, pp. 218-20).

53. In October 1999, Respondent's Work Force Development Division, and the N.C. Professional Teaching Standards Commission sponsored a seminar to educate career and technical education teachers about North Carolina's NBPTS program, and to encourage these teachers to participate in the program. (T. Vol. I, Tucker, pp. 220-22; Vol. II, Smith, pp. 273-74, 282; Pet. Exh. 27).

Ken Smith, Section Chief of Respondent's Business and Marketing Education Section, coordinated this October 1999 seminar. Because career and technical education was a brand new NBPTS certification area in 1999, and because NBPTS certification was a rigorous and time-intensive process, Mr. Smith and Respondent's Business and Marketing Education Section wanted to be sure that they provided accurate information to teachers regarding North Carolina's program, and regarding how to qualify and participate in the program.

(a) In order to do this, Smith selected recognized experts in North Carolina's NBPTS program to serve as faculty for the seminar: Karen Garr, then Education Advisor to Governor Hunt; Tom Blanford, then Executive Director of the N.C. Professional Teaching Standards Commission; and Angela Farthing of NCAE. Mr. Smith chose these individuals, because they were known to have expertise regarding the State's NBPTS program, and because he was not aware of anyone within Respondent who was knowledgeable enough about North Carolina's NBPTS program to help plan and present the seminar. (T. Vol. II, Smith, pp. 259-60, 286-90, 303-04, 307-08; Vol. I, Tucker, p. 222, 227-28).

(b) At the administrative hearing, Mr. Smith explained:

[W]e didn't want to give people misinformation or lead people in the wrong direction. This is a major commitment professionally for these teachers and we wanted to be sure that when we were providing information to teachers on the process . . . and the benefits, that we were giving accurate information and information that would be beneficial to them and help them through the process

(T. Vol. II, Smith, pp. 290-91).

54. Mr. Smith is a veteran administrator in the area of career and technical education, and a former career and technical education teacher. As such, he is familiar with the job responsibilities of curriculum instruction coordinators such as Ms. Tucker. Mr. Smith also is personally familiar with Ms. Tucker's job duties, because he has worked with her in various workshops and education initiatives over the past 10 years. (T. Vol. II, Smith, pp. 260-66, 282-84; Vol. I, Tucker, pp. 224-25).

55. Prior to the October 1999 seminar, Mr. Smith received a list of individuals who had signed up to attend the seminar. He noticed that Ms. Tucker and several other curriculum instruction coordinators were planning to attend. Because Mr. Smith was not certain whether curriculum instruction coordinators would qualify to participate in North Carolina's NBPTS program, he consulted Tom Blanford about whether such individuals would be eligible to participate in the program. Mr. Blanford informed Mr. Smith that Ms. Tucker and other curriculum instruction coordinators were eligible to participate in all aspects of the State's NBPTS program, including receiving the 12% salary increase. (T. Vol. II, Smith, pp. 291-92).

56. After the seminar faculty presented the program at this October 1999 seminar, Ms. Tucker and several other career and technical education curriculum coordinators explained their job responsibilities to Ms. Garr, Mr. Blanford, and Ms. Farthing. They asked the panelists if they would be eligible, as curriculum instruction coordinators, to participate in the State's NBPTS program, and to receive the 12% salary incentive. Each of the panel members advised Tucker and her colleagues that they were eligible to participate in the program and receive the salary incentive. (T. Vol. I, Tucker, pp. 223-24, 229-30).

57. Because Ms. Tucker was repeatedly assured that she satisfied the NBPTS' eligibility credentials, she pursued NBPTS Certification in vocational education. On June 19, 2000, Tucker completed the certification process, believing that she would receive the promised 12% salary increase. On November 30, 2000, Tucker was notified that she had achieved National Board Certification. (T. Vol. I, Tucker, pp. 230-32; Pet. Exh. 31).

58. Consistent with the terms of the NBPTS Application, Respondent paid the \$2,000.00 NBPTS assessment fee for Ms. Tucker, and provided her three paid leave days to allow her to complete the NBPTS Certification program. Respondent furnished Ms. Tucker credit for one full renewal cycle of continuing education. (T. Vol. I, Tucker, pp. 217-18; Pet. Exh. 29).

59. However, Respondent refused to pay Ms. Tucker the 12% salary incentive after she earned her NBPTS Certification. In December 2000, Ms. Tucker learned that she had not been approved to receive the 12% salary increase. Shortly after learning this, Ms. Tucker contacted Mr. Smith to inquire about her eligibility to receive the pay increase. In turn, Mr. Smith spoke with Mr. Blanford to confirm his understanding that curriculum instruction coordinators were eligible to receive the NBPTS salary incentive. Mr. Blanford confirmed his prior statement that these individuals were eligible. (T. Vol. I, Tucker, pp. 233, Vol. II, Smith, pp. 292-96).

60. In early 2001, Respondent's officials told Ms. Tucker that she was not eligible for the 12% pay increase due to new legislation, N.C. Gen. Stat. § 115C-296.2(b)(2)(d) that was passed in July 2000, one month after Ms. Tucker fulfilled all requirements for NBPTS certification. (T. Vol. I, Tucker, pp. 233-35; Pet. Exhs. 30 and 31).

61. By letter dated February 27, 2001, Respondent's Jennifer Bennett informed Ms. Tucker that she did not qualify for the NBPTS pay increase because she did not spend at least 70% of her time in classroom instruction, and her area of certification was not designed for classroom instruction. By letter dated May 23, 2001, Ms. Bennett informed Ms. Tucker that after having received "a more detailed clarification of the intent of the legislation," Respondent's position continued to be that she did not qualify for the 12% salary increase because her area of certification was not designed for classroom instruction. In this letter, Ms. Bennett explained that N.C. Gen. Stat. § 115C-296.2(b)(2)d "is designed for the NBPTS certification in certified student support or certified instructional support areas where direct student interaction is involved such as media or guidance (when available)." (T. Vol. I, Tucker, pp. 234-36; Pet. Exh. 30).

62. After receiving Ms. Bennett's letters, Ms. Tucker wrote to Phillip J. Kirk, Jr., then Chairman of the State Board of Education, to explain her situation, and seek his assistance in obtaining the 12% salary incentive. In response, Respondent again informed Ms. Tucker that she was not eligible for the NBPTS 12% salary increase because she was not in the classroom 70% of the time. (T. Vol. I, p. 236; Pet. Exh. 31).

63. In March 2002, Ms. Tucker continued to pursue her eligibility for the NBPTS salary incentive, and contacted Ms. Garr again. Ms. Garr reiterated her initial opinion that, because Ms. Tucker and other career and technical education curriculum instruction coordinators are teachers, they were eligible to receive the 12% salary increase. (T. Vol. I, Tucker, p. 240).

E. RESPONDENT'S DENIAL OF NBPTS SALARY INCENTIVE

64. When Ms. Rainey and Ms. Rotosky first contacted Respondent to ask why they were not approved to receive the NBPTS salary incentive, Respondent told them that they were not eligible to receive the salary increase, because they were not paid on the teacher salary schedule. (Pet. Exhs. 11, p. 12, and 21).

65. Yet, in its Denial letter, Respondent used a different rationale. It stated that Ms. Rainey and Ms. Rotosky were not eligible for the NBPTS salary incentives because although they were employed within their area of certification or licensure, but they were not “employed in an area of NBPTS certification” because (i) there is no NBPTS certification for speech and language specialists, and (ii) the NBPTS certification area of Exceptional Needs – Mild to Moderate Disabilities is for classroom teachers, not speech and language specialists. Respondent further stated that “until NBPTS establishes an area of certification for speech and language specialists, Ms. Rainey and Ms. Rotosky cannot be employed as speech and language specialists and qualify for the NBPTS salary incentives.” (Pet. Exh. 16, pp. 2-3).

In addition, Respondent declared that the issue of Rotosky and Rainey’s salary schedule:

is not the issue for purposes of determining whether Ms. Rainey or Ms. Rotosky qualify for the NBPTS salary incentives. Insofar as neither Ms. Rainey nor Ms. Rotosky is “employed as a teacher” subject to G.S. § 115C-296.2(b)(2)(d)(1), the issue is: Does either of them meet all the requirements to be deemed a “teacher” for purposes of NBPTS under G.S. § 115C-296.2(b)(2)(d)(2)?

(Pet. Exh. 16, p. 2) (emphasis added).

66. Even though Respondent has represented that the Denial Letter is the document constituting agency action in this case, and has stated in answer to interrogatories that the Denial Letter speaks for itself, Respondent returned to its initial salary schedule/ budget code rationale during the contested case hearing. Respondent’s witnesses explained that Ms. Rainey and Ms. Rotosky were not eligible to receive the NBPTS salary incentive, because (1) they were not “classroom teachers,” as Respondent construes that term, and (2) they did not have teacher budget codes, and were not paid on the teacher salary schedule. (T. Vol. II, Jarrett, pp. 440-41; Schauss, pp. 499-503, 514; Pet. Exh. 35).

67. In its Denial Letter, Respondent stated that Ms. Tucker is not eligible for the salary incentives, because (1) she is not employed as a teacher and does not spend 70% of her time in the classroom, and (2) she is “not employed in an area of NBPTS certification other than teaching and [she has] NBPTS certification in an area of direct classroom instruction, i.e., career and technical education.” (Pet. Exh. 16, p. 2).

68. In the Denial Letter, Respondent’s final rationale for Ms. Tucker’s ineligibility for the 12% salary increase, was also contrary to its initial position that career and technical education was not an area of certification designed for classroom instruction. (Pet. Exh. 30, ¶ 2, “nor is your area of certification designed for classroom instruction.”) During the contested case hearing, Respondent’s witnesses explained that although Ms. Tucker is paid on the teacher salary schedule, she is not eligible to receive the NBPTS salary increase, because she is an administrator, and is not paid under a teacher budget code. (T. Vol. II, Jarrett, pp. 441-42, 471).

69. In its Denial Letter, Respondent made clear that the issue for each Petitioner was whether she met the definition of “teacher” set forth in N.C. Gen. Stat. § 115C-296.2(b)(2). Specifically, “G.S. § 115C-296.2(b)(2)(d)(1) and (2) are the provisions directly at issue” (Pet. Exh. 16, p. 1). Respondent did not cite any other criteria in the definition of “teacher” set forth in N.C. Gen. Stat. § 115C-296.2(b)(2) as a basis for denying any Petitioner the salary benefit at issue in this case.

70. Yet, during the contested case hearing, Respondent’s core contention was that North Carolina’s NBPTS program was designed primarily for “classroom teachers” or teachers engaged in “direct classroom instruction,” and that the only exception to this general rule was for guidance counselors and library media personnel.

71. Respondent also contended that Ms. Rainey and Ms. Rotosky do not qualify to receive the NBPTS salary increase, because they are not coded as classroom teachers under the financial and information coding system established and maintained by Respondent. Likewise, Respondent contended that Ms. Tucker is not eligible to receive the NBPTS salary incentive, because she is coded as an administrator.

(a) Each Petitioners’ local school system assigns financial and information codes to each employee. These assigned codes are based on the Uniform Chart of Accounts developed and maintained by Respondent. An individual employee’s actual salary is determined from the State salary schedule prepared by Respondent, purportedly in compliance with the salary schedule provisions adopted by the General Assembly in the budget bill each year. Whether a particular individual is eligible to receive the NBPTS salary incentive is determined by the business rules Respondent writes into its information system, regarding which positions are eligible to receive the salary increase. These business rules are based on Respondent’s interpretation of the legislation adopted by the General Assembly. (Vol. II, Schauss, pp. 519-20, 522-25, 31-32).

(b) At hearing, Ms. Alexis Schauss, Chief of Respondent's Information and Analysis Section, conceded that Respondent's information system will do whatever Respondent tells it to do. (Vol. II, Schauss, T p. 532). Therefore, the budget and information codes assigned to Petitioners are not relevant, because they do not determine whether Petitioners are eligible to receive the NBPTS salary incentive. It is the business rules written by Respondent into Respondent's information system that determine how an individual employee is paid, and whether that employee qualifies to receive the NBPTS 12% salary incentive. These rules can be rewritten as needed to correctly reflect the mandate of the NBPTS statute.

E. ANALYSIS

Petitioners Rotosky and Rainey

N.C. Gen. Stat. § 115C-296.2(b)(2)a. & b.

72. Respondent concedes that Petitioners Rotosky and Rainey meet subsections a. and b. of N.C. Gen. Stat. § 115C-296.2(b)(2).

N.C. Gen. Stat. § 115C-296.2(b)(2)c.

73. Respondent contends that Petitioners Rotosky and Rainey are not paid on the "teacher salary schedule," because the General Assembly established a separate salary schedule for speech language pathologists. In accordance with the General Assembly's directives, Respondent developed the separate speech language pathologist salary schedule included in Respondent's Salary Manual. (T. Vol. II, Jarrett, p. 434-35; Schauss, pp. 576, 579-80). However, the speech language pathologist salary schedule prepared by Respondent does not include the NBPTS component of the teacher's M salary schedule, and therefore is not consistent with how the General Assembly has mandated that speech language pathologists be paid.

74. During the administrative hearing, Respondent's position on this specific issue was not supported by the evidence. First, Respondent witnesses conceded that: (1) only the General Assembly has authority to create the salary schedules pursuant to which public education personnel are paid, and (2) Respondent does not have authority to alter the salary schedules enacted by the General Assembly in the Session Laws. (T. Vol. II, Jarrett, pp. 431, 455, 480; Schauss, p. 527-28). Second, Respondent offered no evidence of its authority to delete the NBPTS component of the teacher's M schedule from the speech language pathologists salary schedule it created.

(a) Third, since at least 1997, the General Assembly has consistently provided that speech language pathologists holding master's degrees "shall be paid on the school psychologist salary schedule." (SL 2003-284, § 7.1(e); Pet. Exh. 4). The General Assembly has also consistently provided that "the first step of the salary schedule for school psychologists shall be equivalent to Step 5, corresponding to five years of experience, on the salary schedule established in this section for certified personnel of the public schools who are classified as "M" teachers." (SL 2003-284, § 7.1(d) (emphasis added); Pet. Exh. 4).

(b) Fourth, the salary schedule for "M" teachers set forth in the session laws, contains an NBPTS component beginning with Year 4, when a master's level teacher would be eligible to participate in North Carolina's NBPTS program. (SL 2003-284, § 7.1(b); Pet. Exh. 4). However, Respondent did not include this NBPTS component in the salary schedule it prepared for master's degree level speech language pathologists. This newly created salary schedule was to be used by Respondent and local school systems to determine how these employees should be paid. (Resp. Exh. 13, p. D-20).

(c) Fifth, Mr. Jarrett acknowledged that speech language pathologists and school psychologists are paid on the same salary schedule. (T. Vol. II, Jarrett, p. 434). Respondent's witnesses repeatedly stated that although the speech language pathologist salary schedule mirrors the teacher salary schedule, and is derived from the teacher salary schedule, the two schedules are nonetheless distinct and separate. (T. Vol. II, Jarrett, pp. 441, 454, 465-66, 472; Schauss, pp. 497, 499-500). Yet, Ms. Alexis Schauss confirmed that the teacher's M salary schedule (for master's degree level teachers), as well as the school psychologist and speech language pathologist salary schedules, are derived from the teacher's A salary schedule (for bachelor's degree level teachers). (T. Vol. II, Schauss, p. 497).

75. In a 1997 opinion, the North Carolina Attorney General's office opined that speech language pathologists are paid on the M teacher salary schedule. (Pet Exh 34) Senior Deputy Attorney General Speas explained in this opinion:

All the General Assembly has done is to identify the salary schedules for teachers with masters degrees at which school psychologists will be paid. . . . The General Assembly's action with respect to speech pathologists is essentially the same. Like psychologists, they are paid on the salary schedule for teachers with masters' degrees, albeit at a higher starting point on the schedule and no separate schedule was established by the General Assembly for them.

(Emphasis added; Pet. Exh. 34 (internal citations omitted)).

76. At the administrative hearing, Mr. Jarrett's testimony was consistent with Mr. Speas' statutory construction in that:

So we were required in the School Business School Salary Section to establish a salary schedule for school psychologists that started at an M5 [step 5 of the teacher's M schedule] for school psychologists. And as verified or as indicated in 7.1(e), . . . speech and language pathologists were placed on the same salary schedule as school psychologists.

(T. Vol. II, Jarrett, p. 481).

77. Lastly, in Respondent's Division of School Business' "Employee Salary and Benefits Manual 2002-2003, Part I: Salary," Respondent acknowledges that speech language pathologists are paid on a teacher salary schedule. In this Manual, Respondent specifically states that:

. . . speech-language pathologists employed with the Public Schools of North Carolina are paid on the "M" teacher salary schedule, with 5 years of experience on the "M" teacher salary schedule corresponding to 0 years of experience as a . . . speech-language pathologist.

(Resp Exh 13, p D-2, Section I. C.)

78. Based upon a preponderance of the foregoing evidence, Petitioners Rotosky and Rainey are paid on the teacher "M" salary schedule.

N.C. Gen. Stat. § 115C-292.6(b)(2)d.1.

79. Regarding this criteria, Respondent contends that Petitioners Rotosky and Rainey are not "teachers" who spend at least seventy percent of their work time in "classroom instruction." Respondent contends that the terms "teacher" and "classroom instruction," as used in N.C. Gen. Stat. § 115C-296.2(b)(2)d.1, include only classroom teachers who perform duties such as meeting with students on a regular basis, being directly responsible for grading and promoting students, and teaching the standard course of study developed by the State Board of Education for a particular academic subject or content area. (T. Vol. II, Jarrett, pp. 406-09, 413-17, 468; Price, pp. 361-69; Schauss, pp. 534-35).

80. In supporting its position, Respondent relies upon its authority given in N.C. Gen. Stat. § 115C-296.2(f), to adopt guidelines for implementing N.C. Gen. Stat. § 115C-296.2. Respondent uses these "Guidelines for National Board for Professional Teaching Standards (NBPTS) Pay Differential" and the definition of "classroom instruction" therein, to deny Petitioners Rotosky and Rainey the 12% salary incentive outlined in N.C. Gen. Stat. § 115C-296.2. In its Guidelines, Respondent construes that "the intent of this legislation is to encourage highly qualified teachers to remain in the classroom, providing direct instruction to students." (Pet Exh 13, p 1) It specifically interprets the term "classroom instruction" used in N.C. Gen. Stat. § 115C-292.6(b)(2)d.1, and defines that term to determine whether a "teacher" meets N.C. Gen. Stat. § 115C-296.2(b)(2)d.1. Their definition states as follows:

DEFINITION OF CLASSROOM INSTRUCTION

The decision of whether a person is providing direct classroom instruction involves consideration of all the individual duties, obligations and activities, including but not limited to: . . .

(Emphasis added; Pet Exh 13, pp 1-2)

81. However, Respondent's definition of "classroom instruction" is not set forth anywhere in Chapter 115C of the General Statutes governing public education. This definition is not set forth in any duly promulgated administrative rule by Respondent. Further, nothing in N.C. Gen. Stat. § 115C-296.2(b)(2)d.1 indicates that the General Assembly intended to limit the NBPTS program to Respondent's concept of the traditional classroom teacher.

82. Although Respondent contends that the State's NBPTS program was designed primarily for traditional classroom teachers responsible for teaching the standard course of study, the terms "classroom teacher" and "standard course of study" appear nowhere in N.C. Gen. Stat. § 115C-296.2, or the session laws governing the NBPTS program which preceded this statute. Instead, the General Assembly has always used the simple term "teacher."

83. The plain meaning of the term "classroom instruction" is teaching students in a classroom setting. Applying that definition to N.C. Gen. Stat. § 115C-296.2(b)(2)d.1., and the Petitioners in this case, a preponderance of the evidence at hearing showed that

Petitioners Rotosky and Rainey spend more than 80% of their work time teaching exceptional needs students in the classroom setting. Their daily classroom setting includes each Petitioner's classroom, and each Petitioner's students' regularly assigned classrooms.

(a) Both Ms. Rotosky and Ms. Rainey teach the same group of exceptional needs students every week. They teach some of these students every day, and other students less frequently, ranging from one to several days per week. Like other teachers, they both prepare lesson plans for their classes. Rotosky is evaluated like the other teachers in her school. Ms. Rotosky and Ms. Rainey spend the vast majority of their work time teaching exceptional needs students in classrooms. (T. Vol. I, Rotosky, pp. 48-51; Rainey, pp. 106-08, 110; Pet. Exhs. 9 and 19). Moreover, Ms. Rainey and Ms. Rotosky are employed within their area of Respondent's licensure: Speech Language Pathology, as well as their area of NBPTS Certification of Exceptional Needs - Mild to Moderate Disabilities.

(b) Assuming that teachers must teach the standard course of study in order to be engaged in classroom instruction, for purposes of § 115C-296.2(b)(2)d.1, the evidence established that Ms. Rainey and Ms. Rotosky routinely teach their students the standard courses of study related to several different subjects. (Vol. I, Rotosky, pp. 47-48, 57, 84-85; Rainey, pp. 126-27; Pet. Exh. 7).

84. Respondent contends that Ms. Rainey and Ms. Rotosky are not classroom teachers, because they are not licensed in a teaching area. According to Mr. Jarrett, Ms. Rainey and Ms. Rotosky would need to be licensed by Respondent in a teaching area in order to be eligible to participate in the State's NBPTS program. (T. Vol. II, Jarrett, p. 401). All of Respondent's licensure areas are for classroom teaching, except for counseling and library media. (T. Vol. II, Jarrett, p. 400). However, the preponderance of evidence at hearing showed otherwise.

(a) The preponderance of the evidence showed that Ms. Rotosky is licensed and employed in the teaching areas of speech and language pathology, and hearing impaired. (Pet Exh 5) Ms. Rainey is licensed and employed in the teaching areas of speech and language pathology, learning disabled, and mentally disabled. (Pet Exh 17) Further, the certification area codes assigned to Ms. Rainey "correspond specifically to a specific area of teaching licensure that's found in that [Licensure Procedures] manual" prepared by Respondent. (T. Vol. II, Jarrett, p. 420). Respondent has assigned similar certification codes to Ms. Rotosky. (Resp. Exhs. 2 and 3). Ms. Rainey and Ms. Rotosky both have budget codes which indicate they work in an exceptional children program area, and they both have Respondent's purpose code of 124. That code is denoted in the Uniform Chart of Accounts prepared by Respondent as "Teacher - Speech Pathologist / Speech and Language Services." (T. Vol. II, Jarrett, pp. 421, 478; Resp. Exhs. 2 and 3).

(b) Respondent presented evidence that speech language pathologists provide therapy and training to help students overcome or compensate for communication disorders (T. Vol. II, Jarrett, p. 423, 467; Resp. Exh. 17, p. 2). However, the evidence presented by Petitioners regarding the job responsibilities of Ms. Rainey and Ms. Rotosky indicate that their work is much more in the nature of classroom teaching than therapy.

85. Although Ms. Rainey's position has been funded by federal monies since July 2003, this change does not impact her eligibility to receive the 12% NBPTS salary increase after she earned her NBPTS certification. This change in funding source for Ms. Rainey's position merely disqualifies her to receive the NBPTS salary incentive for as long as her position is not State-funded. If her position becomes State-funded again during the 10-year term of her NBPTS certification, she would once again qualify to receive the 12% salary incentive.

86. A preponderance of the evidence at hearing proved that Petitioners Rotosky and Rainey are teachers who spend at least 70% of their work time in classroom instruction, and thus, are "teachers" within the definition of N.C. Gen. Stat. § 115C-296.2(b)(2).

Petitioner Tucker

N.C. Gen. Stat. § 115C-296.2(b)(2) a., b., & c.

87. Respondent concedes that Petitioner Tucker meet subsections a., b., and c. of N.C. Gen. Stat. § 115C-296.2(b)(2).

N.C. Gen. Stat. § 115C-296.2(b)(2)d.1.

88. Respondent contends that Petitioner Tucker cannot qualify for the subject salary incentive under N.C. Gen. Stat. § 115C-296.2(b)(2)d.1., because as a curriculum instruction coordinator assigned to the central office staff, she is not employed as a teacher who spent at least 70% of her work time in "classroom instruction." Respondent contends that Petitioner Tucker cannot qualify for the subject salary incentive under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2., because she is "not employed in an area of NBPTS certification other than teaching" and she has "NBPTS certification in an area of direct classroom instruction, ie. career and technical education." (October 29, 2002 Denial letter)

89. In June 2000, Petitioner Tucker completed the NBPTS certification process. N.C. Gen. Stat. § 115C-296.2 was not codified and effective till July 1, 2000. Because Ms. Tucker completed her NBPTS certification process before N.C. Gen. Stat. § 115C-296.2 was adopted, her eligibility to participate in the program should be determined under the law that governed the NBPTS program when Tucker applied for and completed her NBPTS certification. In its October 29, 2002 Denial Letter, Respondent failed to explain why or how Ms. Tucker should be required to qualify for the 12% salary incentive under N.C. Gen. Stat. § 115C-296.2, when she completed the NBPTS program one month before this statute was enacted.

90. When Ms. Tucker applied for and completed the NBPTS certification program, the General Assembly had provided that teachers were eligible to participate in North Carolina's NBPTS program if they were:

State-paid teachers who (i) have completed three years of teaching in North Carolina schools operated by local board of education . . . prior to application for NBPTS certification, and (ii) have not previously received State funds for participating in any certification area in the NBPTS program.

(SL 1997-443, § 8.23(a).)

(a) Ms. Tucker clearly meets these requirements because she taught for approximately 8 years in North Carolina public schools before she first applied for NBPTS certification in 1999, and had not previously received State funds for participating in the NBPTS assessment.

(b) Ms. Tucker also met the eligibility criteria set forth in her NBPTS Application that Respondent both prepared and provided to her. She was paid entirely from State funds; had at least three full years' experience teaching in North Carolina public schools; held a valid, clear and continuing North Carolina teaching license; and had not previously received State funds for participating in the NBPTS assessment.

91. No evidence was presented at hearing that Respondent ever informed or represented to Ms. Tucker, before she applied for the NBPTS program, or while she was completing the certification process, that she had to spend at least 70% of her time in classroom instruction in order to be eligible to participate in the State's NBPTS program.

92. After attending the October 1999 seminar on NPBTS certification in the area of career and technical education, Ms. Tucker reasonably concluded that according to Respondent, she was eligible to participate in the State's NBPTS program and receive the salary incentive. (T. Vol. II, Smith, p. 308).

93. Assuming arguendo, that Ms. Tucker must qualify under N.C. Gen. Stat. § 115C-296.2 in order to receive the NBPTS 12% salary increase, the evidence at hearing supports the conclusion that Ms. Tucker is a "teacher" under this statute. The evidence presented, established that Ms. Tucker is a lead teacher and curriculum coordinator in the area of career and technical education. A significant portion of instruction in this subject occurs outside of the traditional classroom. Ms. Tucker's responsibilities also include counseling students regarding their career development and education plans, a task very similar to services provided by a guidance counselor. (T. Vol. I, Tucker, pp. 186-206, 213-14; Garr, p. 154).

94. As Ms. Tucker does not spend 70% of her time in direct classroom instruction, she must spend at least 70% of her time working in her area of certification or licensure, and be employed in an area of NBPTS certification other than direct classroom instruction, to be eligible to participate in the State's NBPTS program under § 115C-296.2(b)(2)d.2.

95. Respondent admits that Ms. Tucker is employed within her area of certification or licensure. (Pet. Exh. 16, p. 2). All of the evidence supports a finding that Ms. Tucker spends 100% of her work time in her area of State licensure. Therefore, the question is whether she is employed in "an area of NBPTS certification other than direct classroom instruction."

96. NBPTS does not classify any of its certification areas as applying to classroom instruction or other than classroom instruction. The overviews of the NBPTS certificate areas reveal that each area includes teaching and classroom components. This "classroom instruction"/"other than classroom instruction" distinction is a distinction created by North Carolina as part of its NBPTS program. (T. Vol. I, Garr, pp. 142-43; Pet. Exh. 28). Therefore, the relevant question in determining if an individual works in an area of NBPTS certification other than classroom instruction, is whether in fact, the individual works in an area of education other than direct classroom instruction.

97. Respondent concedes that library media and school counseling are NBPTS certificates in areas "other than direct classroom instruction." It also concedes that individuals who are licensed in these areas, and work in these areas at least 70% of their work time, are "teachers" eligible to participate in the State's NBPTS program under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2.

98. Career and technical education, library media, and school counseling NBPTS certificates each require candidates to work with students in a class, and plan and deliver a lesson for a specific class. Due to the nature of these areas of education, much of this work occurs outside the traditional classroom setting. The National Board construes the classroom component of these certificate areas broadly. NBPTS recognizes that due to differences in subject matter, candidates seeking certificates in areas other than traditional academic subjects, such as career and technical education, may perform much of their work outside the traditional classroom setting. A media specialist's classroom could be the library or media center, the entire school, or a specific classroom. A school counselor's classroom could be the portion of the school population that the counselor serves. (Pet. Exh. 28; T. Vol. I, Garr, pp. 153-57).

99. Career and technical education, library media, and school counseling all relate to areas other than direct classroom instruction by the nature of their subject content. Similarly, if a person licensed and working in the area of library media or school counseling is eligible to participate in North Carolina's NBPTS program under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2, then it follows logically and legally that a person licensed and working in career and technical education, is equally eligible to participate in the NBPTS program under this same subsection of the NBPTS statute.

100. Respondent contends that the component of the State's NBPTS program for teachers who are not employed in classroom instruction, was designed to accommodate media and guidance counseling personnel only. (T. Vol. II, Jarrett, pp. 415, 417). Yet, the plain language of N.C. Gen. Stat. § 115C-296.2(b)(2)d.2 does not support Respondent's position. The language of N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. provides that a person is a teacher eligible to participate in the North Carolina NBPTS program, if she spends at least 70% of her work time:

[i]n work within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

N.C. Gen. Stat. § 115C-296.2(b)(2)d.2 does not restrict this category by stating that the employee is employed in the NBPTS certification areas of media and guidance counseling only.

101. Nor does the language of N.C. Gen. Stat. § 115C-296.2(b)(2) support Respondent's assertion that the NBPTS program was designed primarily for individuals employed as teachers and engaged in classroom instruction. The statute states that individuals engaged in classroom instruction, and individuals who work in an area of NBPTS certification other than direct classroom instruction, are both eligible as teachers to participate in the State's NBPTS program. There is no indication in the statute that one of these categories of teachers is more or less deserving than the other to participate in the NBPTS program.

102. Respondent contends that in order for a person to be eligible to receive the NBPTS salary incentive pursuant to the "other than direct classroom instruction" provision in N.C. Gen. Stat. § 115C-296.2(b)(2)d.2, the position in which the individual is employed must match exactly her NBPTS certification area. (Denial Letter, p. 2; Vol. II, Price, pp. 372-76). However, this assertion is contrary to the plain meaning of N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. Under this statute, a teacher is eligible to participate in the North Carolina NBPTS program if she spends at least 70% of her work time within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction. Nowhere in this definition of teacher, or elsewhere in § 115C-296.2, is there any requirement that a teacher's job title and NBPTS certification areas must match precisely.

103. It is clear from the evidence and testimony presented that Respondent's licensure areas and job titles are much more specific than the certification areas established by NBPTS. Respondent issues more than 100 different types of licenses, while NBPTS has only 24 areas of certification. (Pet. Exh. 28; T. Vol. II, Jarrett, p. 399). Mr. Jarrett conceded that "The National Board certification areas are much broader than what you have in North Carolina licensure." (Vol. II, Jarrett, p. 396). To require a teacher's job title and area of NBPTS certification to match exactly, in order for her to qualify for the State's NBPTS program pursuant to § 115C-296.2(b)(2)d.2, would significantly limit the teachers who are eligible to participate in the program. This limitation would be contrary to, and inhibit, the achievement of the North Carolina NBPTS programs' stated goal – "to keep excellent teachers in the teaching profession." N.C. Gen. Stat. § 115C-296.2(a)

104. A preponderance of the evidence at hearing demonstrated that Petitioner Tucker spends at least 70% of her time working as a lead teacher and curriculum coordinator within her area of licensure: Career and Technical Education, and she is employed in an area of NBPTS Certification other than direct classroom instruction: Career and Technical Education.

105. When Respondent approved each Petitioner's application to participate in the North Carolina NBPTS program, it was fully informed how each Petitioner was licensed and employed. Each Petitioner holds the same teaching licenses, and has the same job responsibilities today as she did when she applied to participate in the State's NBPTS program. (T. Vol. I, Rotosky, p. 245; Rainey, p. 249; Tucker, pp. 186, 218; Pet. Exhs. 5, 17, 22)

106. Petitioners were motivated to pursue NBPTS Certification, in significant part, because of the salary increase provided by law to NBPTS certified teachers. (T. Vol. I, Rotosky, p. 68; Tucker, p. 221). In reliance on Respondent's assurances of a 12% salary increase, each Petitioner signed a promissory note to personally reimburse the State for the costs of the Certification, if she did not complete the NBPTS certification process, or if she completed the process, but did not teach in a North Carolina public school for at least one year immediately following her Certification. Each Petitioner satisfied the conditions of her respective promissory note by earning NBPTS certification and teaching in a North Carolina public school for at least one year afterwards.

107. Each Petitioner was reasonable to conclude that the eligibility criteria and benefits stated in the NBPTS Application pertained to the question of each Petitioner's eligibility to participate in North Carolina's entire NBPTS certification program. (T. Vol. I, Rotosky, pp. 68-69, 91-93; Rainey, pp. 114, 117-18; Garr, pp. 162-64).

108. After approving each Petitioner's NBPTS application, Respondent provided each Petitioner all of the benefits of the State's NBPTS program, except for the 12% salary increase. If each Petitioner is a "teacher" eligible to receive the assessment fee, paid leave days, and continuing education credit benefits of the NBPTS program, then it follows logically and legally that each Petitioner is also a "teacher" eligible to receive the 12% salary incentive benefit of the NBPTS program.

109. Respondent has not presented any statute or rule which proves that the eligibility criteria used to determine whether an NBPTS Certified teacher will receive the salary incentive mandated under N.C. Gen. Stat. § 115C-296.2, are more stringent than the criteria used to determine whether Respondent will pay teachers' NBPTS assessment fee, provide teachers three leave days, and provide teachers a full continuing education renewal credit.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law. To the extent any of the foregoing denominated Findings of Fact contain mixed Findings of Fact and Conclusions of Law, or are otherwise more appropriately considered to be Conclusions of Law, those Findings of Fact or parts thereof, shall be deemed incorporated herein as Conclusions of Law:

1. The Office of Administrative Hearings has subject matter and personal jurisdiction over this contested case.
2. In 1994, North Carolina's NBPTS program was initially implemented through a special provision of the budget bill. In July 2000, the program was codified pursuant to N.C. Gen. Stat. § 115C-296.2(a).
3. In N.C. Gen. Stat. § 115C-296.2(a), the General Assembly declared the public policy underlying the North Carolina NBPTS Certification program was "to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession."
4. N.C. Gen. Stat. § 115C-296.2(a) specifically provides that:

the State **shall** support the efforts of teachers to achieve national certification by providing approved paid leave time for teachers participating in the process, paying the participation fee, and paying a significant salary differential to teachers who attain national certification from the National Board for Professional Teaching Standards (NBPTS).

(Emphasis added) In addition to these statutory benefits, Respondent adopted a rule which provided that each teacher earning NBPTS certification will receive 15 units of continuing education renewal credit. 16 NCAC 6C.0307 (2003).

5. In defining who is eligible for these statutory benefits in North Carolina, as a result of earning NBPTS certification, the General Assembly defines "teacher" as a person who:
 - a. Either:
 1. Is certified to teach in North Carolina; or
 2. Holds a certificate or license issued by the State Board of Education that meets the professional license requirement for NBPTS certification;
 - b. Is a State-paid employee of a North Carolina public school;
 - c. Is paid on the teacher salary schedule; and
 - d. Spends at least seventy percent (70%) of his or her work time:

1. In classroom instruction, if the employee is employed as a teacher. Most of the teacher's remaining time shall be spent in one or more of the following: mentoring teachers, doing demonstration lessons for teachers, writing curricula, developing and leading staff development programs for teachers; or

2. In work within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

(Emphasis added; N.C. Gen. Stat. § 115C-296.2(b)(2)) Thus, in N.C. Gen. Stat. § 115C-296.2(b), our General Assembly recognizes two different categories of teachers who are eligible to participate in the State's NBPTS program: (i) teachers who are employed as teachers and engaged in classroom instruction, and (ii) teachers who work in areas of NBPTS certification other than direct classroom instruction.

6. Although North Carolina's program for rewarding NBPTS certified teachers distinguishes between classroom and non-classroom teachers, NBPTS does not categorize its certification areas as applying to either "direct classroom instruction" or "other than direct classroom instruction." The requirements for achieving NBPTS certification in every area, including counseling, library and media, and career and technical education, include teaching and classroom components. The National Board for Professional Teaching Standards construes the concept of the classroom broadly to include learning environments other than the traditional classroom in which a teacher teaches the same assigned students every day. (T. Vol. I, Garr, pp. 142-43, 153-57; Pet. Exh. 28).

7. In this case, the ultimate question is whether each Petitioner meets the statutory definition of "teacher" under N.C. Gen. Stat. § 115C-296.2(b)(2). Respondent contends that its refusal to pay Petitioners the NBPTS salary incentive is consistent with its understanding of the legislative intent underlying N.C. Gen. Stat. § 115C-296.2 – to keep "classroom teachers," as that term is construed by Respondent, in the classroom.

8. Legislative intent is an important compass in statutory construction. It is well established that the best indicia of the General Assembly's intent are first, the plain language of the statute, then the legislative history, and finally, the spirit of the act and what the act seeks to accomplish. Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001); Polaroid Corp. v. Offerman, 349 N.C. 290, 297 507 S.E.2d 284, 290 (1998).

9. Where the language of a statute is clear, there is no room for judicial construction, and courts must construe the statute according to its plain meaning. Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citing Utilities Comm. v. Edmisten, Atty. General, 291 N.C. 451, 232 S.E.2d 184 (1977)).

10. An administrative agency's interpretation of a statute it administers may be entitled to some deference, but the agency's interpretation is not controlling. State ex rel. Utilities Commission v. Public Staff – North Carolina Utilities Commission, 309 N.C. 195, 211-12, 306 S.E.2d 435, 444-45 (1983); Brooks, Comr. of Labor v. McWhirter Grading Co., 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981). It is the courts, and not the administrative agency, that are the final interpreters of legislation. Wells v. Consolidated Judicial Retirement System, 345 N.C. 313, 319, 553 S.E.2d 877, 881 (2001)

11. Here, the best evidence of the legislative intent underlying the N.C. NBPTS program is stated in the State's policy and goal of N.C. Gen. Stat. § 115C-296.2(a). In N.C. Gen. Stat. § 115C-296.2(a), the General Assembly declared the public policy underlying the NBPTS Certification program in North Carolina is "to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession." By providing two categories of teachers who qualify for statutory benefits under the State's NBPTS program, N.C. Gen. Stat. § 115C-296.2 itself clearly indicates that teachers not involved in direct classroom instruction, are also eligible under the State's NBPTS program for these statutory benefits. Thus, the plain meaning of N.C. Gen. Stat. § 115C-296.2, construed in the context of the statute's goal in N.C. Gen. Stat. § 115C-296.2(a), shows that the General Assembly intended to provide the benefits of the State's NBPTS program to all teachers, not just those who fall within Respondent's definition of a traditional "classroom teacher."

N.C. Gen. Stat. § 115C-296.2(b)(2)a. & b.

12. In applying the definition of "teacher" to each of these Petitioners, it is clear from the evidence, and Respondent concedes, that each Petitioner meets subsections a. and b. of N.C. Gen. Stat. § 115C-296.2(b)(2)'s definition of "teacher."

N.C. Gen. Stat. § 115C-296.2(b)(2)c.

13. A preponderance of the evidence presented at hearing establishes that Petitioners Rotosky and Rainey are paid on the teacher "M" salary schedule. Speech pathologists are paid on the salary schedule for teachers with masters' degrees, albeit at a higher starting

point on the schedule. The General Assembly did not establish a separate salary schedule for speech pathologists when it identified a level on the salary schedules for **teachers** with masters degrees, at which speech pathologists will be paid.

14. With no dispute in the evidence, Petitioner Tucker meets subsection c of N.C. Gen. Stat. § 115C-296.2(b)(2)c., because she is paid on the Teacher “M” salary schedule.

N.C. Gen. Stat. § 115C-296.2(b)(2)d.1.

15. N.C. Gen. Stat. § 115C-296.2(b)(2)d.1. fails to define either the term “teacher” used in the context of subsection d.1.’s language of “employed as a teacher,” or the term “classroom instruction” as used in subsection d.1 of this statute.

16. N.C. Gen. Stat. § 115C-296.2(f) states: Rules - The State Board shall adopt policies and guidelines to implement this Section.

17. Here, Respondent relied upon the authority in N.C. Gen. Stat. § 115C-296.2(f) to “adopt policies and guidelines to implement” N.C. Gen. Stat. § 115C-296.2, and established “Guidelines for National Board for Professional Teaching Standards (NBPTS) Pay Differential (“Guidelines”).” In these Guidelines, Respondent not only interpreted its understanding of the legislative intent of N.C. Gen. Stat. § 115C-296.2, but defined the undefined terms of “teacher” and “classroom instruction,” and interpreted scenarios describing teachers who qualify for the subject salary incentive in N.C. Gen. Stat. § 115C-296.2. (Pet Exh 32)

In construing its understanding of the legislative intent of N.C. Gen. Stat. § 115C-296.2, it defined the term “teacher” in N.C. Gen. Stat. § 115C-296.2 to mean only persons who teach direct classroom instruction. “The intent of this legislation is to encourage highly qualified teachers to remain in the classroom, providing direct instruction to students.” It also defined “classroom instruction” by providing a nonexclusive listing of some duties, obligations, and activities that “teachers” must perform in order to be teaching “classroom instruction.” (Pet Exh 32)

18. However, Respondent’s “Guidelines for National Board for Professional Teaching Standards (NBPTS) Pay Differential” were not duly promulgated as an administrative rule. Nonetheless, Respondent uses its definitions of “teacher” and “classroom instruction” in these “Guidelines” to determine whether any teacher who applies for North Carolina’s NBPTS program is eligible to receive the subject 12% salary incentive under N.C. Gen. Stat. § 115C-296.2. In this case, Respondent used its Guidelines’ definitions to make its determination that Petitioners Rotosky and Rainey were not eligible for the subject 12% salary incentive under N.C. Gen. Stat. § 115C-296.2, because they were not employed as “teachers” who spent 70% of their work time in “classroom instruction.”

19. N.C. Gen. Stat. § 150B-2(8a) defines the term “Rule” as:

any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term does not include the following:

- c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

20. In Comr. of Insurance v. Rate Bureau, 300 N.C. 381, 411, 269 S.E.2d 547, 568, *reh’g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980), the North Carolina Supreme Court held that, “Rules operate to fill the interstices of the statutes, and go beyond mere interpretation of statutory language or application of such language[,] and within statutory limits set down additional substantive requirements.” (See Dillingham v. N.C. Dep’t of Human Resources, 132 N.C. App. 704, 513 S.E.2d 823 (1999)- ruling that a provision of an agency manual created a binding standard interpreting eligibility provisions of Medicaid law.)

21. In this case, N.C. Gen. Stat. § 115C-296.2(f) is entitled “Rules.” It authorizes the State Board to adopt guidelines to “implement” this statute. In this case, Respondent’s “Guidelines” are binding standards that implement and interpret the eligibility provisions of N.C. Gen. Stat. § 115C-296.2. These Guidelines “fill the interstices” of the statutes regarding the definitions of the terms “teacher” and “classroom instruction,” and create additional requirements that any applicant for NBPTS certification must meet before he/she is eligible for the statutory benefits outlined in N.C. Gen. Stat. § 115C-296.2. As a result, Respondent’s “Guidelines” constitute a “Rule” under N.C. Gen. Stat. § 150B-2(8a).

22. By applying this unpromulgated rule to find that Petitioners Rotosky and Rainey were not eligible for the 12% salary incentive, and thus, refuse to pay these Petitioners the 12% salary incentive, Respondent deprived Petitioners Rotosky and Rainey of property, substantially prejudiced their rights, exceeded its authority, and acted erroneously.

23. The terms “classroom teacher” and “standard course of study” appear nowhere in N.C. Gen. Stat. § 115C-296.2, or in the session laws governing the NBPTS program which preceded this statute. Instead, the General Assembly has always used the simple term “teacher.” Because N.C. Gen. Stat. § 115C-296.2 fails to define the terms “teacher” and “classroom instruction” and the language of that statute is unclear as to the definition of these terms, these terms must be construed to given their ordinary meaning.

24. When construing a statute, the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. Abernethy v. Board of Comm’rs, 169 N.C. 631, 86 S.E. 577 (1915).

25. In this case, a broader construction of the definition of “teacher” set forth in N.C. Gen. Stat. § 115C-296.2(b)(2) is consistent with the goal of the NBPTS program set forth in subsection (a) of this statute: “to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession ...”

26. The plain ordinary meaning of “teacher” is “one who teaches or instructs” (Black’s Law Dictionary, 5th Ed. 1979). The plain ordinary meaning of the term “classroom instruction” is instructing or teaching in a classroom. Applying those definitions to Petitioners Rotosky and Rainey in the context of N.C. Gen. Stat. § 115C-296.2(b)(2)d.1, a preponderance of the evidence at hearing proves that Petitioners Rotosky and Rainey are teachers who spend at least 70% of their work time in classroom instruction.

27. Because Petitioners Rotosky and Rainey meet the criteria in N.C. Gen. Stat. § 115C-296.2(b)(2)d.1, they are “teachers” within under N.C. Gen. Stat. § 115C-296.2(b)(2). As such, each is eligible to participate in and receive all the benefits of the North Carolina NBPTS program, including the salary increase authorized pursuant to N.C. Gen. Stat. § 115C-296.2.

N.C. Gen. Stat. § 115C-296.2(b)(2)d.2.

28. Because Ms. Tucker completed her NBPTS certification process before N.C. Gen. Stat. § 115C-296.2 was adopted, her eligibility to participate in the program should be determined under the law that governed the NBPTS program when Tucker applied for and completed her NBPTS certification.

29. When Ms. Tucker applied for and completed the NBPTS certification program, the General Assembly provided that teachers were eligible to participate in North Carolina’s NBPTS program if they were:

State-paid teachers who (i) have completed three years of teaching in North Carolina schools operated by local board of education . . . prior to application for NBPTS certification, and (ii) have not previously received State funds for participating in any certification area in the NBPTS program.

(SL 1997-443, § 8.23(a).)

30. Ms. Tucker clearly meets these requirements because she taught for approximately 8 years in North Carolina public schools before she first applied for NBPTS certification in 1999, and had not previously received State funds for participating in the NBPTS assessment.

31. The language of N.C. Gen. Stat. § 115C-296.2(b)(2) provides that a person is a teacher eligible to participate in the North Carolina NBPTS program, if she spends at least 70% of her work time:

[i]n work within the employee’s area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

This statute does not restrict application of subsection d.2. by stating that the employee is employed in the NBPTS certification areas of media and guidance counseling only. In addition, nowhere in N.C. Gen. Stat. § 115C-296.2 is there any requirement that a teacher’s job title and NBPTS certification areas must match precisely in order to qualify for the benefits of N.C. Gen. Stat. § 115C-296.2(b)(2).

32. Like library media and school counseling, career and technical education relates to areas other than direct classroom instruction by the nature of its subject content. If a person licensed and working in the area of library media or school counseling is eligible to participate in North Carolina’s NBPTS program under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2, then it follows logically and legally that a person licensed and working in career and technical education, is equally eligible to participate in the NBPTS program under this same subsection of the NBPTS statute.

33. Assuming arguendo, that Ms. Tucker must qualify under N.C. Gen. Stat. § 115C-296.2 in order to receive the NBPTS 12% salary increase, the evidence at hearing demonstrates that Petitioner Tucker spends at least 70% of her time working as a lead teacher

and curriculum coordinator within her area of licensure: Career and Technical Education, and is employed in an area of NBPTS Certification other than direct classroom instruction: Career and Technical Education.

34. Petitioners Tucker meets the criteria under N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. to be a “teacher” under N.C. Gen. Stat. § 115C-296.2(b)(2). As such, she is eligible to participate in, and receive all the benefits of the North Carolina NBPTS program, including the salary increase authorized pursuant to N.C. Gen. Stat. § 115C-296.2.

35. Petitioners proved by the preponderance of the evidence that each Petitioner earned NBPTS certification in her respective area of expertise, and is employed in that area at a North Carolina public school. Each Petitioner is a “teacher” as defined in N.C. Gen. Stat. § 115C-296.2(b)(2), and is entitled to receive the 12% salary increase under N.C. Gen. Stat. § 115C-296.2, effective July 1 of the school year in which they obtained their Certification.

36. Petitioners proved by the preponderance of the evidence that Respondent deprived Petitioners of property and otherwise substantially prejudiced their rights, when Respondent refused to pay Petitioners the NBPTS salary increase authorized by N.C. Gen. Stat. § 115C-296.2. Petitioners proved by the preponderance of the evidence that Respondent exceeded its authority, acted erroneously, failed to use proper procedure, and failed to act as required by law or rule, when it refused to pay Petitioners the NBPTS salary increased authorized by N.C. Gen. Stat. § 115C-296.2.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent’s decision to deny Petitioners the NBPTS salary increase authorized by N.C. Gen. Stat. § 115C-296.2, should be **REVERSED**. Respondent shall award each Petitioner all of the benefits of the North Carolina NBPTS program, including payment of the salary increase authorized by N.C. Gen. Stat. § 115C-296.2 without delay.

Respondent shall award Petitioner Rainey the NBPTS salary increase for the period of July 1, 2001 through June 30, 2003, Petitioner Rotosky the NBPTS salary increase from and after July 1, 2001, and Petitioner Tucker the NBPTS salary increase from and after July 1, 2000.

ORDER AND NOTICE

The North Carolina State Board of Education is the agency that will make the final decision in this contested case. N.C. Gen. Stat. § 150B-36(b),(b1),(b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. § 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party’s attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 1st day of June, 2004.

Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DHR 1308

CARILLON ASSISTED LIVING, LLC,)
Petitioner,)
v.)
NORTH CAROLINA DEPARTMENT OF HEALTH)
AND HUMAN SERVICES, DIVISION OF FACILITY)
SERVICES, ADULT CARE LICENSURE SECTION;)
and THE STATE OF NORTH CAROLINA,)
Respondent.)

DECISION GRANTING PETITIONER'S MOTION
FOR SUMMARY JUDGMENT AND ORDER
DENYING RESPONDENT'S MOTION TO DISMISS

The Court has considered the motions, briefs, and memoranda filed by the parties, along with the attachments thereto, including but not limited to, affidavits, deposition transcripts, discovery responses, and pleadings (together with the exhibits to each of the foregoing), and the Court has heard and considered oral argument by parties on March 31, 2004. As a result of those considerations, the undersigned finds the following:

APPEARANCES

For Petitioner:

Brooks, Pierce, McLendon, Humphrey & Leonard, LL.P.
Jim W. Phillips, Jr.
Forrest W. Campbell, Jr.
Charles F. Marshall III

For Respondents:

NC Department of Justice
Thomas M. Woodward
Wendy L. Greene

ORDER DENYING MOTION TO DISMISS

IT HEREBY IS ORDERED that Respondents' Motion to Dismiss is denied.

FINDINGS OF FACT RELATED TO SUMMARY JUDGMENT

Carillon's Development Activities Prior to the 1997 Moratorium

1. In the Spring of 1996, Carillon began to develop assisted living facilities in North Carolina. In June 1997, Carillon filed plans with the Department for the development of 21 facilities in 20 markets. Carillon currently owns and operates six assisted living facilities in North Carolina.

The 1997 Moratorium

2. Until August 8, 1997, North Carolina law permitted a person to develop an assisted living facility by: (1) filing construction plans with the Department's Construction Section for review and approval in accordance with applicable regulations; (2) beginning the construction of the facility once the plans were approved; and (3) filing an application with the Department's Adult Care Licensure Section for an adult care home license just as the construction of the facility was complete.

3. On August 8, 1997, the North Carolina General Assembly enacted Session Law 1997-443, s. 11.69 (the "1997 Moratorium") which contained a provision prohibiting the development of additional adult care facilities but exempting five (5) categories of plans for assisted living projects from this prohibition (the "Exemption Clause"), as follows:

4.

(b) From the effective date of this Act until twelve months after the effective date of this Act, the Department of Health and Human Services shall not approve the addition of any adult care home beds for any type home or facility in the State, except as follows:

- (1) Plans submitted for approval prior to May 18, 1997, may continue to be processed for approval;
- (2) Plans submitted for approval subsequent to May 18, 1997, may be processed for approval if the individual or organization submitting the plan demonstrates to the Department that on or before August 25, 1997, the individual or organization purchased real property, entered into a contract to purchase or obtain an option to purchase real property, entered into a binding real property lease arrangement, or has otherwise made a binding financial commitment for the purpose of establishing or expanding an adult care home facility. An owner of real property who entered into a contract prior to August 25, 1997, for the sale of an existing building together with land zoned for the development of not more than 50 adult care home beds with a proposed purchaser who failed to consummate the transaction may, after August 25, 1997, sell the property to another purchaser and the Department may process and approve plans submitted by the purchaser for the development of not more than 50 adult care home beds. It shall be the responsibility of the applicant to establish, to the satisfaction of the Department, that any of these conditions have been met;
- (3) Adult care home beds in facilities for the developmentally disabled with six beds or less which are or would be licensed under G.S. 131D or G.S. 122C may continue to be approved;
- (4) If the Department determines that the vacancy rate of available adult care home beds in a county is fifteen percent (15%) or less of the total number of available beds in the county as of August 26, 1997, and no new beds have been approved or licensed in the county or plans submitted for approval in accordance with subdivision (1) or (2) of this section which would raise the vacancy rate above fifteen percent (15%) in the county, then the department may accept and approve the addition of beds in that county; or
- (5) If a county board of commissioners determines that a substantial need exists for the addition of adult care home beds in that county, the board of commissioners may request that a specified number of additional beds be licensed for development in their county. In making their determination, the board of commissioners shall give consideration to meeting the needs of Special Assistance clients. The Department may approve licensure of the additional beds from the first facility that files for licensure and subsequently meets the licensure requirements.

Sess. Law. 1997-443, s. 11.69(b). The 1997 Moratorium was made effective retroactively to July 1, 1997, and was set to expire 12 months later on June 30, 1998. Sess. Law 1997-443, ss. 11.69, 35.5.

Carillon's Efforts During the 1997 Moratorium

4 While the 1997 Moratorium was in effect—and knowing that it was set to expire on June 30, 1998—Carillon continued its development efforts. Among other efforts, in May 1998, Carillon filed plans with the Department to expand its first six facilities (Asheboro, Harrisburg, Newton, Cramerton, Salisbury, and Shelby) by adding 32 beds to each facility.

The Gap Projects

5. The 1997 Moratorium expired by its own terms on June 30, 1998. Four months later - on October 30, 1998 - the General Assembly reinstated the 1997 Moratorium retroactively to July 1, 1998 and continued it in effect through August 26, 1999. Sess. Law 1998-212, ss. 12.16C, 30.6. During this four month “gap period,” Carillon continued its development efforts, and on October 23, 1998, Carillon filed plans with the Department for the development of 43 additional facilities (“the Gap Projects”).

Carillon's 1999 Declaratory Ruling Request

6. On January 26, 1999, Carillon filed a Declaratory Ruling Petition with the Department's Division of Facility Services (“DFS”), seeking a ruling that the Moratorium did not prevent Carillon from developing eight new assisted living facility projects and expanding six existing assisted living facility projects. On March 29, 1999, DFS issued a Decision Not To Issue Declaratory Ruling, informing Carillon that DFS declined to issue a declaratory ruling (the “1999 Ruling”).

1999 Appeal to Superior Court

7. On April 26, 1999, Carillon filed an Amended Petition for Judicial Review and Complaint for Declaratory Judgment in Wake County Superior Court, seeking judicial review of the Department’s 1999 Ruling and asserting four alternative claims for relief: (a) Carillon’s projects were exempt from the Moratorium; (b) Carillon could develop its projects because the Moratorium expired on June 30, 1998 and was not reinstated until October 30, 1998 and, prior to said reinstatement, Carillon had filed plans and made binding financial commitments for its projects; (c) the retroactive application of the Moratorium to Carillon’s projects violated the North Carolina Constitution; and (d) the application of the Moratorium to Carillon’s projects otherwise violated the North Carolina Constitution. On October 15, 1999, the Superior Court entered an Order (the “Order”) reversing the Department’s 1999 Ruling and holding that Carillon was entitled to develop 27 projects—21 new projects and six expansion projects for its existing six facilities. The Department appealed the Order to the North Carolina Court of Appeals. Carillon filed cross-assignments of error contending that the court failed to consider the constitutionality of the Moratorium, and thereby deprived Carillon of an alternative basis for judgment in its favor.

The Settlement Agreement

8. While the appeal was pending, Carillon, the Department, and the State entered into a Settlement Agreement, which was effective June 20, 2000, and which resolved all four of Carillon’s claims (the “Settlement Agreement”). In the Settlement Agreement, Carillon surrendered the opportunity to develop the 27 facilities permitted by the Order and agreed to accept the right to develop 19 specific facilities (the “Settlement Projects”). The language conveying that right is explicit:

Immediately upon entry of an order by the Superior Court of Wake County allowing the joint motion [for relief from the Order pursuant to G.S. 1A-1, Rule 60(b)], Carillon, and any of Carillon’s wholly-owned subsidiaries, shall be entitled to develop the [nineteen] assisted living facilities identified in Exhibit A to this agreement. The parties hereby agree that the Moratorium is not applicable to development of the [nineteen] facilities described in Exhibit A.

Settlement Agreement 2.

9. The two foregoing sentences from the Settlement Agreement are unambiguous. The first sentence provides that Carillon “shall be entitled to develop” the Settlement Projects. This means that Carillon has the legal right to construct the Settlement Projects. This is different from the language of the Exemption Clause, which did not grant a person the right to construct projects. The second sentence provides that the “moratorium is not applicable to development of the [Settlement Projects].” “Moratorium” is defined in the Settlement Agreement as “the moratorium on the development of new assisted living facilities in North Carolina imposed by Chapter 443 of the 1997 Session Laws.” Indeed, this law’s general prohibition on development of new facilities and the Exemption Clause are imbedded in a single sentence. Hence, the term “moratorium” as used in the Settlement Agreement means the entire Moratorium law (Section 11.69 of Chapter 443), including the Exemption Clause and the subsequent amendments to that law. By its plain language, then, the phrase “the moratorium is not applicable” means the entire Moratorium law - including the Exemption Clause and the subsequent amendments to the Moratorium law - are not applicable to the Settlement Projects.

10. Throughout the litigation, the Department never believed that the Settlement Projects qualified for an exemption under the Exemption Clause. Consistent with this, in the Settlement Agreement, the Department refused to concede its position that Carillon’s projects did not qualify for an exemption:

WHEREAS, the Agency contends that it properly precluded the development of the assisted living facilities;

WHEREAS, the execution of this settlement agreement does not constitute an admission of error by any party;

WHEREAS, pursuant to N.C.G.S. § 150B-22, it is the policy of the State to settle disputes between State agencies and other persons wherever possible[.]

Settlement Agreement at 2.

11. The Settlement Agreement does not state anywhere that Carillon qualified for or was being granted an exemption. Notably absent from the Settlement Agreement is the word “exemption” and any reference to the Exemption Clause (section (b) of Session Law 1997-443) or any of the five specific exemptions in subsections (b)(1)-(5). Furthermore, the Exemption Clause is limited to five specific categories, and nothing in any of those five categories includes an exemption for projects developed pursuant to a negotiated Settlement Agreement.

12. The second paragraph of numbered paragraph two of the Settlement Agreement is also instructive because: (a) it uses the same language - "moratorium is not applicable" - that is contained in the first paragraph of numbered paragraph two quoted above, and (b) the Moratorium does not purport to address expansions of facilities where no beds are added, as the Respondents admit:

The parties agree that the moratorium is not applicable to expansions of any of Carillon's . . . facilities if, in expanding the facilities . . . the number of licensed beds is not increased.

Settlement Agreement 2.

13. The Department never treated the Settlement Projects as exemptions. Once an applicant qualified for an exemption, the Department's normal course of business was to send a letter from the Adult Care Licensure Section notifying the applicant it was "allowed to proceed with licensure," and to cite the specific statutory subsection under which the exemption was granted (i.e., "(b)(1)," "(b)(2)," etc.). After the Settlement Agreement was executed, Carillon never received any correspondence from the Department confirming it qualified for an exemption or specifying the specific statutory subsection under which an exemption was granted. In addition, the Construction Section's customary practice was to enter the qualifying applicant's information in its database and cite the specific subsection of the Exemption Clause under which the exemption was granted. That practice was not followed for Carillon's Settlement Projects. Instead, entries for the Settlement Projects contain an asterisk with a "note" explaining that the projects were "[a]pproved to move forward by settlement agreement for [] beds . . . see agreement terms and act accordingly."

The 1999 and 2000 Amendments Extending the Moratorium

14. In June 1999, the General Assembly enacted Session Law 1999-135, which amended the 1997 Moratorium to extend it through September 30, 2000. Effective July 1, 2000, the General Assembly enacted Session Law 2000-67, which amended the 1997 Moratorium to extend it through September 30, 2001. Hence, from October 30, 1998, the Moratorium was continuously in effect through September 30, 2001.

The 2001 Session Law

15. In June 2001, General Assembly enacted the Session Law 2001-234 (the "2001 Session Law"), which provided that the Moratorium would continue through December 31, 2001 but thereafter assisted living facilities would be subject to the Certificate of Need ("CON") law. See G.S. 131E-175 *et seq.* (the CON law).

16. The 2001 Session Law also added two new provisions to the Moratorium—(b1) and (b2)—stating that "exemptions" received under the Moratorium's Exemption Clause will terminate unless certain financial and construction deadlines are met in connection with the exempt projects by certain dates (sometimes hereinafter referred to as the "Exemption Termination Provision"). Session Law 2001-234, s. 3.

17. The 2001 Session Law includes a finding that "persons who have received an exemption under [the Exemption Clause] have had sufficient time to complete development plans and initiate construction." That is not true in Carillon's case. The Settlement Agreement was executed one year before the 2001 Session Law was enacted, and it granted Carillon the right to develop 19 facilities. Under even the strictest timetable, one year was not sufficient time to complete development plans and commence construction on 19 separate facilities at once.

Application of the 2001 Session Law to the Settlement Projects

18. On July 10, 2003, the Department issued the decision that is at issue in this case (the "Decision"). The Decision stated that Carillon's rights under the Settlement Agreement to develop the Settlement Projects are "exemptions" under the Moratorium Exemption Clause, that the 2001 Session Law is applicable to those Settlement Projects, and that Carillon's development rights will terminate unless Carillon meets the requirements and deadlines imposed by the Exemption Termination Provision.

Application of the 2001 Session Law to the Gap Projects

19. The 1997 Moratorium expired by its own terms on June 30, 1998, and prior to its expiration, Carillon continued its development efforts, knowing that the law was set to expire on June 30, 1998. During the four month "gap period" between the expiration of the 1997 Moratorium on June 30, 1998 and the reinstatement of the Moratorium on October 30, 1998, Carillon also continued its development activities. On October 23, 1998 - during the gap period - Carillon filed plans with the Department for the development of the Gap Projects. During this gap period, no Moratorium was in effect, and the only law in effect applicable to the development of assisted living facilities permitted Carillon to initiate the development of the Gap Projects by filing its project plans with the Department. Carillon complied with all of the requirements for initiating the development of the Gap Projects. Carillon's development expenditures and obligations up to the reinstatement of the Moratorium on October 30, 1998 totaled at least \$1,561,064 (\$864,358 for acquiring real estate for Carillon's first six projects and \$696,706 for various other development expenditures) and that

total included, in part, expenditures for the Gap Projects. Following the filing of the Gap Project plans on October 23, 1998, Carillon continued to make and incur substantial development expenditures and obligations in connection with the Gap Projects.

20. On October 30, 1998 - after Carillon had filed its plans for the Gap Projects - the Moratorium was reinstated by Session Law 1998-212, ss. 12.16C, 30.6, and by its terms, it applied retroactively to plans for assisted living facilities that were filed on or after July 1, 1998, which purportedly included the Gap Projects. As noted in preceding paragraphs, the Moratorium was subsequently continued in effect through December 31, 2001, and then, as a result of the 2001 Session Law, assisted living facilities became subject to the CON law effective January 1, 2002.

21. In the Decision, the Department notified Carillon that, during the years when the Moratorium was in effect, the Moratorium applied to prevent Carillon from developing the Gap Projects, and upon the expiration of the Moratorium, the 2001 Session Law applied to prevent (and continues to prevent) Carillon from developing the Gap Projects unless Carillon first obtains a certificate of need.

CONCLUSIONS OF LAW RELATED TO SUMMARY JUDGMENT

1. To the extent that any portion of any item recited in the foregoing Findings of Facts is properly considered a conclusion of law, in whole or in part, such portion shall be deemed to be a conclusion of law. To the extent that any portion of any item recited in these Conclusions of Law is properly considered a finding of fact, in whole or in part, such portion shall be deemed to be a finding of fact.

2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this case.

3. There is no genuine issue as to any material fact and, therefore, summary judgment is proper pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 and 26 N.C.A.C. 3.0101 and 3.0105(1).

4. The 2001 Session Law is not applicable to the Settlement Projects and, hence, cannot lawfully be applied to prevent or otherwise limit the development of the Settlement Projects.

5. The Moratorium and the 2001 Session Law are not applicable to the Gap Projects and, hence, cannot lawfully be applied to prevent or otherwise limit the development of the Gap Projects.

6. In light of the foregoing conclusions of law, it is unnecessary to reach the breach of contract or the constitutional claims asserted by Carillon. However, the Court has serious concerns that the application of the 2001 Session Law to the Settlement Projects and the application of the Moratorium and the 2001 Session Law to the Gap Projects would result in an impairment of vested rights that would violate both the United States Constitution and the North Carolina Constitution.

DECISION

IT IS HEREBY RECOMMENDED that Carillon's Motion for Summary Judgment be granted and the Decision be reversed and that Respondents' Motion for Summary Judgment 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. Gen. Stat. § 150B-36(b).

NOTICE

Before the Agency makes the Final Decision, it is required by N.C. Gen. Stat. § 150B-36(a) to give each party an opportunity to file exceptions to this Recommended Decision, and to present written arguments to those in the Agency who will make the final decision.

The Agency is required by N.C. Gen. Stat. § 150B-36(b3) to serve a copy of the Final Agency Decision on all parties and to furnish a copy to the parties' attorneys of record.

This the 11th day of May, 2004.

Beecher R. Gray
Administrative Law Judge