

NORTH CAROLINA

REGISTER



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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

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

NCAC TITLES		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/Transliterator	
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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 2005 – December 2005

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
19:13	01/03/05	12/08/04	01/18/05	03/04/05	03/21/05	05/01/05	05/06	09/30/05
19:14	01/18/05	12/22/04	02/02/05	03/21/05	04/20/05	06/01/05	05/06	10/15/05
19:15	02/01/05	01/10/05	02/16/05	04/04/05	04/20/05	06/01/05	05/06	10/29/05
19:16	02/15/05	01/25/05	03/02/05	04/18/05	04/20/05	06/01/05	05/06	11/12/05
19:17	03/01/05	02/08/05	03/16/05	05/02/05	05/20/05	07/01/05	05/06	11/26/05
19:18	03/15/05	02/22/05	03/30/05	05/16/05	05/20/05	07/01/05	05/06	12/10/05
19:19	04/01/05	03/10/05	04/16/05	05/31/05	06/20/05	08/01/05	05/06	12/27/05
19:20	04/15/05	03/24/05	04/30/05	06/14/05	06/20/05	08/01/05	05/06	01/10/06
19:21	05/02/05	04/11/05	05/17/05	07/01/05	07/20/05	09/01/05	05/06	01/27/06
19:22	05/16/05	04/25/05	05/31/05	07/15/05	07/20/05	09/01/05	05/06	02/10/06
19:23	06/01/05	05/10/05	06/16/05	08/01/05	08/22/05	10/01/05	05/06	02/26/06
19:24	06/15/05	05/24/05	06/30/05	08/15/05	08/22/05	10/01/05	05/06	03/12/06
20:01	07/01/05	06/10/05	07/16/05	08/30/05	09/20/05	11/01/05	05/06	03/28/06
20:02	07/15/05	06/23/05	07/30/05	09/13/05	09/20/05	11/01/05	05/06	04/11/06
20:03	08/01/05	07/11/05	08/16/05	09/30/05	10/20/05	12/01/05	05/06	04/28/06
20:04	08/15/05	07/25/05	08/30/05	10/14/05	10/20/05	12/01/05	05/06	05/12/06
20:05	09/01/05	08/11/05	09/16/05	10/31/05	11/21/05	01/01/06	05/06	05/29/06
20:06	09/15/05	08/25/05	09/30/05	11/14/05	11/21/05	01/01/06	05/06	06/12/06
20:07	10/03/05	09/12/05	10/18/05	12/02/05	12/20/05	02/01/06	05/06	06/30/06
20:08	10/17/05	09/26/05	11/01/05	12/16/05	12/20/05	02/01/06	05/06	07/14/06
20:09	11/01/05	10/11/05	11/16/05	01/03/06	01/20/06	03/01/06	05/06	07/29/06
20:10	11/15/05	10/24/05	11/30/05	01/17/06	01/20/06	03/01/06	05/06	08/12/06
20:11	12/01/05	11/07/05	12/16/05	01/30/06	02/20/06	04/01/06	05/06	08/28/06
20:12	12/15/05	11/22/05	12/30/05	02/13/06	02/20/06	04/01/06	05/06	09/11/06

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 PUBLIC MEETING AND PUBLIC COMMENT PERIOD
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES
DIVISION OF WASTE MANAGEMENT
HAZARDOUS WASTE SECTION
1646 MAIL SERVICE CENTER
RALEIGH, NORTH CAROLINA 27699-1646
(919) 508- 8400**

Notice is hereby given of a public meeting and public comment period on the Remedial Recommendation Document for the former Seaboard Chemical Corporation Facility and the City of High Point Riverdale Drive Landfill site located in Jamestown, North Carolina, Guilford County. The purpose of the Remedial Recommendation Document is to present the remedy that is recommended by the City of High Point, North Carolina and Seaboard Group II to address the containment and remediation of impacted soils and ground water at the site. The proposed remedy will provide the containment and treatment necessary to ensure an effective and viable remedy that is protective of public health, safety and the environment. A summary of the Document appears at the end of this notice*.

This is to notify the public of a Public Hearing to be held on Thursday, June 23, 2005 at 7:00 p.m. in the auditorium at Guilford Technical Community College, located at 601 High Point Road, Jamestown, N. C. All interested parties will have an opportunity to present oral and/or written statements concerning the proposed remedy. Five (5) minutes will be allotted per speaker.

The public comment period will begin on June 1, 2005 and extend through July 15, 2005. All comments received during the public comment period or at the public meeting will be considered in the formulation of a final decision on the Remedy recommendation document. Written comments regarding the Remedial Recommendation Document should be sent to the following address by July 15, 2005:

Mr. Robert Glaser
Hazardous Waste Section
N. C. Division of Waste Management
1646 Mail Service Center
Raleigh, NC 27699-1646

The Remedial Recommendation Document is available for review at the following location during office hours (9:00 a.m. – 4:00 p.m.) Monday through Friday:

Division of Waste Management
Hazardous Waste Section
401 Oberlin Road, Suite 150, Room 21
Raleigh, North Carolina 27605
Call (919) 508-8400, extension 8564 for an appointment

The City of High Point will also maintain a copy of the Remedial Recommendation Document, as part of the administrative record, at the High Point Public Library, 901 North Main Street, High Point. No appointment is necessary to review the Remedy Recommendation Document during normal business hours (Library phone number is 336-883-3643).

* Summary of Remedial Recommendation Document

The proposed Remedy takes into consideration the findings of the Remedial Investigation (RI), the Feasibility Study (FS) and the Baseline Risk assessment (BRA) and the currently known technical limitations on remediation of dense, non-aqueous phase liquids (“DNAPL”) in fractured bedrock. The proposed Remedy includes engineering and institutional controls along with leachate collection, groundwater extraction and treatment for plume containment and contaminant reduction. The proposed Remedy will control potential for off-site migration of impacted groundwater and leachate into the Deep River and, once constructed, into Randleman Reservoir.

The proposed Remedy addresses these objectives through the following components:

1. Isolation of Landfill leachate and leachate-impacted groundwater to prevent its migration to the waters of the Deep River and the Northern and Southern Intermittent Streams;
2. Stabilization of Landfill slopes and enhancement of the existing caps at the Landfill and the Seaboard Site;
3. Extraction of groundwater to contain plume migration and capture impacted groundwater recharge into the Deep River and the Northern and Southern Intermittent Streams.
4. Treatment of extracted groundwater to reduce contaminant mass
5. The use of natural treatment processes, including constructed wetlands and upland phytoremediation systems, to provide sustainable and cost-effective treatment of extracted groundwater;
6. Physical and chemical treatment, including air stripping, aeration and ozone-oxidation methods, to supplement the natural treatment processes. A HiPOx treatment system, which uses hydroxyl radicals formed by the reaction of ozone with hydrogen peroxide organic containment in the groundwater, is proposed for use at the Site. This system will provide effective treatment during periods of time when the natural treatment systems are being started up
7. Continued use and maintenance of the existing fences and warning signs at the Site to restrict unauthorized access;
8. Permanent land use restrictions on the Seaboard Site and the property immediately across the Deep River from the Site and the Landfill to prevent future uses of impacted groundwater or activities which could result in unacceptable risk exposures;
9. Long term, periodic site inspections and agency reviews; and
10. Long-term, periodic groundwater and surface water monitoring.

NC DENR will provide auxiliary aids and services for disabled persons who wish to review the documents to comply with the Americans with Disabilities Act. To receive special services, please contact Robert Glaser at the address above, via email at robert.glaser@ncmail.net or by calling (919) 508-8541.

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

Bellevue Development, LLC

Pursuant to N.C.G.S. § 130A-310.34, Bellevue Development, 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 Hillsborough, Orange County, North Carolina. The Property consists of approximately 9.1 acres and is located at 200 through 210 South Nash Street. Environmental contamination exists on the Property in the soil and groundwater. Bellevue Development, LLC has committed itself to make no use of the Property other than for owner- or tenant-occupied residential apartments and related amenities. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Bellevue Development, 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 at the Orange County Public Library, 300 W. Tryon St., Hillsborough, NC 27278, by contacting Ms. Kim Sholar at that address or at (919) 245-2525; or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Ms. Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411, 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. Thus, if Bellevue Development, LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on June 2, 2005. All such comments and requests should be addressed as follows:

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

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

Town of Fletcher

Pursuant to N.C.G.S. § 130A-310.34, the Town of Fletcher has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Fletcher, Henderson County, North Carolina. The Property consists of 28.77 acres on the east side of Howard Gap Road near U.S. Highway 25. The Property is bordered to the north by railroad tracks and land that is partially vacant and partially agricultural; to the south by the facilities of Asheville Maintenance and Construction, Inc., where equipment/supply storage and work related to electrical, carpentry and painting contracting occur, and by property containing a building that houses the Park Ridge Medical Association medical practice; to the southeast by Fletcher Community Park; to the east by land that is partially vacant and partially agricultural; and to the west by Howard Gap Road. Environmental contamination exists on the Property in soil and groundwater. The Town of Fletcher has committed itself to make no use of the Property other than for mixed commercial/residential redevelopment to include a town hall, commercial and retail businesses, office space, green space with walking trails, and residential townhomes or condominiums. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and the Town of Fletcher, 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 at Henderson County Public Library, Fletcher Branch, 120 Library Road, Fletcher, NC 28732 by contacting Sherry Waldrop at (828) 687-1218; 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. Publication in the North Carolina Register is scheduled for June 1, 2005. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. Thus, if the Town of Fletcher, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on August 1, 2005. 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

STATE OF NORTH CAROLINA

BEFORE THE
TAX REVIEW BOARD

COUNTY OF WAKE
IN THE MATTER OF:

The Proposed Assessment of Sales and Use)
Tax for the period April 1, 1999 through)
March 31, 2002, by the Secretary of)
Revenue of North Carolina)

ADMINISTRATIVE DECISION
Number: 451

vs.)

EarthData International of North Carolina, LLC)
Taxpayer)

This Matter was heard before the regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, in the office of the State Treasurer on Tuesday, April 13, 2004, upon a petition filed by EarthData International of North Carolina, LLC (hereinafter "Taxpayer") for administrative review of the Final Decision of the Assistant Secretary of Revenue sustaining the proposed use tax assessment for the period of April 1, 1999 through March 31, 2002.

Chairman Richard H. Moore, State Treasurer, presided over the hearing with ex officio member, Jo Anne Sanford, Chair, Utilities Commission and duly appointed member, Noel L. Allen, Attorney at Law participating.

Pursuant to N.C. Gen. Stat. § 105-241.2, the Taxpayer, through counsel, appeals from the adverse decision by the Assistant Secretary of Revenue issued on June 10, 2003 that sustained the assessment of use tax and interest, but waived the penalties imposed against the Taxpayer in this matter.

STATEMENT OF CASE AND FACTS

The Taxpayer is a land surveying company with its corporate offices in High Point, North Carolina. The Taxpayer provides aerial topographical mapping services within and without North Carolina. These services are nontaxable when ultimately sold to the Taxpayer's customers. In the course of providing land surveying services to its customers, the Taxpayer purchases aerial photography, undeveloped film, contract prints, negatives, diapositives, data tapes and compact disks, and thermal imagery from subcontractors that include affiliate companies. After conducting an audit of the Taxpayer's records, the Department of Revenue proposed a use tax assessment against the Taxpayer. The additional tax resulted from Taxpayer's purchases for use of aerial photography, undeveloped film, geo-referenced imaging data in the form of a contract print, negative or diapositive and scanning information in the form of data tapes or compact disks. After receiving the notice of assessment, the Taxpayer, through counsel, notified the Department of Revenue that it objected to the assessment and requested an administrative hearing before the Secretary of Revenue. After conducting the hearing, the Assistant Secretary of Revenue issued a final decision sustaining the proposed assessment of use tax and interest for the period of April 1, 1999 through March 31, 2002. For good cause shown, the Assistant Secretary of Revenue waived the penalties that were imposed against the Taxpayer. Thereafter, the Taxpayer filed a notice of intent and petition for administrative review of the Assistant Secretary of Revenue's final decision with the Board.

ISSUES

The issues considered by the Assistant Secretary of Revenue regarding this matter are stated as follows:

1. Are the Taxpayer's purchases of undeveloped aerial photography film, contract prints, negatives, diapositives, data tapes and compact disks considered purchases of taxable property for use or purchase of nontaxable services?
2. Is the Taxpayer a disregarded entity, and therefore not subject to sales tax, based on its corporate structure and the corporate structure of its vendors?
3. Are the penalties and interest on the Taxpayer's assessment correctly proposed and assessed?

EVIDENCE

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

FINDINGS OF FACTS

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

CONCLUSIONS OF LAW

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

DECISION

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

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

Pursuant to N.C. Gen. Stat. § 105-241.1(a), a proposed tax assessment is presumed to be correct and the burden is on the Taxpayer to rebut that presumption. In order to rebut the presumption, the Taxpayer must offer evidence to show that the assessment is not proper. The record in this matter shows that the Taxpayer is a single member limited liability company that provides aerial topographical services. In order to provide its nontaxable aerial topographical services, the Taxpayer purchases undeveloped aerial photography film, geo-referenced imaging data in the form of contact prints, negatives, or diapositives and scanning information in the form of data tapes or compact disks. These items are purchased from subcontractors, including corporate entities that are affiliates of the Taxpayer.

In the petition filed with the Board, the Taxpayer contends that the subcontractors are providing services that are an integral step in the process of photogrammetry and the services rendered by the subcontractors are not taxable under North Carolina's Use Tax. The Taxpayer further contends that any tangible personal property produced by these subcontractors is merely incidental to the professional services being rendered and the tangible items are merely an instrument of the service being performed. Thus, the Taxpayer argues that the "true object" of the transactions at issue is information and not the transfer of tangible personal property. In the alternative, the Taxpayer argues that the assessment must be reduced because it includes transactions between affiliate companies that do not constitute a taxable event under North Carolina's Sales and Use Tax.

In the final decision, the Assistant Secretary determined that the "true object" of the transactions in question is the contact prints, negatives, diapositives, data tapes and compact disks because these are the items that the Taxpayer must obtain and use in order to provide the nontaxable topographical services. The Assistant Secretary ruled that Taxpayer purchases tangible personal property used in providing aerial topographical services and is therefore subject to the use taxes. The Assistant Secretary also ruled that the transactions between the Taxpayer and its wholly owned sister limited liability companies are taxable transactions. Thus, the Assistant Secretary rejected the argument that the transactions between the Taxpayer and its affiliates do not constitute a taxable event.

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

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

Made and entered into the 9th day of September 2004.

TAX REVIEW BOARD

Richard H. Moore, Chairman
State Treasurer

IN ADDITION

Jo Anne Sanford, Member
Chair, Utilities Commission

Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

COUNTY OF WAKE
IN THE MATTER OF:

BEFORE THE
TAX REVIEW BOARD

The Proposed Assessment of Unauthorized
Substance Tax dated January 23, 2003
by the Secretary of Revenue of the
State of North Carolina
vs.
Gwendolyn Fennell-Wimes, Taxpayer

ADMINISTRATIVE DECISION
NUMBER 452

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, in the office of the State Treasurer, on Wednesday, August 25, 2004, pursuant to the petition of Gwendolyn Fennell-Wimes (hereinafter "Taxpayer") for administrative review of the final decision entered by the Assistant Secretary of Revenue on August 5, 2003, sustaining the proposed tax assessment plus interest against the Taxpayer.

Pursuant to N.C.G.S. 105-113.111 and N.C.G.S. 105-241.1(a)&(b), a notice of proposed assessment was delivered to the Taxpayer by U.S. Mail sent to the Taxpayer's last known address of 701 Chandler Road, Durham, NC 27703. The notice alleged that on January 19, 2003, the Taxpayer was in unauthorized possession of 60 dosages of oxycodone, to which no tax stamps were affixed. The notice proposed an assessment comprised of excise tax in the amount of \$1,200.00, penalties totaling \$480.00, and interest in the amount of \$6.00, for a total proposed tax liability of \$1,686.00.

The Taxpayer protested the assessment and requested a hearing before the Secretary of Revenue. Pursuant to N.C. Gen. Stat. 105-260.1, Eugene J. Cella, Assistant Secretary, conducted a hearing upon Taxpayer's timely application and objection to the proposed assessment. On August 5, 2003, the Assistant Secretary issued the final decision, which adjusted the proposed assessment against the Taxpayer to \$1,200.00 plus interest. Thereafter, the Taxpayer timely filed a petition for administrative review of the final decision with the Board.

ISSUES

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

EVIDENCE

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

DECISION

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

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

On August 25, 2004, the Board conducted an administrative hearing in this matter and considered the petition, the brief, the record, the Assistant Secretary's final decision, the arguments presented at the administrative hearing and the documentary evidence filed with the Board on August 25, 2004. Upon review of the additional evidence filed by the Taxpayer on August 25, 2004, the Board deems this evidence material to the issues and determines that it is appropriate to remand this matter to the Assistant Secretary where the evidence shall be taken and ruled upon by the Assistant Secretary. Thus, the Board, in its discretion, remands this matter to the Assistant Secretary for a further proceeding to consider the Taxpayer's additional evidence.

THEREFORE, it is the decision of the Board to **REMAND** this matter to the Assistant Secretary for a further proceeding.

Made and entered into the 23rd day of November, 2004.

TAX REVIEW BOARD

Richard H. Moore, Chairman
State Treasurer

Jo Anne Sanford, Member
Chair, Utilities Commission

Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

BEFORE THE
TAX REVIEW BOARD

COUNTY OF WAKE

IN THE MATTER OF:)

)

The Proposed Assessment of Unauthorized)

Substance Tax dated September 19, 2002)

by the Secretary of Revenue of the)

State of North Carolina)

)

vs.)

)

Gary Richard Taylor,)

Taxpayer)

ADMINISTRATIVE DECISION
NUMBER 453

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, in the office of the State Treasurer, on Wednesday, August 25, 2004, pursuant to the petition of Gary Richard Taylor (hereinafter "Taxpayer") for administrative review of the final decision entered by the Assistant Secretary of Revenue on May 28, 2003.

Pursuant to N.C.G.S. 105-113.111 and N.C.G.S. 105-241.1(a)&(b), a notice of proposed assessment was delivered to the Taxpayer by U.S. Mail sent to the Taxpayer at his last known address of 27 Edney Rd., Arden, NC 28704. Based on the Taxpayer's unauthorized possession of 3,924.68 grams of marijuana on September 17, 2002, to which no tax stamps were affixed, the notice proposed an assessment comprised of excise tax in the amount of \$13,737.50, penalties totaling \$5,495.00, and interest in the amount of \$68.69, for a total proposed tax liability of \$19,301.19.

The Taxpayer protested the assessment and requested a hearing before the Secretary of Revenue. Pursuant to N.C. Gen. Stat. 105-260.1, Eugene J. Cella, Assistant Secretary, conducted a hearing upon Taxpayer's timely application and objection to the proposed assessment. On May 28, 2004, the Assistant Secretary issued the final decision, adjusting the proposed assessment of tax to \$5,390.00 plus interest for the period at issue. Thereafter, the Taxpayer timely filed a petition for administrative review of the final decision with the Board.

ISSUES

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

EVIDENCE

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

FINDINGS OF FACT

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

1. Assessment of Unauthorized Substance Tax was made against the Taxpayer on September 17, 2002, in the sum of \$13,737.50 tax, \$5,495.00 penalty and \$68.69 interest, for a total proposed liability of \$19,301.19, based on possession of 3,924.68 grams of marijuana.
2. The Taxpayer made timely objection and application for a hearing.
3. On September 17, 2002, the Taxpayer was in constructive possession of 3,924.68 grams of marijuana.
4. No tax stamps were purchased for or affixed to the marijuana as required by law.

CONCLUSIONS OF LAW

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

1. A preponderance of the evidence supports the foregoing findings of fact, therefore the Taxpayer is subject to an assessment of unauthorized substances tax.
2. The forty-cent tax rate authorized in G.S. 105-113.107(a)(1) applies to “harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.” Growing marijuana plants, by definition, do not qualify for this tax rate. See G.S. 105-113.106(6) and G.S. 105-113.107(a)(1a).
3. Without authorization, the Taxpayer possessed 1,100 grams of marijuana on September 17, 2002, and was therefore a “dealer” as that term is defined in N.C.G.S. 105-113.106(3).
4. The Taxpayer is liable for excise tax in the amount of \$3,850.00, penalties totaling \$1,540.00, and interest until date of full payment.

DECISION

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

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

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

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

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

Made and entered into the 23rd day of November, 2004.

TAX REVIEW BOARD

Richard H. Moore, Chairman
State Treasurer

Jo Anne Sanford, Member
Chair, Utilities Commission

Noel L. Allen, Appointed Member

STATE OF NORTH CAROLINA

BEFORE THE
TAX REVIEW BOARD

COUNTY OF WAKE

IN THE MATTER OF:)

)

The Proposed Assessment of Unauthorized)

Substance Tax dated December 15, 2002)

by the Secretary of Revenue of the)

State of North Carolina)

)

vs.)

)

Sammy Mark Smith, Taxpayer)

ADMINISTRATIVE DECISION
NUMBER 454

This Matter was heard before the Regular Tax Review Board (hereinafter "Board") in the City of Raleigh, Wake County, North Carolina, in the office of the State Treasurer, on Wednesday, August 25, 2004, pursuant to the petition of Sammy Mark Smith (hereinafter "Taxpayer") for administrative review of the final decision entered by the Assistant Secretary of Revenue on July 24, 2003, sustaining the proposed tax assessment plus penalty and interest against the Taxpayer.

Pursuant to N.C.G.S. 105-113.111 and N.C.G.S. 105-241.1(a)&(b), a notice of proposed assessment was delivered to the Taxpayer by leaving a copy of same at the Taxpayer's last known address of 281 Allen Dr., Forest City, NC 28043. The notice alleged that on December 15, 2002, the Taxpayer was in unauthorized possession of 2,940 dosages of methamphetamine, to which no tax stamps were affixed. The notice proposed an assessment comprised of excise tax in the amount of \$14,700.00, penalties totaling \$5,880.00, and interest in the amount of \$39.20, for a total proposed tax liability of \$20,619.20. The Taxpayer's mother paid the tax in full, \$14,700.00, within 48 hours, therefore the penalty and interest are waived and the hearing is essentially a request for a refund.

The Taxpayer protested the assessment and requested a hearing before the Secretary of Revenue. Pursuant to N.C. Gen. Stat. 105-260.1, Eugene J. Cella, Assistant Secretary, conducted a hearing upon Taxpayer's timely application and objection to the proposed assessment. On July 24, 2003, the Assistant Secretary issued the final decision, which adjusted the proposed assessment based on possession of 2,940 dosages of methamphetamine, comprised of excise tax in the amount of \$14,700.00 which is deemed to be proper under the law and the facts, and is sustained and declared to be final, and the Taxpayer's request for a refund was rightly denied.

ISSUES

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

EVIDENCE

Pursuant to N.C. Gen. Stat. 105-241.2(b), the Board reviewed all the documents, records, data, evidence and other materials that the parties presented at the hearing before the Assistant Secretary in this matter.

DECISION

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

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

On August 25, 2004, the Board conducted an administrative hearing in this matter and considered the petition, the brief, the record, the Assistant Secretary's final decision, the arguments presented at the administrative hearing and the documentary evidence filed with the Board. Upon review of the additional evidence filed by the Taxpayer concerning the SBI lab report, the Board deems this evidence material to the issues and determines that it is appropriate to remand this matter to the Assistant Secretary where the evidence shall be taken and ruled upon by the Assistant Secretary. Thus, the Board, in its discretion, remands this matter to the Assistant Secretary for a further proceeding to consider the Taxpayer's additional evidence.

THEREFORE, it is the decision of the Board to **REMAND** this matter to the Assistant Secretary for further consideration.

Made and entered into the 23rd day of November, 2004.

TAX REVIEW BOARD

Richard H. Moore, Chairman
State Treasurer

Jo Anne Sanford, Member
Chair, Utilities Commission

Noel L. Allen, Appointed Member

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 2 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Plant Conservation Board intends to amend the rules cited as 02 NCAC 48F .0301-.0302; .0304.

Proposed Effective Date: October 1, 2005

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 June 16, 2005, to Marj Boyer, Secretary, NC Plant Conservation Board, 1060 Mail Service Center, Raleigh NC 27699-1060.

Reason for Proposed Action: Proposed rule changes would add and delete various plant species to lists of protected plants based on review of their current status by the Plant Conservation Board.

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 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 Services Center, Raleigh, NC 27699-1060, phone (919)733-3610 ext. 250, fax (919)716-1041, email marj.boyer@ncmail.net.

Comment period ends: August 1, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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

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 .0301 ENDANGERED PLANT SPECIES LIST

The North Carolina Plant Conservation Board hereby establishes the following list of endangered plant species:

- (1) ~~Adiantum eapillus-veneris~~ L. capillus-veneris L.
Venus Hair Fern;
- (2) ~~Aeschynomene virginica~~ (L.) virginica (L.) B.S.P.
Sensitive Jointvetch;
- (3) ~~Agrostis mertensii~~ Trin. mertensii Trin.
Arctic bentgrass;
- (4) ~~Amorpha georgiana~~ var. georgiana — ~~Wilbur~~ georgiana Wilbur
Georgia Indigo-bush;
- (5) ~~Amphicarpum muehlenbergianum~~ (J.A. Schultes) A.S. Hitchc.
Florida Goober Grass, Blue Maidencane;
- (5)(6) ~~Arethusa bulbosa~~ L. bulbosa L.
Bog Rose;
- (6)(7) ~~Asplenium heteroresiliens~~ — W.H. heteroresiliens W.H. Wagner
Carolina Spleenwort;
- (7)(8) ~~Asplenium monanthes~~ L. monanthes L.
Single-sorus Spleenwort;
- (8)(9) ~~Aster parviceps~~ — (Burgess) parviceps (Burgess) Mackenzie & Bush
Glade Aster;
- (9)(10) ~~Bryocrumia andersonii~~ — (Bartr.) andersonii (Bartr.) Anders.
Gorge Moss;
- (10)(11) ~~Buckleya distichophylla~~ — (Nuttall) distichophylla (Nuttall) Torrey
Piratebush;
- (11)(12) ~~Calamagrostis eainii~~ — ~~Hitchcock~~ cainii Hitchcock
Cain's Reed Grass;
- (12)(13) ~~Calopogon multiflorus~~ — Lindl. multiflorus

- Lindl.
Many-flowered Grass-Pink;
(14) Canoparmelia amabilis Heiman & Elix
Worthy Shield Lichen;
- (13)(15) Cardamine mieranthera — Rollins micranthera
Rollins
Small-anthered Bittercress;
- (14)(16) Carex aenea — Fernald aenea Fernald
Fernald's Hay Sedge;
- (15)(17) Carex barrattii — Schweinitz barrattii
Schweinitz and Torrey
Barratt's Sedge;
- (16)(18) Carex lutea — LeBlond lutea LeBlond
Golden Sedge;
- (17)(19) Carex oligosperma — Michx. oligosperma
Michx.
Few-seeded Sedge;
- (18)(20) Carex radfordii — Gaddy radfordii Gaddy
Radford's sedge;
- (19)(21) Carex schweinitzii — Dewey schweinitzii
Dewey ex Schweinitz
Schweinitz's Sedge;
- (20)(22) Carya myristiciformis — (Michaux myristiciformis (Michaux f.) Nuttall
Nutmeg hickory;
- (21)(23) Cheilolejeunea evansii — (M. evansii (M. Taylor) Schust.
A liverwort;
- (22)(24) Chrysoma pauciflorescens — (Michx.) pauciflorescens (Michx.) Greene
Woody Goldenrod;
- (23)(25) Conioselinum chinense — (L.) chinense (L.)
B.S.P.
Hemlock Parsley;
- (24)(26) Cystopteris tennesseensis — Shaver tennesseensis Shaver
Tennessee Bladderfern;
- (25)(27) Dalibarda repens — L. repens L.
Robin Runaway;
- (26)(28) Delphinium exaltatum — Aiton exaltatum
Aiton
Tall Larkspur;
- (29) Dichantherium caeruleum (Hack. ex Hitchc.)
Correll
Blue Witch Grass;
- (27)(30) Echinacea laevigata — (Boynton laevigata (Boynton and Beadle) Blake
Smooth Coneflower;
- (28)(31) Eriocaulon lineare — Small lineare Small
Linear Pipewort;
- (32) Eriocaulon texense Koern.
Texas Hatpins;
- (29)(33) Filipendula rubra — (Hill) rubra (Hill) B.L. Robins.
Queen-of-the-Prairie;
- (34) Fimbristylis perpusilla Harper ex Small & Britt.
Harper's Fimbristylis;
- (35) Gaylussacia nana (Gray) Small
- Confederate Huckleberry;
- (30)(36) Gentianopsis erinita — (Froelich) crinita (Froelich) Ma
Fringed Gentian;
- (31)(37) Geum radiatum — Michaux radiatum Michaux
Spreading Avens;
- (32)(38) Grammitis nimbata — (Jenm.) nimbata (Jenm.)
Proctor
Dwarf Polypody Fern;
- (33)(39) Gymnocarpium appalachianum — Pryer appalachianum Pryer & Haufler
Appalachian Oak Fern;
- (34)(40) Helenium brevifolium — (Nutt.) brevifolium (Nutt.) Wood
Littleleaf Sneezeweed;
- (35)(41) Helenium vernale — Walt. vernale Walt.
Spring Sneezeweed;
- (42) Helianthemum nashii Britt.
Florida scrub frostweed;
- (43) Helianthus floridanus Gray ex Chapman
Florida Sunflower;
- (36)(44) Helianthus schweinitzii — T. schweinitzii T. & G.
Schweinitz's Sunflower;
- (37)(45) Hexastylis contracta — Blomquist contracta Blomquist
Mountain Heartleaf;
- (38)(46) Hierochloa odorata — (L.) odorata (L.) Beauv.
Holy Grass;
- (39)(47) Houstonia purpurea var. montana — (Small) montana (Small) Terrell
Mountain Bluet;
- (40)(48) Hudsonia montana — Nutt. montana Nutt.
Mountain Golden Heather;
- (41)(49) Hydrastis canadensis — L. canadensis L.
Goldenseal;
- (42)(50) Hymenophyllum tayloriae — Farrar tayloriae Farrar & Raine
Gorge filmy fern;
- (51) Isoetes microvela D.F. Brunton
A Quillwort;
- (43)(52) Isotria medeoloides — (Pursh) medeoloides (Pursh) Raf.
Small Whorled Pogonia;
- (44)(53) Juncus caesariensis — Coville caesariensis Coville
Rough Rush;
- (45)(54) Juncus trifidus ssp. carolinianus — Hamet carolinianus Hamet Ahti
One-flowered Rush;
- (46)(55) Lilium pyrophilum — M. pyrophilum M. W. Skinner & Sorrie
Sandhills bog lily;
- (47)(56) Lindera melissaefolia — (Walter) melissaefolia (Walter) Blume
Southern Spicebush;
- (57) Lipocarpa micrantha (Vahl) G. Tucker
Small-flowered Hemicarpha;
- (48)(58) Lophiola aurea — Ker Gawl. aurea Ker-Gawl.

- Golden Crest;
 (49)(59) *Lysimachia asperulaefolia* — Poiret
asperulaefolia Poiret
 Rough-leaf Loosestrife;
 (50)(60) *Lysimachia fraseri* — Duby *fraseri* Duby
 Fraser's Loosestrife;
 (51)(61) *Minuartia godfreyi* — (Shinners) *godfreyi*
 (Shinners) McNeill
 Godfrey's Sandwort;
 (52)(62) *Minuartia uniflora* — (Walter) *uniflora*
 (Walter) Mattfield
 Single-flowered Sandwort;
 (53)(63) *Muhlenbergia torreyana* — (Schultes) *torreyana*
 (Schultes) Hitchcock
 Torrey's Muhly;
 (54)(64) *Myrica gale* — L. *gale* L.
 Sweet Gale;
 (55)(65) *Narthecium americanum* — Ker *americanum*
 Ker
 Bog Asphodel;
 (56)(66) *Orbexilum macrophyllum* — (Rowlee
macrophyllum (Rowlee ex Small) Rydberg
 Bigleaf Scurfpea;
 (57)(67) *Orthotrichum keeverae* — Crum *keeverae*
 Crum & Anders.
 Keever's Bristle Moss;
 (58)(68) *Oxypolis canbyi* — (Coult. *canbyi* (Coult. &
 Rose) Fern.
 Canby's Cowbane;
 (59)(69) *Panicum hirstii* — Swallen *hirstii* Swallen
 Hirst's Panic Grass;
 (60)(70) *Parnassia caroliniana* — Michaux *caroliniana*
 Michaux
 Carolina Grass-of-Parnassus;
 (71) *Paronychia herniariodes* (Michx.) Nutt.
 Michaux's Whitlow-wort;
 (61)(72) *Pellaea wrightiana* — Hooker *wrightiana*
 Hooker
 Wright's Cliff-brake Fern;
 (62)(73) *Plantago eordata* — Lam. *cordata* Lam.
 Heart-leaf Plantain;
 (63)(74) *Plantago sparsiflora* — Michaux *sparsiflora*
 Michaux
 Pineland Plantain;
 (64)(75) *Platanthera integrilabia* — (Correll) *integrilabia*
 (Correll) Leur
 White Fringeless Orchid;
 (65)(76) *Poa paludigena* — Fernald *paludigena* Fernald
 & Wiegand
 Bog Bluegrass;
 (66)(77) *Pteroglossaspis ecristata* — (Fernald) *ecristata*
 (Fernald) Rolfe
 Eulophia;
 (67)(78) *Ptilimnium nodosum* — (Rose) *nodosum*
 (Rose) Mathias
 Harperella;
 (68)(79) *Pyxidantha barbulate* var. *brevifolia* —
 (Wells) *brevifolia* (Wells) Ahles
 Wells' Pyxie-moss;
 (69)(80) *Rhus michauxii* — Sargent *michauxii* Sargent
 Michaux's Sumac;
 (70)(81) *Rhynchospora erinipes* — Gale *crinipes* Gale
 Mosquito Beak Sedge;
 (71)(82) *Rhynchospora maera* — (C.B. *macra* (C.B.
 Clarke) Small
 Large Beak Sedge;
 (83) *Rhynchospora odorata* C. Wright ex Griseb.
 Fragrant Beaksedge;
 (72)(84) *Rhynchospora thornei* — Kral *thornei* Kral
 Thorne's Beaksedge;
 (73)(85) *Rudbeckia heliopsidis* — Torr. *heliopsidis*
 Torr. & Gray
 Sun-facing coneflower;
 (74)(86) *Sagittaria fasciculata* — E.O. *fasciculata* E.O.
 Beal
 Bunched Arrowhead;
 (75)(87) *Sarracenia jonesii* — Wherry *jonesii* Wherry
 Mountain Sweet Pitcher Plant;
 (76)(88) *Sarracenia oreophila* — (Kearney) *oreophila*
 (Kearney) Wherry
 Green Pitcher Plant;
 (77)(89) *Schwalbea americana* — L. *americana* L.
 Chaffseed;
 (90) *Scirpus flaccidifolius* (Fern.) Schuyler
 Reclining Bulrush;
 (78)(91) *Sedum pusillum* — Michaux *pusillum* Michaux
 Puck's Orpine;
 (79)(92) *Sedum rosea* — (L.) *rosea* (L.) Scop.
 Roseroot;
 (80)(93) *Senecio schweinitzianus* — Nuttall
schweinitzianus Nuttall
 Schweinitz's Groundsel;
 (81)(94) *Shortia galacifolia* — T. *galacifolia* T. & G.
 Ocone Bells;
 (82)(95) *Sisyrinchium dichotomum* — Bicknell
dichotomum Bicknell
 Reflexed Blue-eyed Grass;
 (83)(96) *Solidago plumosa* — Small *plumosa* Small
 Yadkin River Goldenrod;
 (84)(97) *Solidago ptarmicoides* — (Nees) *ptarmicoides*
 (Nees) Boivin
 Prairie Goldenrod;
 (85)(98) *Solidago spithamea* — M.A. *spithamea* M.A.
 Curtis
 Blue Ridge Goldenrod;
 (86)(99) *Solidago villosicarpa* — LeBlond *villosicarpa*
 LeBlond
 Coastal goldenrod;
 (87)(100) *Sphagnum fuscum* — (Schimp.) *fuscum*
 (Schimp.) Klinggr.
 Brown Peatmoss;
 (88)(101) *Sphenolobopsis pearsoni* — (Sprengel)
pearsoni (Sprengel) Schuster & Kitagawa
 A liverwort;
 (102) *Spigelia marilandica* (L.) L.
 Pink Root;
 (89)(103) *Spiraea virginiana* — Britton *virginiana*
 Britton

- Virginia Spiraea;
~~(90)(104)~~ Sporobolus heterolepis — Gray heterolepis
Gray
 Prairie Dropseed;
~~(91)(105)~~ Stylisma pickeringii var. pickeringii —
~~(Torrey pickeringii (Torrey ex M.A. Curtis)~~
Gray
 Pickering's Morning Glory;
~~(92)(106)~~ Talinum mengesii — W. mengesii W. Wolf
 Large-flowered fameflower;
~~(93)(107)~~ Thalictrum cooleyi — Ahles cooleyi Ahles
 Cooley's Meadowrue;
~~(94)(108)~~ Tortula ammoniana — Crum ammoniana
Crum & Anders.
 Ammon's Tortula;
 (109) Tridens ambiguus (Ell.) J.A. Schultes
Pinelands Triodia;
~~(95)(110)~~ Trillium pusillum — Michaux pusillum
Michaux
 Carolina Least Trillium;
~~(96)(111)~~ Trisetum spicatum var. molle — (Michaux)
molle (Michaux) Beal
 Soft ~~Trisetum~~ Trisetum;
 (112) Utricularia resupinata B.D. Greene ex Bigelow
Northeastern Bladderwort;
 (113) Warea cuneifolia (Muhl. ex Nutt.) Nutt.
Carolina Pineland-cress;
 (114) Zephyranthes simpsonii Chapman
Rain Lily.

- (10) Eleocharis halophila — Fern. halophila Fern. &
 Brack.
 Salt Spikerush;
 (11) Eupatorium resinosum — Torr. resinosum
Torr. ex DC.
 Resinous Boneset;
 (12) Fimbristylis perpusilla — Harper perpusilla
Harper ex Small & Britton
 Harper's Fringe-rush;
 (13) Geum geniculatum — Michaux geniculatum
Michaux
 Bent Avens;
 (14) Glyceria nubigena — W.A. nubigena W.A.
 Anderson
 Smoky Mountain Mannagrass;
 (15) Gymnoderma lineare — (Evans) lineare
(Evans) Yoshimura & Sharp
 Gnome Finger Lichen;
 (16) Helonias bullata — L. bullata L.
 Swamp Pink;
 (17) Hexastylis naniflora — Blomquist naniflora
Blomquist
 Dwarf-flowered Heartleaf;
 (18) Hexastylis rhombiformis Gaddy
French Broad Heartleaf;
~~(18)(19)~~ Ilex collina — Alexander collina Alexander
 Long-stalked Holly;
~~(19)(20)~~ Isoetes piedmontana — (Pfeiffer) piedmontana
(Pfeiffer) Reed
 Piedmont Quillwort;
~~(20)(21)~~ Liatris helleri — (Porter) helleri (Porter) Porter
 Heller's Blazing Star;
~~(21)(22)~~ Lilaeopsis carolinensis — Coult. carolinensis
Coult. & Rose
 Carolina Lilaeopsis;
~~(22)(23)~~ Lilium grayi — Watson grayi Watson
 Gray's Lily;
~~(23)(24)~~ Lindera subcoriacea — Wofford subcoriacea
Wofford
 Bog spicebush;
~~(24)(25)~~ Lobelia boykinii — T. boykinii T. & G.
 Boykin's lobelia;
~~(25)(26)~~ Macbridea caroliniana — (Walt.) caroliniana
(Walt.) Blake
 Carolina Bogmint;
~~(26)(27)~~ Menyanthes trifoliata — L. trifoliata L.
 Buckbean;
~~(27)(28)~~ Myriophyllum laxum — Schuttlew. laxum
Schuttlew. ex Chapman
 Loose Watermilfoil;
~~(28)(29)~~ Parnassia grandifolia — DC. grandifolia DC.
 Large-leaved Grass-of-Parnassus;
~~(29)(30)~~ Platanthera integra — (Nuttall) integra (Nuttall)
 Gray ex Beck
 Yellow Fringeless Orchid;
~~(30)(31)~~ Platanthera nivea — (Nutt.) nivea (Nutt.) Luer
 Snowy Orchid;
~~(31)(32)~~ Portulaca smallii — P. smallii P. Wilson
 Small's Portulaca;

Authority G.S. 106-202.15.

02 NCAC 48F .0302 THREATENED PLANT SPECIES LIST

The North Carolina Plant Conservation Board hereby establishes the following list of threatened plant species:

- (1) Amaranthus pumilus — Raf. pumilus Raf.
 Seabeach Amaranth;
- (2) Amorpha georgiana var. confusa — Wilbur
confusa Wilbur
 Savanna Indigo-bush;
- (3) Aster georgianus — Alexander georgianus
Alexander
 Georgia Aster;
- (4) Astragalus michauxii — (Kuntze) michauxii
(Kuntze) F.J. Herm.
 Sandhills Milkvetch;
- (5) Baptisia minor — Lehmann minor Lehmann
 Prairie Blue Indigo;
- (6) Cacalia rugelia — (Shuttl. rugelia (Shuttl. ex
 Chapm) Barkley & Cronq.
 Rugel's Ragwort;
- (7) Camassia scilloides — (Raf.) scilloides (Raf.)
 Cory
 Wild Hyacinth;
- (8) Carex conoidea — Willd. conoidea Willd.
 Cone-shaped Sedge;
- (9) Carex exilis — Dewey exilis Dewey
 Coastal Sedge;

- (32)(33) Quercus ilicifolia — Wangenheim ilicifolia
Wangenheim
Bear oak;
- (33)(34) Rhexia aristosa — Britton aristosa Britton
Awned Meadow-beauty;
- (35) Rhynchospora pleiantha (Kukenth.) Gale
Coastal Beaksedge;
- (34)(36) Ruellia humilis — Nutt. humilis Nutt.
Low Wild-petunia;
- (35)(37) Sabatia kennedyana — Fern. kennedyana Fern.
Plymouth Gentian;
- (38) Sarracenia minor Walt.
Hooded Pitcher Plant;
- (36)(39) Schisandra glabra — (Briekel) glabra (Brickel)
Rehder
Magnolia-vine;
- (37)(40) Schlotheimia lanceifolia — Bartr. lancifolia
Bartr.
Highlands Moss;
- (38)(41) Senecio millefolium — T. millefolium T. & G.
Divided-leaf Ragwort;
- (39)(42) Solidago verna — M.A. verna M.A. Curtis
Spring-flowering Goldenrod;
- (40)(43) Spiranthes longilabris — Lindl. longilabris
Lindl.
Giant Spiral Orchid;
- (41)(44) Sporobolus teretifolius — Harper teretifolius
Harper
Wireleaf Dropseed;
- (42)(45) Thelypteris simulata — (Davenp.) simulata
(Davenp.) Nieuwl.
Bog Fern;
- (43)(46) Trichomanes boschianum — Sturm
boschianum Sturm ex Bosch
Appalachian Filmy-fern;
- (44)(47) Trichomanes petersii — A. petersii A. Gray
Dwarf Filmy-fern;
- (45)(48) Trillium discolor — Wray discolor Wray ex
Hook.
Mottled Trillium;
- (46)(49) Utricularia olivacea — Wright olivacea Wright
ex Grisebach
Dwarf Bladderwort.

Authority G.S. 106-202.15.

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
tennesseensis Shaver
Tennessee Bladderfern;
- (2) Delphinium exaltatum — Aiton exaltatum
Aiton Tall Larkspur;
- (3) Echinacea laevigata — (Boynton) laevigata
(Boynton & Beadle) Blake Smooth

- (4) Gentianopsis erinita — (Froehlich) crinita
(Froehlich) Ma
Fringed Gentian;
- (5) Geum radiatum — Michaux radiatum Michaux
Spreading Avens;
- (6) Hydrastis canadensis — L. canadensis L.
Goldenseal, Orangeroot;
- (7) Kalmia cuneata — Michaux
White Wicky;
- (8)(7) Lilium pyrophilum — Skinner pyrophilum
Skinner & Sorrie Sandhills bog lily;
- (9)(8) Pellaea wrightiana — Hooker wrightiana
Hooker
Wright's Cliff-brake Fern;
- (10)(9) Rhus michauxii — Sargent michauxii Sargent
Michaux's Sumac;
- (11)(10) Sarracenia jonesii — Wherry jonesii Wherry
Mountain Sweet Pitcher Plant;
- (12)(11) Sarracenia oreophila — (Kearney) oreophila
(Kearney) Wherry
Green Pitcher Plant;
- (13)(12) Shortia galacifolia — T. galacifolia T. & G.
Oconee Bells; Bells;
- (13) Spigelia marilandica (L.) L.
Pink Root;
- (14) Zephyranthes simpsonii Chapman
Rain Lily.

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

- (1) Eupatorium resinosum — Torr. resinosum
Torr. ex DC.
Resinous Boneset;
- (2) Helonias bullata — L. bullata L.
Swamp Pink;
- (3) Liatris helleri — (Porter) helleri (Porter) Porter
Heller's Blazing Star;
- (4) Lilium grayi — Watson grayi Watson
Gray's Lily;
- (5) Sabatia kennedyana — Fern. kennedyana Fern.
Plymouth Gentian;
- (6) Sarracenia minor Walt.
Hooded Pitcher Plant;
- (6)(7) Schisandra glabra — (Briekel) 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 muscipula Ellis
Venus Flytrap;
- (2) Panax quinquefolius — L. 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 Division of Facility Services intends to amend the rules cited as 10A NCAC 14C .1602, .1901-.1902, .2101, .2103, .2202-.2203, .2701-.2705, .3703 and .3802.

Proposed Effective Date: October 1, 2005

Public Hearing:

Date: July 21, 2005

Time: 2:00 p.m.

Location: Division of Facility Services, Council Building, Room 201, Dorothea Dix Campus, 701 Barbour Drive, Raleigh, NC

Reason for Proposed Action: Several subject matters are addressed in the State Medical Facilities Plan (SMFP). Each year, changes to existing Certificate of Need (CON) rules are required to ensure consistency with the SMFP. Several CON rules were amended under temporary action to coincide with the 2005 SMFP's effective date of January 1, 2005. The specific subject areas being addressed by these amended rules are Cardiac Catheterization and Cardiac Angioplasty Equipment, Radiation Therapy Equipment, Surgical Services and Operating Rooms, End-State Renal Disease Services, Magnetic Resonance Imaging (MRI) Scanner, Positron Emission Tomography (PET) Scanner, and Acute Care Beds. These rules were amended through temporary procedures and this rule-making action will facilitate the permanent rule-making process.

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

Written comments may be submitted to: Mercidee Benton, Division of Facility Services, 2701 Mail Service Center, Raleigh, NC 27699-2701, phone (919) 855-3750, fax (919) 733-2757, email mercidee.benton@ncmail.net.

Comment period ends: August 1, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. The Commission will receive

those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 14 – DIRECTOR, DIVISION OF FACILITY SERVICES

SUBCHAPTER 14C – CERTIFICATE OF NEED REGULATIONS

SECTION .1600 – CRITERIA AND STANDARDS FOR CARDIAC CATHETERIZATION EQUIPMENT AND CARDIAC ANGIOPLASTY EQUIPMENT

10A NCAC 14C .1602 INFORMATION REQUIRED OF APPLICANT

(a) An applicant that proposes to acquire cardiac catheterization or cardiac angioplasty equipment shall use the acute care facility/medical equipment application form.

(b) The applicant shall provide the following additional information based on the population residing within the applicant's proposed cardiac catheterization service area:

- (1) the projected annual number of cardiac catheterization procedures, by CPT or ICD-9-CM codes, by classification of classified by adult diagnostic, adult therapeutic and pediatric cardiac catheterization procedure, to be performed in each cardiac catheterization room for each of the first 12 calendar quarters the facility during each of the first three years of operation following completion of the proposed project, including the methodology and assumptions used for these projections;
(2) documentation of the applicant's experience in treating cardiovascular patients at the facility during the past 12 months, including:
(A) the number of patients receiving stress tests;
(B) the number of patients receiving intravenous thrombolytic therapies;
(C) the number of patients presenting in the Emergency Room or admitted to the hospital with suspected or diagnosed acute myocardial infarction;
(D) the number of patients referred to other facilities for cardiac catheterization procedures or open heart surgery procedures, by type of procedure; and

- (E) the number of diagnostic and therapeutic cardiac catheterization procedures performed during the twelve month period reflected in the most recent licensure form on file with the Division of Facility Services;
- (3) the number of ~~cardiac catheterization patients~~ patients, classified by adult diagnostic, adult therapeutic and pediatric, from the proposed cardiac catheterization service area ~~who are projected to have a cardiac catheterization procedure that the applicant proposes to serve~~ by patient's county of residence in each of the first ~~12 quarters~~ three years of operation, including the methodology and assumptions used for these projections;
- (4) ~~the number of patients from the proposed primary cardiac catheterization service area who are projected to have a cardiac catheterization procedure by patients' county of residence in each of the first 12 quarters of operation, including the methodology and assumptions used for these projections;~~
- (~~5~~)(4) documentation of the applicant's projected sources of patient referrals that are located in the proposed cardiac catheterization service area, including letters from the referral sources that demonstrate their intent to refer patients to the applicant for cardiac catheterization procedures;
- (~~6~~)(5) evidence of the applicant's capability to communicate with emergency transportation agencies and with an established comprehensive cardiac services program;
- (~~7~~)(6) the number and composition of cardiac catheterization teams available to the applicant;
- (~~8~~)(7) documentation of the applicant's in-service training or continuing education programs for cardiac catheterization team members;
- (~~9~~)(8) a written agreement with a comprehensive cardiac services program that specifies the arrangements for referral and transfer of patients seen by the applicant and that includes a process to alleviate the need for duplication in cardiac catheterization procedures;
- (~~10~~)(9) a written description of patient selection criteria including referral arrangements for high-risk patients;
- (~~11~~)(10) a copy of the contractual arrangements for the acquisition of the proposed cardiac catheterization equipment or cardiac angioplasty equipment, including itemization of the cost of the equipment; and
- (~~12~~)(11) documentation that the cardiac catheterization equipment and cardiac angioplasty equipment and the procedures for operation of the equipment are designed and developed based on the American College of

Cardiology/American Heart Association Guidelines for Cardiac Catheterization Laboratories (1991) report.

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

SECTION .1900 – CRITERIA AND STANDARDS FOR RADIATION THERAPY EQUIPMENT

10A NCAC 14C .1901 DEFINITIONS

These definitions shall apply to all rules in this Section:

- (1) "Approved linear accelerator" means a linear accelerator which was not operational prior to the beginning of the review period.
- (2) "Complex Radiation treatment" is equal to 1.0 ESTV and means: treatment on three or more sites on the body; use of special techniques such as tangential fields with wedges, rotational or arc techniques; or use of custom blocking.
- (3) "Equivalent Simple Treatment Visit [ESTV]" means one basic unit of radiation therapy which normally requires up to fifteen (15) minutes for the uncomplicated set-up and treatment of a patient on a megavoltage teletherapy unit including the time necessary for portal filming.
- (4) "Existing linear accelerator" means a linear accelerator in operation prior to the beginning of the review period.
- (5) "Intermediate Radiation treatment" means treatment on two separate sites on the body, three or more fields to a single treatment site or use of multiple blocking and is equal to 1.0 ESTV.
- (6) "Linear accelerator" means MRT equipment which is used to deliver a beam of electrons or photons in the treatment of cancer patients.
- (7) "Linear accelerator service area" means a single or multi-county area as used in the development of the need determination in the applicable State Medical Facilities Plan.
- (8) "Megavoltage unit" means MRT equipment which provides a form of teletherapy that involves the delivery of energy greater than, or equivalent to, one million volts by the emission of x-rays, gamma rays, electrons, or other radiation.
- (9) "Megavoltage radiation therapy (MRT)" means the use of ionizing radiation in excess of one million electron volts in the treatment of cancer.
- (10) "MRT equipment" means a machine or energy source used to provide megavoltage radiation therapy including linear accelerators and other particle accelerators.
- (11) "Radiation therapy equipment" means medical equipment which is used to provide radiation therapy services.

- (12) "Radiation therapy services" means those services which involve the delivery of controlled and monitored doses of radiation to a defined volume of tumor bearing tissue within a patient. Radiation may be delivered to the tumor region by the use of radioactive implants or by beams of ionizing radiation or it may be delivered to the tumor region systemically.
- (13) "Radiation therapy service area" means a single or multi-county area as used in the development of the need determination in the applicable State Medical Facilities Plan.
- (14) "Simple Radiation treatment" means treatment on a single site on the body, single treatment field or parallel opposed fields with no more than simple blocks and is equal to 1 ESTV.
- (15) "Simulator" means a machine that reproduces the geometric relationships of the MRT equipment to the patient.
- (16) "Special technique" means radiation therapy treatments that may require increased time for each patient visit including:
 - (a) total body irradiation (photons or electrons) which equals 2.5 ESTVs;
 - (b) hemi-body irradiation which equals 2.0 ESTVs;
 - (c) intraoperative radiation therapy which equals 10.0 ESTVs;
 - (d) ~~particle-neutron and proton~~ radiation therapy which equals 2.0 ESTVs;
 - (e) ~~weekly radiation therapy management, conformal, which equals 1.5 ESTVs;~~
 - (e) intensity modulated radiation treatment (IMRT) which equals 2.0 ESTVs;
 - (f) limb salvage irradiation at lengthened SSD which equals 1.0 ESTV;
 - (g) additional field check radiographs which equals .50 ESTV;
 - (h) stereotactic radiosurgery treatment management with linear accelerator or gamma knife which equals 3.0 ESTVs; and
 - (i) pediatric patient under anesthesia which equals ~~1.2~~ 1.5 ESTVs.

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

10A NCAC 14C .1902 INFORMATION REQUIRED OF APPLICANT

- (a) An applicant proposing to acquire radiation therapy equipment shall use the Acute Care Facility/Medical Equipment application form.
- (b) An applicant proposing to acquire radiation therapy equipment shall also provide the following additional information:

- (1) a list of all the radiation therapy equipment to be acquired and documentation of the capabilities and capacities of each item of equipment;
- (2) documentation of the purchase price and fair market value of each piece of radiation therapy equipment, each simulator, and any other related equipment proposed to be acquired;
- (3) the projected number of patient treatments by county and by simple, intermediate and complex treatments to be performed on each piece of radiation therapy equipment for each of the first ~~eight calendar quarters~~ three years of operation following the completion of the proposed project and documentation of all assumptions by which utilization is projected;
- (4) documentation that the proposed radiation therapy equipment shall be operational at least seven hours per day, five days a week;
- (5) documentation that no more than one simulator is available for every two linear accelerators in the applicant's facility, except that an applicant that has only one linear accelerator may have one simulator;
- (6) documentation that the services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies; and
- (7) the projected number of patients that will be treated ~~for cure and the number of patients that will be treated for palliation on each linear accelerator on an annual basis by county in each of the first three years of operation~~ following completion of the proposed project.

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

SECTION .2100 – CRITERIA AND STANDARDS FOR SURGICAL SERVICES AND OPERATING ROOMS

10A NCAC 14C .2101 DEFINITIONS

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

- (1) ~~"Ambulatory surgical case" means an individual who receives one or more ambulatory surgical procedures in an operating room during a single operative encounter.~~
- (2) ~~"Ambulatory surgical service area" means a single or multi-county area as used in the development of the ambulatory surgical facility need determination in the applicable State Medical Facilities Plan.~~
- (3) ~~"Ambulatory surgical services" means those surgical services provided to patients as part of an ambulatory surgical program within a licensed ambulatory surgical facility or a general acute care hospital licensed under G.S. 131E, Article 5, Part A.~~
- (4)(1) "Ambulatory surgical facility" means a facility as defined in G.S. 131E-176(1b).

- (5)(2) "Operating room" means an inpatient operating room, an outpatient or ambulatory surgical operating room, a shared operating room, or an endoscopy procedure room in a licensed health service facility.
- (6)(3) "Ambulatory surgical program" means a program as defined in G.S. 131E-176(1c).
- (7) ~~"Ambulatory surgical procedure" means a procedure performed in an operating room which requires local, regional or general anesthesia and a period of post-operative observation of less than 24 hours.~~
- (8)(4) "Existing operating rooms" means those operating rooms in ambulatory surgical facilities and hospitals which were reported in the License Application for Ambulatory Surgical Facilities and Programs and in Part III of Hospital Licensure Renewal Application Form submitted to the Licensure Section of the Division of Facility Services and which were licensed and certified prior to the beginning of the review period.
- (9)(5) "Approved operating rooms" means those operating rooms that were approved for a certificate of need by the Certificate of Need Section prior to the date on which the applicant's proposed project was submitted to the Agency but that have not been licensed and certified.
- (10)(6) "Multispecialty ambulatory surgical program" means a program as defined in G.S. 131E-176(15a).
- (11)(7) "Outpatient or ambulatory surgical operating room" means an operating room used solely for the performance of ~~ambulatory surgical procedures—procedures which require local, regional or general anesthesia and a period of post-operative observation of less than 24 hours.~~
- (8) "Service area" means the Operating Room Service Area as defined in the applicable State Medical Facilities Plan.
- (12)(9) "Shared operating room" means an operating room that is used for the performance of both ambulatory and inpatient surgical procedures.
- (13)(10) "Specialty area" means an area of medical practice in which there is an approved medical specialty certificate issued by a member board of the American Board of Medical Specialties and includes, but is not limited to the following: gynecology, otolaryngology, plastic surgery, general surgery, ophthalmology, urology, orthopedics, and oral surgery.
- (14)(11) "Specialty ambulatory surgical program" means a program as defined in G.S. 131E-176(24c).
- (15) ~~"Practical utilization" is 4.3 surgical cases per day for an outpatient or ambulatory surgical~~

~~operating room, 3.5 surgical cases per day for a shared operating room, 2.7 surgical cases per day for an inpatient operating room, and 4.3 cases per day for an endoscopy procedure room.~~

- (12) "Surgical case" means an individual who receives one or more surgical procedures in an operating room during a single operative encounter.

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

10A NCAC 14C .2103 PERFORMANCE STANDARDS

(a) ~~In projecting utilization for existing, approved, proposed and expanded surgical programs, a program utilization, the existing, approved and proposed operating rooms shall be considered to be open available for use five days per week and 52 weeks a year.~~

(b) A proposal to establish a new ambulatory surgical facility, to increase the number of operating rooms (excluding dedicated C-section operating rooms), to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall not be approved unless the applicant documents that the average number of surgical cases per operating room to be performed in ~~the applicant's facility~~ each facility owned by the applicant in the proposed service area, is reasonably projected to be at least ~~2.7~~ 2.4 surgical cases per day for each inpatient operating room, ~~4.3~~ 4.8 surgical cases per day for each outpatient or ambulatory surgical operating room, ~~4.3~~ 7.2 cases per day for each endoscopy procedure room, and ~~3.5~~ 3.2 surgical cases per day for each shared operating room during ~~the fourth quarter of~~ the third year of operation following completion of the project.

(c) A proposal to develop an additional operating room to be used as a dedicated C-section operating room shall not be approved unless the applicant documents that the average number of surgical cases per operating room to be performed in each facility owned by the applicant in the proposed service area, is reasonably projected to be at least 2.4 surgical cases per day for each inpatient operating room (excluding dedicated C-section operating rooms), 4.8 surgical cases per day for each outpatient or ambulatory surgical operating room and 3.2 surgical cases per day for each shared operating room during the third year of operation following completion of the project.

~~(e)(d)~~ An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall provide documentation to show that each existing ambulatory surgery program in the ~~ambulatory surgical~~ service area that performs ambulatory surgery in the same specialty area as proposed in the application is currently operating at ~~4.3~~ 4.8 surgical cases per day for each outpatient or ambulatory surgical operating room, ~~4.3~~ 7.2 cases per day for each endoscopy procedure room, and ~~3.5~~ 3.2 surgical cases per day for each shared operating room.

~~(d)(e)~~ An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical

program shall provide documentation to show that each existing and approved ambulatory surgery program in the ~~ambulatory surgical~~ service area that performs ambulatory surgery in the same specialty areas as proposed in the application is reasonably projected to be operating at ~~4.3~~ 4.8 surgical cases per day for each outpatient or ambulatory surgical operating room, ~~4.3-7.2~~ cases per day for each endoscopy procedure room, and ~~3.5~~ 3.2 surgical cases per day for each shared surgical operating room prior to the completion of the proposed project. ~~The applicant shall document the assumptions and provide data supporting the methodology used for the projections.~~

(f) The applicant shall document the assumptions and provide data supporting the methodology used for each projection in this Rule.

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

**SECTION .2200 – CRITERIA AND STANDARDS FOR
END-STAGE RENAL DISEASE SERVICES**

10A NCAC 14C .2202 INFORMATION REQUIRED OF APPLICANT

(a) An applicant that proposes to increase dialysis stations in an existing certified facility or relocate stations must provide the following information:

- (1) Utilization rates;
- (2) Mortality rates;
- (3) The number of patients that are home trained and the number of patients on home dialysis;
- (4) The number of transplants performed or referred;
- (5) The number of patients currently on the transplant waiting list;
- (6) Hospital admission rates, by admission diagnosis, i.e., dialysis related versus non-dialysis related;
- (7) The number of patients with infectious disease, i.e., hepatitis and AIDS, e.g., hepatitis, and the number converted to infectious status during last calendar year.

(b) An applicant that proposes to develop a new facility, increase the number of dialysis stations in an existing facility, ~~or~~ establish a new dialysis station, or ~~the relocation of~~ relocate existing dialysis stations ~~must~~ shall provide the following information requested on the End Stage Renal Disease (ESRD) Treatment application form:

- (1) ~~A~~ For new facilities, a letter of intent to sign a written agreement or a signed written agreement with an acute care hospital that specifies the relationship with the dialysis facility and describes the services that the hospital will provide to patients of the dialysis facility. The agreement must comply with 42 C.F.R., Section 405.2100.
- (2) ~~A~~ For new facilities, a letter of intent to sign a written agreement or a written agreement with a transplantation center describing the relationship with the dialysis facility and the specific services that the transplantation center

will provide to patients of the dialysis facility. The agreements must include the following:

- (A) timeframe for initial assessment and evaluation of patients for transplantation,
- (B) composition of the assessment/evaluation team at the transplant center,
- (C) method for periodic re-evaluation,
- (D) criteria by which a patient will be evaluated and periodically re-evaluated for transplantation,
- (E) signatures of the duly authorized persons representing the facilities and the agency providing the services.

~~(3) Documentation that the water supply will comply with 42 C.F.R., Section 405.2100.~~

~~(4)~~(3) Documentation of standing service from a power company and back-up capabilities.

~~(5)~~(4) The ~~For new facilities~~, the location of the site on which the services are to be operated. If such site is neither owned by nor under option to the applicant, the applicant must provide a written commitment to pursue acquiring the site if and when the approval is granted, must specify a secondary site on which the services could be operated should acquisition efforts relative to the primary site ultimately fail, and must demonstrate that the primary and secondary sites are available for acquisition.

~~(6)~~(5) Documentation that the services will be provided in conformity with applicable laws and regulations pertaining to staffing, fire safety equipment, physical environment, water supply, and other relevant health and safety requirements.

~~(7)~~(6) The projected patient origin for the services. All assumptions, including the methodology by which patient origin is projected, must be stated.

~~(8)~~(7) For new facilities, documentation that at least 80 percent of the anticipated patient population resides within 30 miles of the proposed facility.

(8) A commitment that the applicant shall admit and provide dialysis services to patients who have no insurance or other source of payment, but for whom payment for dialysis services will be made by another healthcare provider in an amount equal to the Medicare reimbursement rate for such services.

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

10A NCAC 14C .2203 PERFORMANCE STANDARDS

(a) An applicant proposing to establish a new End Stage Renal Disease facility shall document the need for at least 10 stations based on utilization of 3.2 patients per station per week as of the end of the first operating year of the facility.

(b) An applicant proposing to increase the number of dialysis stations in an existing End Stage Renal Disease facility shall document the need for the additional stations based on utilization of 3.2 patients per station per week as of the end of the first operating year of the additional ~~stations.~~ stations with the exception that the performance standard shall be waived for a need in the State Medical Facilities Plan that is based on an adjusted need determination.

(c) An applicant shall provide all assumptions, including the specific methodology by which patient utilization is projected.

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

SECTION .2700 - CRITERIA AND STANDARDS FOR MAGNETIC RESONANCE IMAGING SCANNER

10A NCAC 14C .2701 DEFINITIONS

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

- (1) "Approved MRI scanner" means an MRI scanner which was not operational prior to the beginning of the review period but which had been issued a certificate of need.
- (2) "Capacity of fixed MRI scanner" means 100% of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a fixed MRI scanner is 6,864 weighted MRI procedures, which assumes two weighted MRI procedures are performed per hour and the scanner is operated 66 hours per week, 52 weeks per year.
- (3) "Capacity of mobile MRI scanner" means 100% of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a mobile MRI scanner is 4,160 weighted MRI procedures, which assumes two weighted MRI procedures are performed per hour and the scanner is operated 40 hours per week, 52 weeks per year.
- ~~(2)~~(4) "Existing MRI scanner" means an MRI scanner in operation prior to the beginning of the review period.
- (5) "Fixed MRI scanner" means an MRI scanner that is not a mobile MRI scanner.
- ~~(3)~~(6) "Magnetic Resonance Imaging" (MRI) means a non-invasive diagnostic modality in which electronic equipment is used to create tomographic images of body structure. The MRI scanner exposes the target area to nonionizing magnetic energy and radio

frequency fields, focusing on the nuclei of atoms such as hydrogen in the body tissue. Response of selected nuclei to this stimulus is translated into images for evaluation by the physician.

- ~~(4)~~(7) "Magnetic resonance imaging scanner" (MRI Scanner) is defined in ~~G.S. 131E-176(14e), G.S. 131E-176(14e), and includes dedicated fixed breast MRI scanners.~~
- (8) "Mobile MRI region" means either the eastern part of the State which includes the counties in Health Service Areas IV, V and VI, or the western part of the State which includes the counties in Health Service Areas I, II, and III. The counties in each Health Service Area are identified in Appendix A of the State Medical Facilities Plan.
- ~~(5)~~(9) "Mobile MRI scanner" means an MRI scanner and transporting equipment which is moved at least weekly to provide services at two or more host facilities.
- ~~(6)~~(10) "MRI procedure" means a single discrete MRI study of one patient.
- ~~(7)~~(11) "MRI service area" means the Magnetic Resonance Imaging Planning Areas, as defined in the applicable State Medical Facilities Plan, except for proposed new mobile MRI ~~scanners.~~ scanners for which the service area is a mobile MRI region.
- ~~(8)~~(12) "MRI study" means one or more scans relative to a single diagnosis or symptom.
- (13) "Pediatric MRI patient" means a patient requiring an MRI scan who is under the age of 12 years or who is a special needs patient and is under the age of 21 years.
- (14) "Related entity" means the parent company of the applicant, a subsidiary company of the applicant (i.e., the applicant owns 50% or more of another company), a joint venture in which the applicant is a member, or a company that shares common ownership with the applicant (i.e., the applicant and another company are owned by some of the same persons).
- (15) "Special Needs patient" means a patient who has cerebral palsy, encephalomyelopathy, central nervous system injuries, genetic and metabolic disorders, autism, and mental retardation.
- (16) "Temporary MRI scanner" means a MRI scanner that the Certificate of Need Section has approved to be temporarily located in North Carolina at a facility that holds a certificate of need for a new fixed MRI scanner, but which is not operational because the project is not yet complete.
- (17) "Weighted MRI procedures" means MRI procedures which are adjusted to account for the length of time to complete the procedure,

based on the following weights: one outpatient MRI procedure without contrast or sedation is valued at 1.0 weighted MRI procedure, one outpatient MRI procedure with contrast or sedation is valued at 1.4 weighted MRI procedures, one inpatient MRI procedure without contrast or sedation is valued at 1.4 weighted MRI procedures; and one inpatient MRI procedure with contrast or sedation is valued at 1.8 weighted MRI procedures.

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

10A NCAC 14C .2702 INFORMATION REQUIRED OF APPLICANT

(a) An applicant proposing to acquire an MRI scanner, including a mobile MRI scanner, shall use the Acute Care Facility/Medical Equipment application form.

(b) Except for proposals to acquire mobile MRI scanners that serve two or more host facilities, both the applicant and the person billing the patients for the MRI service shall be named as co-applicants in the application form.

(c) An applicant proposing to acquire a magnetic resonance imaging scanner, including a mobile MRI scanner, shall provide the following information:

- (1) documentation that the proposed fixed MRI scanner shall be available and staffed for use at least 66 hours per week, with the exception of a mobile MRI scanner; week;
- (2) documentation that the proposed mobile MRI scanner shall be available and staffed for use at least 40 hours per week;
- (2) ~~projections of the annual number of procedures to be performed for each of the first three years of operation after completion of the project;~~
- (3) the average charge to the patient, regardless of who bills the patient, for each of the 20 most frequent MRI procedures to be performed for each of the first three years of operation after completion of the project and a description of items included in the charge; if the professional fee is included in the charge, provide the dollar amount for the professional fee;
- (4) if the proposed MRI service will be provided pursuant to a service agreement, the dollar amount of the service contract fee billed by the applicant to the contracting party for each of the first three years of operation; ~~and~~
- (5) letters from physicians indicating their intent to refer patients to the proposed magnetic resonance imaging scanner; scanner and their estimate of the number of patients proposed to be referred per year;
- (6) for each location at which the service will be provided, projections of the annual number of weighted MRI procedures to be performed for each of the four types of weighted MRI

- (7) procedures, as identified in the SMFP, for each of the first three years of operation after completion of the project;
 - (7) a detailed description of the methodology used to project the number of weighted MRI procedures to be performed;
 - (8) documentation to support each assumption used in projecting the number of procedures to be performed;
 - (9) for each existing fixed or mobile MRI scanner owned by the applicant or a related entity and operated in North Carolina in the month the application is submitted, the vendor, tesla strength, serial number or vehicle identification number, CON project identification number, physical location for fixed MRI scanners, and host sites for mobile MRI scanners;
 - (10) for each approved fixed or mobile MRI scanner to be owned by the applicant or a related entity and approved to be operated in North Carolina, the proposed vendor, proposed tesla strength, CON project identification number, physical location for fixed MRI scanners, and host sites for mobile MRI scanners;
 - (11) if proposing to acquire a mobile MRI scanner, an explanation of the basis for selection of the proposed host sites if the host sites are not located in MRI service areas that lack a fixed MRI scanner.
- (d) An applicant proposing to acquire a mobile MRI scanner shall provide copies of letters of intent from, and proposed contracts with, all of the proposed host facilities of the new MRI scanner.
- (e) An applicant proposing to acquire a dedicated fixed breast MRI scanner shall:
- (1) provide a copy of a contract or working agreement with a radiologist or practice group that has experience interpreting images and is trained to interpret images produced by an MRI scanner configured exclusively for mammographic studies;
 - (2) document that the applicant performed mammograms without interruption in the provision of the service during the last year; and
 - (3) document that the applicant's existing mammography equipment is in compliance with the U.S. Food and Drug Administration Mammography Quality Standards Act.
- (f) An applicant proposing to acquire a dedicated fixed pediatric MRI scanner shall:
- (1) provide a copy of a contract or working agreement with two pediatric radiologists qualified as described in 10A NCAC 14C .2705(f)(1);
 - (2) provide a copy of the facility's emergency plan for pediatric and special needs patients that

- outline all emergency procedures including acute care transfers and a copy of a contract with an ambulance service for transportation during any emergencies;
- (3) commit that the proposed MRI scanner shall be used exclusively to perform procedures on pediatric MRI patients;
- (4) provide a description of the scope of the research studies that shall be conducted to develop protocols related to MRI scanning of pediatric MRI patients; which includes special needs patients; and
- (5) commit to prepare an annual report, to be submitted to the Medical Facilities Planning Section and the Certificate of Need Section, which shall include the protocols for scanning pediatric MRI patients and the annual volume of weighted MRI procedures performed, by type.

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

10A NCAC 14C .2703 PERFORMANCE STANDARDS

(a) An applicant proposing to acquire a mobile magnetic resonance imaging (MRI) scanner shall:

- (1) ~~if an applicant operates an existing mobile MRI scanner in the Health Service Area(s), demonstrate that at least 2900 MRI procedures were performed in the last year on each of its existing mobile MRI scanners operating in the Health Service Area(s), (e.g., HSA I), in which the proposed mobile MRI scanner will be located~~ demonstrate that each existing mobile MRI scanner which the applicant or a related entity owns and operates in the mobile MRI region in which the proposed equipment will be located, except temporary MRI scanners, performed 3,328 weighted MRI procedures in the most recent 12 month period for which the applicant has data. [Note: This is not the average number of weighted MRI procedures performed on all of the applicant's mobile MRI scanners.];
- (2) demonstrate annual utilization in the third year of operation is reasonably projected to be at least 2900 3328 weighted MRI procedures on each of its the existing, approved and proposed mobile MRI scanners owned by the applicant or a related entity to be operated in the Health Service Area(s), (e.g., HSA I), mobile MRI region in which the proposed equipment will be located. [Note: This is not the average number of weighted MRI procedures performed on all of the applicant's mobile MRI scanners.];
- (3) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

(b) An applicant proposing to acquire a fixed magnetic resonance imaging (MRI) scanner for which the need determination in the State Medical Facilities Plan was based on the utilization of fixed MRI scanners, scanner, except for fixed MRI scanners described in Paragraphs (c) and (d) of this Rule, shall:

- (1) ~~if an applicant operates an existing MRI scanner in the proposed MRI service area, demonstrate that its existing MRI scanners, except mobile MRI scanners, operating in the proposed MRI service area in which the proposed MRI scanner will be located performed an average of at least 2900 MRI procedures per scanner in the last year; demonstrate that the existing fixed MRI scanners which the applicant or a related entity owns and locates in the proposed MRI service area performed an average of 3,328 weighted MRI procedures in the most recent 12 month period for which the applicant has data.~~
- (2) demonstrate that each existing mobile MRI scanner which the applicant or a related entity owns and operates in the proposed mobile MRI region, except temporary MRI scanners, performed 3,328 weighted MRI procedures in the most recent 12 month period for which the applicant has data. [Note: This is not the average number of weighted MRI procedures performed on all of the applicant's mobile MRI scanners.];
- (2)(3) demonstrate annual utilization in the third year of operation is reasonably projected to be an average of 2900 procedures per scanner for all existing, approved and proposed MRI scanners or mobile MRI scanners to be operated by the applicant in the MRI service area(s) in which the proposed equipment will be located; and; demonstrate that the average annual utilization of the existing, approved and proposed fixed MRI scanners which the applicant or a related entity owns and locates in the proposed MRI service area are reasonably expected to perform the following number of weighted MRI procedures, whichever is applicable, in the third year of operation following completion of the proposed project:
 - (A) 1,716 weighted MRI procedures in MRI service areas in which the SMFP shows no fixed MRI scanners are located,
 - (B) 3,775 weighted MRI procedures in MRI service areas in which the SMFP shows one fixed MRI scanner is located,
 - (C) 4,118 weighted MRI procedures in MRI service areas in which the SMFP shows two fixed MRI scanners are located,

(D) 4,462 weighted MRI procedures in MRI service areas in which the SMFP shows three fixed MRI scanners are located or

(E) 4,805 weighted MRI procedures in MRI service areas in which the SMFP shows four or more fixed MRI scanners are located.

(4) demonstrate that annual utilization of each existing, approved and proposed mobile MRI scanner which the applicant or a related entity owns and locates in the proposed MRI service area is reasonably expected to perform 3,328 weighted MRI procedures in the third year of operation following completion of the proposed project. [Note: This is not the average number of weighted MRI procedures to be performed on all of the applicant's mobile MRI scanners.];

~~(4)(5)~~ document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

~~(c)~~ An applicant proposing to acquire a magnetic resonance imaging (MRI) scanner for which the need determination in the State Medical Facilities Plan was based on utilization of mobile MRI scanners, shall:

~~(1)~~ if the applicant does not own or lease an MRI scanner or have an approved MRI scanner, demonstrate annual utilization in the third year of operation is reasonably projected to be at least 2080 MRI procedures per year for the proposed MRI scanner;

~~(2)~~ if the applicant already owns or leases an MRI scanner or has an approved MRI scanner, demonstrate annual utilization is reasonably projected to be an average of 2900 MRI procedures per scanner for all existing, approved and proposed MRI scanners or mobile MRI scanners to be operated by the applicant in the MRI service area(s) in which the proposed equipment will be located; and

~~(3)~~ document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

~~(c)~~ An applicant proposing to acquire a fixed magnetic resonance imaging (MRI) scanner for which the need determination in the State Medical Facilities Plan was based on the absence of an existing or approved fixed MRI scanner in the MRI service area an approved petition for an adjustment to the need determination shall:

(1) demonstrate annual utilization of the proposed MRI scanner in the third year of operation is reasonably projected to be at least 2080 1,716 weighted MRI procedures per year; and

(2) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

~~(d)~~ An applicant proposing to acquire a dedicated fixed pediatric MRI scanner shall:

(1) demonstrate annual utilization of the proposed MRI scanner in the third year of operation is reasonably projected to be at least 2746 weighted MRI procedures (i.e., 80 percent of one procedure per hour, 66 hours per week, 52 weeks per year); and

(2) document the assumptions and provide data supporting the methodology used for each projection required in this Rule.

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

10A NCAC 14C .2704 SUPPORT SERVICES

~~(a)~~ An applicant proposing to acquire a magnetic resonance imaging scanner, including a mobile MRI scanner, shall make available through written affiliation or referral agreements the following services:

- ~~(1)~~ anesthesiology;
- ~~(2)~~ radiology;
- ~~(3)~~ oncology;
- ~~(4)~~ neurology;
- ~~(5)~~ internal medicine;
- ~~(6)~~ orthopedics;
- ~~(7)~~ neurosurgery;
- ~~(8)~~ pathology; and
- ~~(9)~~ surgery.

~~(b)(a)~~ An applicant proposing to acquire a mobile MRI scanner shall provide referral agreements between each host site and at least one other provider of MRI services in the proposed MRI service area to document the availability of MRI services if patients require them when the mobile unit is not in service at that host site.

~~(b)~~ An applicant proposing to acquire a dedicated fixed pediatric MRI scanner shall provide a written policy regarding pediatric sedation which outlines the criteria for sedating a pediatric patient, including the special needs patients, and identifies the staff that will administer and supervise the sedation process.

~~(c)~~ An applicant proposing to acquire a dedicated fixed pediatric MRI scanner shall provide evidence of the availability of a pediatric code cart at the facility where the proposed pediatric MRI scanner will be located and a plan for emergency situations as described in 10A NCAC 14C .2702(f)(2).

~~(d)~~ An applicant proposing to acquire a fixed or mobile MRI scanner shall obtain accreditation from the Joint Commission for the Accreditation of Healthcare Organizations, the American College of Radiology or a comparable accreditation authority, as determined by the Certificate of Need Section, for magnetic resonance imaging within two years following operation of the proposed MRI scanner.

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

10A NCAC 14C .2705 STAFFING AND STAFF TRAINING

(a) An applicant proposing to acquire an MRI scanner shall demonstrate that one diagnostic radiologist certified by the American Board of Radiologists shall be available to provide the proposed services who has had:

- (1) training in magnetic resonance imaging as an integral part of his or her residency training program; or
- (2) six months of supervised MRI experience under the direction of a certified diagnostic radiologist; or
- (3) at least six months of fellowship training, or its equivalent, in MRI; or
- (4) a combination of MRI experience and fellowship training equivalent to Subparagraph (a)(1), (2) or (3) of this Rule.

(b) An applicant proposing to acquire a dedicated fixed breast MRI scanner shall provide documentation that the radiologist is trained and has experience in interpreting images produced by an MRI scanner configured exclusively to perform mammographic studies.

(c) ~~The~~ An applicant proposing to acquire a MRI scanner shall provide evidence of the availability of two full-time MRI technologist-radiographers and that one of these technologists shall be present during the hours of operation of the MRI scanner.

(d) An applicant proposing to acquire an MRI scanner shall demonstrate that the following staff training is provided:

- (1) American Red Cross or American Heart Association certification in cardiopulmonary resuscitation (CPR) and basic cardiac life support; and
- (2) the availability of an organized program of staff education and training which is integral to the services program and ensures improvement in technique and the proper training of new personnel.

(e) An applicant proposing to acquire a mobile MRI scanner shall document that the requirements in Paragraphs (a) and (c) of this Rule shall be met at each host facility.

(f) An applicant proposing to acquire a dedicated fixed pediatric MRI scanner shall:

- (1) provide documentation of the availability of at least two radiologists, certified by the American Board of Radiology, with a pediatric fellowship or two years of specialized training in pediatrics;
- (2) provide evidence that the applicant will have at least one licensed physician on-site during the hours of operation of the proposed MRI scanner;
- (3) provide documentation that the applicant will employ at least two licensed registered nurses and that one of these nurses shall be present during the hours of operation of the proposed MRI scanner;
- (4) provide a description of a research group for the project including a radiologist, neurologist, pediatric sedation specialist and research coordinator;
- (5) provide documentation of the availability of the research group to conduct research studies on the proposed MRI scanner; and

- (6) provide letters from the proposed members of the research group indicating their qualifications, experience and willingness to participate on the research team.

(g) An applicant proposing to perform cardiac MRI procedures shall provide documentation of the availability of a radiologist, certified by the American Board of Radiology, with training and experience in interpreting images produced by an MRI scanner configured to perform cardiac MRI studies.

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

SECTION .3700 - CRITERIA AND STANDARDS FOR POSITRON EMISSION TOMOGRAPHY SCANNER

10A NCAC 14C .3703 PERFORMANCE STANDARDS

(a) An applicant proposing to acquire a dedicated PET scanner, including a mobile dedicated PET scanner, shall demonstrate that:

- (1) the proposed dedicated PET scanner, including a proposed mobile dedicated PET scanner, shall be utilized at an annual rate of at least ~~1,220~~ 3,200 PET procedures by the end of the third year following completion of the project;
- (2) if an applicant operates an existing dedicated PET scanner, its existing dedicated PET scanners, excluding those used exclusively for research, performed an average of ~~1,200~~ at least 3,200 PET procedures per PET scanner in the last year; and
- (3) its existing and approved dedicated PET scanners shall perform an average of at least ~~1,220~~ 3,200 PET procedures per PET scanner during the third year following completion of the project.

(b) The applicant shall describe the assumptions and provide data to support and document the assumptions and methodology used for each projection required in this Rule.

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

SECTION .3800 - CRITERIA AND STANDARDS FOR ACUTE CARE BEDS

10A NCAC 14C .3802 INFORMATION REQUIRED OF APPLICANT

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

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

- (1) the number of acute care beds proposed to be licensed and operated following completion of the proposed project;
- (2) documentation that the proposed services shall be provided in conformance with all applicable facility, programmatic, and service specific licensure, certification, and JCAHO accreditation standards;

- (3) documentation that the proposed services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies;
- (4) if adding new acute care beds to an existing facility, documentation of the number of inpatient days of care provided in the last operating year in the existing licensed acute care beds by medical diagnostic category, as classified by the Centers for Medicare and Medicaid Services according to the list set forth in the applicable State Medical Facilities Plan;
- (5) the projected number of inpatient days of care to be provided in the total number of licensed acute care beds in the facility, by county of residence, for each of the first three years following completion of the proposed project, including all assumptions, data and methodologies;
- (6) documentation that the applicant shall be able to communicate with emergency transportation agencies 24 hours per day, 7 days per week;
- (7) documentation that services in the emergency care department shall be provided 24 hours per day, 7 days per week, including a description of the scope of services to be provided during each shift and the physician and professional staffing that will be responsible for provision of those services;
- (8) copy of written administrative policies that prohibit the exclusion of services to any patient on the basis of age, race, sex, creed, religion, disability or the patient's ability to pay;
- (9) a written commitment to participate in and comply with conditions of participation in the Medicare and Medicaid programs;
- (10) documentation of the health care services provided by the applicant, and any facility in North Carolina owned or operated by the applicant's parent organization, in each of the last two operating years to Medicare patients, Medicaid patients, and patients who are not able to pay for their care;
- (11) documentation of strategies to be used and activities undertaken by the applicant to attract physicians and medical staff who will provide care to patients without regard to their ability to pay; and
- ~~(12) correspondence from physicians and other referral sources that documents their willingness to offered in the new acute care beds; and~~
- ~~(13)~~(12) documentation that the proposed new acute care beds shall be operated in a hospital that provides inpatient medical services to both surgical and non-surgical patients.

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

- (1) the projected number of inpatient days of care to be provided in the licensed acute care beds in the new hospital or on the new campus, by major diagnostic category as recognized by the Centers for Medicare and Medicaid Services (CMS) according to the list set forth in the applicable State Medical Facilities Plan;
- (2) documentation that medical and surgical services shall be provided in the proposed acute care beds on a daily basis within at least five of the major diagnostic categories as recognized by the Centers for Medicare and Medicaid Services (CMS) according to the list set forth in the applicable State Medical Facilities Plan;
- (3) copies of written policies and procedures for the provision of care within the new acute care hospital or on the new campus, including but not limited to the following:
 - (A) the admission and discharge of patients, including discharge planning,
 - (B) transfer of patients to another hospital,
 - (C) infection control, and
 - (D) safety procedures;
- (4) documentation that the applicant owns or otherwise has control of the site on which the proposed acute care beds will be located; and
- (5) documentation that the proposed site is suitable for development of the facility with regard to water, sewage disposal, site development and zoning requirements; and provide the required procedures for obtaining zoning changes and a special use permit if site is currently not properly ~~zoned~~ zoned; and
- (6) correspondence from physicians and other referral sources that documents their willingness to refer or admit patients to the proposed new hospital or new campus.

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

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 43D .0706.

Proposed Effective Date: October 1, 2005

Public Hearing:

Date: July 7, 2005

Time: 10:00 a.m. – 12:00 p.m.

Location: Room 116, Royster Building, Dorthea Dix Campus, 1020 Richardson Drive, Raleigh, NC

Reason for Proposed Action: *The proposed rule changes are required to comply with the Child and Nutrition and WIC Reauthorization Act of 2004, P.L. 108-265 as well as some state policy changes dealing with cost containment in the retail food delivery system of the WIC Program. In addition, the changes include the establishment of three new sanctions for vendor violations described in the new rule.*

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, the Rule-Making Coordinator, during the public comment period. Additionally, objections may be made verbally or in writing at the public hearing for this rule.*

Written comments may be submitted to: *Chris Hoke, 1915 Mail Service Center, Raleigh, NC 27699-1915, email chris.hoke@ncmail.net.*

Comment period ends: *August 1, 2005*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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

10A NCAC 43D .0706 AUTHORIZED WIC VENDORS

(a) Vendor applicants and authorized vendors shall be placed into peer groups as follows:

- (1) When annual WIC supplemental food sales are not yet available, vendor applicants and authorized vendors, excluding chain stores, stores under a WIC corporate agreement, military commissaries, and free-standing pharmacies, shall be placed into peer groups based on the number of cash registers in the store until annual WIC supplemental food sales become available. The following are the peer groups based on the number of cash registers in the store:
 - Peer Group I - - zero to two cash registers;

- Peer Group II - - three to five cash registers; and
- Peer Group III - - six or more cash registers; registers.

WIC sales figures of new vendors will be reviewed six months from authorization. A vendor whose first six months of WIC sales exceed twenty five thousand dollars (\$25,000) will be placed in the peer group designation in accordance with the dollar thresholds of Subparagraph(a)(2).

- (2) Authorized vendors for which annual WIC supplemental food sales is available, excluding chain stores, stores under a WIC corporate agreement, military commissaries, and free-standing pharmacies, shall be placed into peer groups as follows, except as provided in Subparagraph (a)(7)(8) of this Rule.

- Peer Group I - - two thousand dollars (\$2,000) to twenty five thousand dollars (\$25,000) annually in WIC supplemental food sales at the store;
- Peer Group II - - greater than twenty five thousand dollars (\$25,000) but not exceeding seventy five thousand dollars (\$75,000) annually in WIC supplemental food sales at the store;
- Peer Group III - - greater than seventy five thousand dollars (\$75,000) but not exceeding three hundred thousand dollars (\$300,000) annually in WIC supplemental food sales at the store; and
- Peer Group IV - - greater than three hundred thousand dollars (\$300,000) annually in WIC supplemental food sales at the store;

- (3) Chain stores, stores under a WIC corporate agreement (20 or more authorized vendors under one agreement), military commissaries, and free-standing pharmacies, including free-standing pharmacy chain stores and free-standing pharmacies participating under a WIC corporate agreement, shall be placed into peer groups as follows:

- Peer Group IV - - chain stores, stores under a WIC corporate agreement (20 or more authorized vendors under one agreement) and military commissaries; and
- Peer Group V - - free-standing pharmacies, including free-standing pharmacy chain stores and free-standing pharmacies participating under a WIC corporate agreement;

- (4) Annual WIC supplemental food sales is the dollar amount in sales of WIC supplemental foods at the store within a 12-month period.

- (5) If a vendor applicant has at least 30% ownership in the applying store and at least 30% ownership in a store(s) already authorized, the applying store shall be placed in the peer group of the highest designation of the already authorized stores(s). Upon contract reauthorization, all stores held under common ownership shall be placed in the highest peer group among those held commonly. Common ownership is ownership of 30% or more in two or more stores.
- ~~(5)~~(6) In determining a vendor's peer group designation based on annual WIC supplemental food sales under Subparagraph (a)(2) of this Rule, the state agency shall look at the most recent 12-month period for which sales data is available. If the most recent available 12-month period of WIC sales data ends more than one year prior to the time of designation, the peer group designation shall be based on the number of cash registers in the store in accordance with Subparagraph (a)(1) of this Rule.
- ~~(6)~~(7) The state agency may reassess an authorized vendor's peer group designation at any time during the vendor's agreement period and place the vendor in a different peer group if upon reassessment the state agency determines that the vendor is no longer in the appropriate peer group.
- ~~(7)~~(8) A vendor applicant previously authorized in a peer group under Subparagraph (a)(2) of this Rule that is being reauthorized following the nonrenewal or termination of its Agreement or disqualification from the WIC Program shall be placed into the same peer group the vendor applicant was previously in under Subparagraph (a)(2) of this Rule, provided that no more than one year has passed since the nonrenewal, termination or disqualification. If more than one year has passed, the vendor applicant shall be placed into a peer group in accordance with Subparagraph (a)(1) of this Rule.
- (b) To become authorized as a WIC vendor, a vendor applicant shall comply with the following vendor selection criteria:
- (1) Accurately complete a WIC Vendor Application, a WIC Price List, and a WIC Vendor Agreement. A vendor applicant must submit its current highest shelf price for each WIC supplemental food listed on the WIC Price List;
 - (2) At the time of application and throughout the term of authorization, submit all completed forms to the local WIC program, except that a corporate entity operating under a WIC corporate agreement shall submit one completed WIC corporate agreement and the WIC Price Lists to the state agency and a separate WIC Vendor Application for each store to the local WIC agency. A corporate entity operating under a WIC corporate agreement may submit a single WIC Price List for those stores that have the same prices for WIC supplemental foods in each store, rather than submitting a separate WIC Price List for each store;
- (3) Authorized vendors shall agree to purchase all infant formula, exempt infant formula, and WIC-eligible medical food directly from:
- (A) Infant formula manufacturers registered with the Food and Drug Administration;
 - (B) Food and drug wholesalers registered with the North Carolina Secretary of State and inspected or licensed by the North Carolina Department of Agriculture;
 - (C) Retail food stores that purchase directly from infant formula manufacturers or an approved wholesaler in accordance with Part (b)(3)(B) of this Rule; or
 - (D) A supplier on another state's list of approved infant formula suppliers as verified by this state agency.
- Authorized vendors shall agree to make available to the local or state agency, upon request, invoices or receipts documenting purchases of all infant formula, exempt infant formula, and WIC-eligible medical food directly from the above listed sources. Acceptable receipts will include at a minimum company letterhead or name of wholesaler/manufacturer, date(s) of purchase and itemization of purchases reflecting infant formula, exempt infant formula, and WIC-eligible medical food purchases.
- ~~(3)~~(4) A vendor applicant's current highest shelf price for each WIC supplemental food listed on the WIC Price List must not exceed the maximum price set by the state agency for each supplemental food within that vendor applicant's peer group, except as provided in Part (b)~~(3)~~(4)(B) of this Rule;
- (A) The most recent WIC Price Lists submitted by authorized vendors within the same peer group shall be used to determine the maximum price for each supplemental food. The maximum price shall be the 97th percentile of the current highest shelf prices for each supplemental food within a vendor peer group. The state agency shall reassess the maximum price set for each supplemental food at least four times a year. For two of its price assessments, the state agency

shall use the WIC Price Lists which must be submitted by all vendors by ~~January 1~~ April 1 and ~~July 1~~ October 1 each year in accordance with Subparagraph (c)(30) of this Rule. The other two price assessments shall be based on WIC Price Lists requested from a sample of vendors within each peer group in ~~March~~ January and ~~September~~ July of each year;

(B) If any of the vendor applicant's price(s) on its WIC Price List exceed the maximum price(s) set by the state agency for that applicant's peer group, the applicant shall be notified in writing. Within 30 days of the date of the written notice, the vendor applicant may resubmit price(s) that it shall charge the state WIC Program for those foods that exceeded the maximum price(s). If none of the vendor applicant's resubmitted prices exceed the maximum prices set by the state agency, the vendor applicant shall be deemed to have met the requirements of Subparagraph (b)~~(3)~~(4) of this Rule. If any of the vendor applicant's resubmitted prices still exceed the maximum prices set by the state agency, or the vendor applicant does not resubmit prices within 30 days of the date of written notice, the application shall be denied in writing. The vendor applicant must wait 90 days from the date of receipt of the written denial to reapply for authorization;

~~(4)~~(5) Pass a monitoring review by the local WIC program to determine whether the store has minimum inventory of supplemental foods as specified in Subparagraph (c)(23) of this Rule. A vendor applicant who fails this review shall be allowed a second opportunity for an unannounced monitoring review within 14 days. If the applicant fails both reviews, the applicant shall wait 90 days from the date of the second monitoring review before submitting a new application;

~~(5)~~(6) Attend, or cause a manager or other authorized store representative to attend, WIC Vendor Training provided by the local WIC Program prior to authorization and ensure that the applicant's employees receive instruction in WIC program procedures and requirements;

~~(6)~~(7) Mark the current shelf prices of all WIC supplemental foods clearly on the foods or have the prices posted on the shelf or display case at all times;

~~(7)~~(8) The store shall be located at a permanent and fixed location within the State of North Carolina. The store shall be located at the address indicated on the WIC vendor application and shall be the site at which WIC supplemental foods are selected by the WIC customer;

~~(8)~~(9) The store shall be open throughout the year for business with the public at least six days a week for at least 40 hours per week between 8:00 a.m. and 11:00 p.m.;

(10) The store shall not use either the acronym "WIC" or the WIC logo, including close facsimiles, in total or part, either in the official name in which the business is registered or in the manner under which it does business, if different.

~~(9)~~(11) A vendor applicant shall not submit false, erroneous, or misleading information in an application to become an authorized WIC vendor or in subsequent documents submitted to the state or local agency;

~~(10)~~(12) The owner(s), officer(s) or manager(s) of a vendor applicant shall not be employed, or have a spouse, child, or parent who is employed by the state WIC program or the local WIC program serving the county in which the vendor applicant conducts business. A vendor applicant shall not have an employee who handles, transacts, deposits, or stores WIC food instruments who is employed, or has a spouse, child, or parent who is employed by the state WIC program or the local WIC program serving the county in which the vendor applicant conducts business;

~~(11)~~(13) WIC vendor authorization shall be denied if in the last six years any of the vendor applicant's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity, including, but not limited to, fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice. For purposes of this Subparagraph, "convicted" or "conviction" means and includes a plea of guilty, a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established, and recognized adjudicating body, tribunal, or official, either civilian or military, or a plea of no contest, nolo contendere, or the equivalent. Entry of a prayer for judgment continued following a conviction as defined in this Rule is the same as a conviction for purposes of this Subparagraph.

~~(12)~~(14) A vendor applicant shall not be authorized if it is currently disqualified from the Food Stamp Program or it has been assessed a Food Stamp Program civil money penalty for hardship and the disqualification period that otherwise would have been imposed has not expired;

~~(13)~~(15) A vendor applicant, excluding chain stores and stores under a WIC corporate agreement that have a separate manager on site for each store, shall not have an owner who holds a financial interest in any of the following:

(A) a Food Stamp vendor which is disqualified from participation in the Food Stamp Program or has been assessed a civil money penalty for hardship in lieu of disqualification and the time period during which the disqualification would have run, had a penalty not been paid, is continuing; or

(B) another WIC vendor which is disqualified from participation in the WIC Program or which has been assessed an administrative penalty pursuant to G.S. 130A-22(c1), Paragraph (k), or Paragraph (l) of this Rule as the result of violation of Paragraphs (g), (h)(1)(A), (h)(1)(B), (h)(1)(C), (h)(1)(D) or (h)(2)(D) of this Rule, and if assessed a penalty, the time during which the disqualification would have run, had a penalty not been assessed, is continuing.

The requirements of this Subparagraph shall not be met by the transfer or conveyance of financial interest during the period of disqualification. Additionally, the requirements of this Subparagraph shall not be met even if such transfer or conveyance of financial interest in a Food Stamp vendor under Part ~~(b)(13)~~(15)(A) of this Subparagraph prematurely ends the disqualification period applicable to that Food Stamp vendor. The requirements of this Subparagraph shall apply until the time the Food Stamp vendor disqualification otherwise would have expired;

~~(14)~~(16) A vendor applicant, excluding free-standing pharmacies, must have Food Stamp Program authorization for the store as a prerequisite for WIC vendor authorization and must provide its Food Stamp Program authorization number to the state agency; and

~~(15)~~(17) A vendor applicant shall not become authorized as a WIC vendor if the store has been disqualified from participation in the WIC Program and the disqualification period has not expired.

(c) By signing the WIC Vendor Agreement, the vendor agrees to:

(1) Process WIC program food instruments in accordance with the terms of this agreement, state and federal WIC program rules, and applicable law;

(2) Accept WIC program food instruments in exchange for WIC supplemental foods. Supplemental foods are those foods which satisfy the requirements of 10A NCAC 43D .0501;

(3) Provide only the authorized supplemental foods listed on the food instrument, accurately determine the charges to the WIC program, and complete the "Pay Exactly" box on the food instrument prior to obtaining the countersignature of the WIC customer. The WIC customer is not required to get all of the supplemental foods listed on the food instrument;

(4) Enter in the "Pay Exactly" box on the food instrument only the total amount of the current shelf prices, or less than the current shelf prices, for the supplemental food actually provided and shall not charge or collect sales taxes for the supplemental food provided;

(5) Charge no more for supplemental food provided to a WIC customer than to a non-WIC customer or no more than the current shelf price, whichever is less;

(6) Accept payment from the state WIC Program only up to the maximum price set by the state agency for each food instrument within that vendor's peer group. The maximum price for each food instrument shall be based on the maximum prices set by the state agency for each supplemental food, as described in Part ~~(b)(3)~~(4)(A) of this Rule, listed on the food instrument. A food instrument deposited by a vendor for payment which exceeds the maximum price shall be paid at the maximum price set by the state agency for that food instrument.

(7) Not charge the state WIC Program more than the maximum price set by the state agency under Part ~~(b)(3)~~(4)(A) of this Rule for each supplemental food within the vendor's peer group;

(8) For non-contract brand milk-based and soy-based infant formulas, excluding exempt infant formulas, accept payment from the state WIC Program only up to the maximum price established for contract brand infant formulas under Part ~~(b)(3)~~(4)(A) of this Rule for the vendor's peer group;

(9) For free-standing pharmacies, provide only infant formula and WIC-eligible medical foods;

PROPOSED RULES

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| <p>(10) Excluding free-standing pharmacies, redeem at least two thousand dollars (\$2,000) annually in WIC supplemental food sales. Failure to redeem at least two thousand dollars (\$2,000) annually in WIC supplemental food sales shall result in termination of the WIC Vendor Agreement. The store must wait 180 days to reapply for authorization;</p> <p>(11) Accept WIC program food instruments only on or between the "Date of Issue" and the "Participant Must Use By" dates;</p> <p>(12) Prior to obtaining the countersignature, enter in the "Date Transacted" box the month, day and year the WIC food instrument is exchanged for supplemental food;</p> <p>(13) Ensure that the food instrument is countersigned in the presence of the cashier;</p> <p>(14) Refuse acceptance of any food instrument on which quantities, signatures or dates have been altered;</p> <p>(15) Not transact food instruments in whole or in part for cash, credit, unauthorized foods, or non-food items;</p> <p>(16) Not provide refunds or permit exchanges for authorized supplemental foods obtained with food instruments, except for exchanges of an identical authorized supplemental food when the original authorized supplemental food is defective, spoiled, or has exceeded its "sell by," "best if used by," or other date limiting the sale or use of the food. An identical authorized supplemental food means the exact brand, type and size as the original authorized supplemental food obtained and returned by the WIC customer;</p> <p>(17) Imprint the authorized WIC vendor stamp in the "Pay the Authorized WIC Vendor Stamped Here" box on the face of the food instrument</p> | <p>to enable the vendor number to be read during the Program editing process;</p> <p>(18) Imprint the vendor's bank deposit stamp or the vendor's name, address and bank account number in the "Authorized WIC Vendor Stamp" box in the endorsement;</p> <p>(19) Promptly deposit WIC program food instruments in the vendor's bank. All North Carolina WIC program food instruments must be deposited in the vendor's bank within 60 days of the "Date of Issue" on the food instrument;</p> <p>(20) Ensure that the authorized WIC vendor stamp is used only for the purpose and in the manner authorized by this agreement and assume full responsibility for the unauthorized use of the authorized WIC vendor stamp;</p> <p>(21) Maintain storage so only the staff designated by the vendor owner or manager have access to the authorized WIC vendor stamp and immediately report loss of this stamp to the local agency;</p> <p>(22) Notify the local agency of misuse (attempted or actual) of the WIC program food instrument(s);</p> <p>(23) Maintain a minimum inventory of supplemental foods in the store for purchase. Supplemental foods that are outside of the manufacturer's expiration date do not count towards meeting the minimum inventory requirement. The following items and sizes constitute the minimum inventory of supplemental foods for vendors in Peer Groups I through III of Subparagraph (a)(1) of this Rule, vendors in Peer Groups I through IV of Subparagraph (a)(2) of this Rule and vendors in Peer Group IV of Subparagraph (a)(3) of this Rule:</p> |
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Food Item	Type of Inventory	Quantities Required
Milk	Whole fluid: gallon	Total of 6 gallons fluid milk
	-and-	
	Skim/lowfat fluid: gallon	
	Nonfat dry: quart package	Total of 5 quarts when reconstituted
	-or-	
	Evaporated: 12 oz. can	5 cans
Cheese	2 varieties in 8 or 16 oz. package	Total of 6 pounds
Cereals	4 types (minimum package size 12 oz.)	Total of 12 packages
Eggs	Grade A, large or extra-large: white or brown: one dozen size carton	6 dozen

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Juices	Frozen: 11.5-12 oz. container	10 containers	
	Single strength: 46oz container	10 containers	
	Orange juice must be available in frozen and single strength. A second flavor must be available in frozen or single strength.		
Dried Peas and Beans	2 varieties: one pound package	3 packages	
or Peanut Butter	Plain (smooth, crunchy, or whipped; No reduced fat): 18 oz. container	3 containers	
Infant Cereal	Plain-no fruit added: 2 cereal grains (one must be rice); 8-oz. box; brand specified in Vendor Agreement	6 boxes	
Infant Formula	milk and soy based as specified in Vendor Agreement; 13 oz. concentrate	62 can combination	
<u>Infant Formula</u>	<u>milk-based concentrate;</u> <u>13 oz.</u>	<u>31 cans</u>	
	<u>-and-</u>		
	<u>soy-based concentrate;</u> <u>13 oz.</u>	<u>15 cans</u>	
	<u>-and-</u>		
	<u>milk-based powder;</u> <u>12 – 14.3 oz.</u>	<u>9 cans</u>	
	<u>-and-</u>		
	<u>soy-based powder;</u> <u>12 – 14.3 oz.</u> <u>Brand specified in Vendor Agreement</u>	<u>4 cans</u>	
Tuna	Chunk light in water: 6-6.5 oz. can	4 cans	
Carrots	Raw, canned or frozen 14.5-16 oz. size	2 packages/cans	
			(25) Permit the purchase of supplemental food without requiring other purchases;
			(26) Attend, or cause a manager or other authorized store representative to attend, annual vendor training class upon notification of class by the local agency;
			(27) Inform and train vendor's cashiers and other staff on WIC Program requirements;
			(28) Be accountable for the actions of its owners, officers, managers, agents, and employees who commit vendor violations;
(24)	Ensure that all supplemental foods in the store for purchase are within the manufacturer's expiration date;		(29) Allow reasonable monitoring and inspection of the store premises and procedures to ensure compliance with the agreement and state and federal WIC Program rules, regulations and

- statutes. This includes, but shall not be limited to, allowance of access to all WIC food instruments at the store, vendor records pertinent to the purchase and sale of WIC supplemental foods, including invoices, copies of purchase orders, and any other proofs of purchase, federal and state corporate and individual income tax and sales and use tax returns and all records pertinent to these returns, and books and records of all financial and business transactions. These records must be retained by the vendor for a period of three years or until any audit pertaining to these records is resolved, whichever is later. Failure or inability to provide these records or providing false records for an inventory audit shall be deemed a violation of 7 C.F.R. 246.12(l)(1)(iii)(B) and Part (g)(2)(A) of this Rule;
- (30) Submit a current accurately completed WIC Price List when signing this agreement, and by ~~January 1~~ April 1 and ~~July 1~~ October 1 of each year. The vendor also agrees to submit a WIC Price List within one week of any written request by the state or local agency. Failure to submit a WIC Price List as required by this Subparagraph within 30 days of the required submission date shall result in disqualification of the vendor from the WIC Program in accordance with Part (h)(1)(D) of this Rule;
- (31) Reimburse the state agency within 30 days of written notification of a claim assessed due to a vendor violation that affects payment to the vendor or a claim assessed due to the unauthorized use of the authorized WIC vendor stamp. The state agency shall deny payment or assess a claim in the amount of the full purchase price of each food instrument rendered invalid under Subparagraphs (a)(2), (a)(5), (a)(6) or (a)(7) of Rule .0704 of this Section. Denial of payment by the state agency or payment of a claim by the vendor for a vendor violation(s) shall not absolve the vendor of the violation(s). The vendor shall also be subject to any vendor sanctions authorized under this Rule for the vendor violation(s);
- (32) Not seek restitution from the WIC customer for reimbursement paid by the vendor to the state agency or for WIC food instruments not paid or partially paid by the state agency. Additionally, the vendor shall not charge the WIC customer for authorized supplemental foods obtained with food instruments;
- (33) Not contact a WIC customer outside the store regarding the transaction or redemption of WIC food instruments;
- (34) Notify the local agency in writing at least 30 days prior to a change of ownership, change in location, cessation of operations, or withdrawal from the WIC Program. Change of ownership, change in location of more than three miles from the vendor's previous location, cessation of operations, withdrawal from the WIC Program or disqualification from the WIC Program shall result in termination of the WIC Vendor Agreement by the state agency. Change of ownership, change in location, ceasing operations, withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement shall not stop a disqualification period applicable to the store.
- (35) Return the authorized WIC vendor stamp to the local agency upon termination of this agreement or disqualification from the WIC Program;
- (36) Offer WIC customers the same courtesies as offered to other customers;
- (37) An authorized vendor for which more than 50% of the annual revenue from the sale of food items comes from WIC transactions may provide incentive items to WIC customers only if each incentive item is less than two dollars (\$2) in cost to the vendor in accordance with federal regulations. These vendors shall not provide transportation to WIC customers to or from the vendor's premises, delivery of supplemental foods, lottery tickets, nor cash gifts. Federal requirements are adopted by reference.
- ~~(37)~~(38) A vendor must reapply to continue to be authorized beyond the period of its current WIC Vendor Agreement. Additionally, a store must reapply to become authorized following the expiration of a disqualification period or termination of the Agreement. In all cases, the vendor applicant shall be subject to the vendor selection criteria of Paragraph (b) of this Rule; and
- ~~(38)~~(39) Comply with all the requirements for vendor applicants of Subparagraphs (b)~~(3)~~(4) and (b)~~(6)~~(7) through (b)~~(14)~~(16) of this Rule throughout the term of authorization. The state agency may reassess a vendor at any time during the vendor's period of authorization to determine compliance with these requirements. The state agency shall terminate the WIC Vendor Agreement of any vendor that fails to comply with Subparagraphs (b)~~(3)~~(4), (b)~~(7)~~(8), (b)~~(8)~~(9), (b)~~(10)~~(12), (b)~~(11)~~(13) or (b)~~(13)~~(15) of this Rule during the vendor's period of authorization, and terminate the Agreement of or sanction or both any vendor that fails to comply with Subparagraphs (b)~~(6)~~(7), (b)~~(9)~~(11), (b)~~(12)~~(14) or (b)~~(14)~~(16) of this Rule during the vendor's period of authorization.

(d) By signing the WIC Vendor Agreement, the local agency agrees to the following:

- (1) Provide annual vendor training classes on WIC procedures and regulations;
- (2) Monitor the vendor's performance under this agreement in a reasonable manner to ensure compliance with the agreement, state and federal WIC program rules, regulations, and applicable law. A minimum of one-third of all authorized vendors shall be monitored within a ~~state fiscal year (July 1 through June 30)~~ contract year (October 1 through September 30) and all vendors shall be monitored at least once within three consecutive ~~state fiscal~~ contract years. Any vendor shall be monitored within one week of written request by the state agency;
- (3) Provide vendors with the North Carolina WIC Vendor Manual, all Vendor Manual amendments, blank WIC Price Lists, and the authorized WIC vendor stamp indicated on the signature page of the WIC Vendor Agreement;
- (4) Assist the vendor with questions which may arise under this agreement or the vendor's participation in the WIC Program; and
- (5) Keep records of the transactions between the parties under this agreement pursuant to ~~15A NCAC 21D 10A~~ NCAC 43D .0206.

(e) In order for a food retailer or free-standing pharmacy to participate in the WIC Program a current WIC Vendor Agreement must have been signed by the vendor, the local WIC agency, and the state agency.

(f) If an application for status as an authorized WIC vendor is denied, the applicant is entitled to an administrative appeal as described in Section .0800 of this Subchapter.

(g) Title 7 C.F.R. 246.12(l)(1)(i) through (vi) and (xii) are incorporated by reference with all subsequent amendments and editions.

- (1) In accordance with 7 CFR 246.12(l)(1)(i), the state agency shall not allow imposition of a civil money penalty in lieu of disqualification for a vendor permanently disqualified.
- (2) A pattern, as referenced in 7 C.F.R. 246.12(l)(1)(iii)(B) through (F) and 246.12(l)(1)(iv), shall be established as follows:
 - (A) claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for six or more days within a 60-day period. The six or more days do not have to be consecutive days within the 60-day period. Failure or inability to provide records or providing false records required under Subparagraph (c)(29) of this Rule for an inventory audit shall be

deemed a violation of 7 C.F.R. 246.12(l)(1)(iii)(B) and Part (g)(2)(A) of this Rule;

- (B) two occurrences of vendor overcharging within a 12-month period;
- (C) two occurrences of receiving, transacting or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor or an unauthorized person within a 12-month period;
- (D) two occurrences of charging for supplemental food not received by the WIC customer within a 12-month period;
- (E) two occurrences of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments within a 12-month period; or
- (F) three occurrences of providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument within a 12-month period.

(h) Title 7 C.F.R. Section 246.12(l)(2)(i) is incorporated by reference with all subsequent amendments and editions. Except as provided in 7 C.F.R. 246.12 (l)(1)(xii), a vendor shall be disqualified from the WIC Program for the following state-established violations in accordance with the sanction system below. The total period of disqualification shall not exceed one year for state-established violations investigated as part of a single investigation, as defined in Paragraph (i) of this Rule.

- (1) When a vendor commits any of the following violations, the state-established disqualification period shall be:
 - (A) 90 days for each occurrence of failure to properly transact a WIC food instrument by not completing the date or purchase price on the WIC food instrument before obtaining the countersignature, by not obtaining the countersignature in the presence of the cashier, or by accepting a WIC food instrument prior to the "Date of Issue" or after the "Participant Must Use By" dates on the food instrument;
 - (B) 60 days for each occurrence of requiring a cash purchase to transact a WIC food instrument;
 - (C) 30 days for each occurrence of requiring the purchase of a specific

- brand when more than one WIC supplemental food brand is available; and
- (D) 30 days for each occurrence of failure to submit a WIC Price List as required by Subparagraph (c)(30) of this Rule.
- (2) When a vendor commits any of the following violations, the vendor shall be assessed sanction points as follows for each occurrence:
- (A) 2.5 points for: ~~for stocking WIC supplemental foods outside of the manufacturer's expiration date.~~
- (i) stocking WIC supplemental foods outside of the manufacturer's expiration date, or
- (ii) unauthorized use of the "WIC" acronym or the WIC logo.
- (B) 5 points for:
- (i) failure to attend annual vendor training;
- (ii) failure to stock minimum inventory; ~~or~~
- (iii) failure to mark the current shelf prices of all WIC supplemental foods clearly on the foods or have the prices posted on the shelf or display ~~case; case; or~~
- (iv) offering improper incentives, free merchandise, or services by a vendor for which more than 50% of annual food sales result from WIC sales.
- (C) 7.5 points for:
- (i) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.); or
- (ii) contacting a WIC customer in an attempt to recoup funds for food instrument(s) or contacting a WIC customer outside the store regarding the transaction or redemption of WIC food instruments.
- (D) 15 points for:
- (i) failure to allow monitoring of a store by WIC staff when required;
- (ii) failure to provide WIC food instrument(s) for review when requested;
- (iii) failure to provide store inventory records when requested by WIC staff,
- except as provided in Subparagraph (c)(29) and Part (g)(2)(A) of this Rule for failure or inability to provide records for an inventory audit;
- (iv) nonpayment of a claim made by the state agency; ~~or~~
- (v) providing false information on vendor records (application, vendor agreement, price list, WIC food instrument(s), monitoring forms), except as provided in Subparagraph (c)(29) and Part (g)(2)(A) of this Rule for providing false records for an inventory ~~audit; audit; or~~
- (vi) failure to purchase infant formula from an authorized supplier.
- (3) For the violations listed in Subparagraph (h)(2) of this Rule, all sanction points assessed against a vendor remain on the vendor's record for 12 months or until the vendor is disqualified as a result of those points. If a vendor accumulates 15 or more points, the vendor shall be disqualified. The nature of the violation(s) and the number of violations, as represented by the points assigned in Subparagraph (h)(2) of this Rule, are used to calculate the period of disqualification. The formula used to calculate the disqualification period is: the number of points assigned to the violation carrying the highest number of sanction points multiplied by 18 days. Additionally, if the vendor has accumulated more than 15 points, 18 days shall be added to the disqualification period for each point over 15 points.
- (i) For investigations pursuant to this Section, a single investigation is:
- (1) Compliance buy(s) conducted by undercover investigators within a 12-month period to detect the following violations:
- (A) buying or selling food instruments for cash (trafficking);
- (B) selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments;
- (C) selling alcohol or alcoholic beverages or tobacco products in exchange for food instruments;
- (D) vendor overcharging;
- (E) receiving, transacting, or redeeming food instruments outside of authorized channels, including the

- use of an unauthorized vendor or an unauthorized person;
 - (F) charging for supplemental food not received by the WIC customer;
 - (G) providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments;
 - (H) providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument;
 - (I) failure to properly transact a WIC food instrument;
 - (J) requiring a cash purchase to transact a WIC food instrument;
 - (K) requiring the purchase of a specific brand when more than one WIC supplemental food brand is available; or
- (2) Monitoring reviews of a vendor conducted by WIC staff within a 12-month period which detect the following violations:
 - (A) failure to stock minimum inventory;
 - (B) stocking WIC supplemental food outside of the manufacturer's expiration date;
 - (C) failure to allow monitoring of a store by WIC staff when required;
 - (D) failure to provide WIC food instrument(s) for review when requested;
 - (E) failure to provide store inventory records when requested by WIC staff;
 - (F) failure to mark the current shelf prices of all WIC supplemental foods clearly on the foods or have the prices posted on the shelf or display case; or
- (3) Any other method used by the state or local agency to detect the following violations by a vendor within a 12-month period:
 - (A) failure to attend annual vendor training;
 - (B) failure to submit a WIC Price List as required by Subparagraph (c)(30) of this Rule;
 - (C) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.);
 - (D) contacting a WIC customer in an attempt to recoup funds or food instrument(s) or contacting a WIC customer outside the store regarding the transaction or redemption of WIC food instruments;
 - (E) nonpayment of a claim made by the state agency;
 - (F) providing false information on vendor records (application, vendor agreement, price list, WIC food instrument(s), monitoring forms); or
 - (G) claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time, or failure or inability to provide records or providing false records required under Subparagraph (c)(29) of this Rule for an inventory audit.
- (j) The Food Stamp Program disqualification provisions in 7 C.F.R. 246.12(l)(1)(vii) are incorporated by reference with all subsequent amendments and editions.
- (k) The participant access provisions of 7 C.F.R. 246.12(l)(1)(ix) and 246.12(l)(8) are incorporated by reference with all subsequent amendments and editions. The existence of any of the factors listed in Parts (l)(3)(A), (l)(3)(B) or (l)(3)(C) of this Rule shall conclusively show lack of inadequate participant access provided there is no geographic barrier, such as an impassable mountain or river, to using the other authorized WIC vendors referenced in these Subparagraphs. The agency shall not consider other indicators of inadequate participant access when any of these factors exist.
- (l) The following provisions apply to civil money penalties assessed in lieu of disqualification of a vendor:
 - (1) The civil money penalty formula in 7 C.F.R. 246.12(l)(1)(x) is incorporated by reference with all subsequent amendments and editions, provided that the vendor's average monthly redemptions shall be calculated by using the six-month period ending with the month immediately preceding the month during which the notice of administrative action is dated.
 - (2) The state agency may also impose civil money penalties in accordance with G.S. 130A-22(c1) in lieu of disqualification of a vendor for the state-established violations listed in Paragraph (h) of this Rule when the state agency determines that disqualification of a vendor would result in participant hardship in accordance with Subparagraph (l)(3) of this Rule.
 - (3) In determining whether to disqualify a WIC vendor for the state-established violations listed in Paragraph (h) of this Rule, the agency shall not consider other indicators of hardship if any of the following factors, which conclusively show lack of hardship, are found to exist:
 - (A) the noncomplying vendor is located outside of the limits of a city, as defined in G.S. 160A-2, and another

- (B) WIC vendor is located within seven miles of the noncomplying vendor; the noncomplying vendor is located within the limits of a city, as defined in G.S. 160A-2, and another WIC vendor is located within three miles of the noncomplying vendor; or
- (C) a WIC vendor, other than the noncomplying vendor, is located within one mile of the local agency at which WIC participants pick up their food instruments.

(4) The provisions for failure to pay a civil money penalty in 7 C.F.R. 246.12(l)(6) are incorporated by reference with all subsequent amendments and editions.

(m) The provisions of 7 C.F.R. 246.12(l)(1)(viii) prohibiting voluntary withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement as an alternative to disqualification are incorporated by reference with all subsequent amendments and editions.

(n) The provision in 7 C.F.R. 246.12(l)(3) regarding prior warning to vendors is incorporated by reference with all subsequent amendments and editions.

(o) The state agency may set off payments to an authorized vendor if the vendor fails to reimburse the state agency in accordance with Subparagraph (c)(31) of this Rule.

(p) In accordance with 7 C.F.R. 246.12(l)(7) or 246.12(u)(5) or both, North Carolina's procedures for dealing with abuse of the WIC program by authorized WIC vendors do not exclude or replace any criminal or civil sanctions or other remedies that may be applicable under any federal and state law.

(q) Notwithstanding other provisions of this Rule, for the purpose of providing a one-time payment to a non-authorized store for WIC food instruments accepted by the store, an agreement for a one-time payment need only be signed by the store manager and the state agency. The store may request such one-time payment directly from the state agency. The store manager shall sign an agreement indicating that the store has provided foods as prescribed on the food instrument, charged current shelf prices or less than current shelf prices, not charged sales tax, and verified the identity of the WIC customer. Any agreement entered into in this manner shall automatically terminate upon payment of the food instrument in question. After entering into an agreement for a one-time payment, a non-authorized store shall not be allowed to enter into any further one-time payment agreements for WIC food instruments accepted thereafter.

(r) Except as provided in 7 C.F.R. 246.18(a)(2), an authorized WIC vendor shall be given at least 15 days advance written notice of any adverse action which affects the vendor's participation in the WIC Program. The vendor appeal procedures shall be in accordance with 10A NCAC 43D .0800.

Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.

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 45B .0104 and repeal the rules cited as 10A NCAC 46 .0401-.0404 and .0501-.0503.

Proposed Effective Date: October 1, 2005

Public Hearing:

Date: July 6, 2005

Time:

1:00 p.m. – 10A NCAC 45B .0104

1:15 p.m. – 10A NCAC 46 .0401-.0404

1:30 p.m. – 10A NCAC 46 .0501-.0503

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

Reason for Proposed Action: G.S. 150B-17 authorizes the State Health Director to issue declaratory rulings in 15A NCAC 13, 15A NCAC 18 and 10A NCAC 39-47. Reference to 15A NCAC 18 was omitted from the portion of this rule that cites these authorizations and this proposed amendment corrects that citation.

Procedure by which a person can object to the agency on a proposed rule: The procedure by which a person can object to the agency about proposed rules, rules changes, or repeals of rules is as follows: During the public comment period objections may be submitted in writing to Chris G. Hoke, JD, the Rule-Making Coordinator for the Division of Public Health. Additionally, objections may be made either verbally or in writing at the public hearing for this proposed rule-making action.

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

Comment period ends: August 2, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 45 – GENERAL PROCEDURES FOR
PUBLIC HEALTH PROGRAMS**

SUBCHAPTER 45B - PROCEDURAL RULES

10A NCAC 45B .0104 DECLARATORY RULINGS

(a) The State Health Director shall in accordance with G.S. 150B-17 issue declaratory rulings concerning rules found in ~~15A NCAC 13~~ 15A NCAC 13, 15A NCAC 18, and 10A NCAC 39-47.

(b) All requests for declaratory rulings shall be by written petition and shall be submitted to: State Health Director, Division of Public Health, 1915 Mail Service Center, Raleigh, North Carolina 27699-1915.

(c) Every request for a declaratory ruling must include the following information:

- (1) the name and address of the petitioner,
- (2) the statute or rule to which the petition relates,
- (3) a concise statement of the manner in which the petitioner is aggrieved by the rule or statute or its potential application to him, and
- (4) the consequences of a failure to issue a declaratory ruling.

(d) The State Health Director may refuse to issue a declaratory ruling whenever the State Health Director believes for good cause that the issuance of a declaratory ruling is undesirable. When good cause is deemed to exist, the State Health Director shall notify the petitioner of the decision in writing, stating the reasons for the denial of a declaratory ruling. The State Health Director shall issue a declaratory ruling under the following circumstances:

- (1) the petitioner shows that the circumstances are so changed since adoption of the rule that such a ruling would be warranted;
- (2) the rule making record evidences a failure by the agency to consider specified relevant factors.

(e) The State Health Director shall not issue a declaratory ruling under the following circumstances:

- (1) if there has been a similar controlling factual determination in a contested case, or if the factual context being raised for a declaratory ruling was specifically considered upon adoption of the rule being questioned as evidenced by the rule making record; or
- (2) if circumstances stated in the request or otherwise known to the agency show that a contested case hearing would presently be appropriate.

(f) A declaratory ruling procedure may consist of written submissions, oral hearings, or such other procedure as may be deemed appropriate, in the discretion of the State Health Director, in the particular case.

(g) The State Health Director may issue notice to persons who might be affected by the ruling that written comments may be submitted or oral presentations received at a scheduled hearing.

Authority G.S. 150B-11; 150B-17.

CHAPTER 46 – LOCAL STANDARDS

SECTION .0400 – SANITATION INSPECTIONS

10A NCAC 46 .0401 DEFINITIONS

~~In addition to the definitions in G.S. 110-86 and Section .0100 of this Subchapter, the following definitions apply in the interpretation and enforcement of the standards in this Subchapter:~~

- ~~(1) "Division Director" means the Director of the Division of Health Services or his/her authorized representative.~~
- ~~(2) "Local health director" means the health director of a county or district health department, or his/her authorized representative.~~
- ~~(3) "Sanitarian" means a person authorized to represent the Department of Human Resources in making inspections.~~
- ~~(4) "Sanitize" means the effective bactericidal treatment of clean surfaces of equipment and utensils by a process which is currently approved by the Department of Human Resources as being effective in destroying microorganisms, including pathogens.~~
- ~~(5) "Potentially hazardous food" means any perishable food which consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish or other ingredients capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms.~~
- ~~(6) "Department of Human Resources" means the Secretary or his/her authorized representative.~~
- ~~(7) "Linen" means a clean, absorbent, washable or disposable material in place between the child and the cot or mat at the beginning of nap or rest time, which is at least the length of the cot or mat and the width of the cot or mat.~~

Authority G.S. 110-91(1); 110-92; 143B-168.3.

10A NCAC 46 .0402 APPROVAL OF CONSTRUCTION: RENOVATION PLANS

~~(a) Plans and specifications for new construction or major modification of child day care centers shall be submitted to the local health department for review and approval or disapproval prior to beginning construction. The results of the review shall be provided to the operator within three weeks of the submission of the plans and specifications.~~

~~(b) Review of the plans by the local health department will be based on the following considerations:~~

- ~~(1) adequate provisions for sanitary food service;~~
- ~~(2) adequate provisions for cleanable floors, walls, ceilings, storage spaces and utensils;~~
- ~~(3) adequate provisions for sanitary water supply, lavatory facilities, toilet facilities and sewage disposal;~~

- (4) ~~adequate provisions for solid waste storage and disposal;~~
- (5) ~~such other items and facilities as are necessary in the interest of the public health.~~

(e) ~~Plans and specifications for new construction or major modification of child day care centers shall be submitted to the section and local building inspection department or the State Department of Insurance prior to beginning construction.~~

Authority G.S. 110-91(1); 143B-168.3.

10A NCAC 46 .0403 INSPECTIONS AND REPORTS

(a) ~~Inspections of child day care centers shall be made by a sanitarian prior to the issuance of an initial license. Inspections of child day care centers will be made by a sanitarian at least once a year prior to the expiration date of the license. An original and two copies of the Sanitation Standards Evaluation Form for Day Care Centers must be completed by the sanitarian. The original shall be submitted to the Child Day Care Section. The center operator and the sanitarian will each retain a copy.~~

(b) ~~If conditions found at the center at the time of any inspection are dangerous to the health of the children, the sanitarian shall notify the section immediately. The original of the inspection report documenting the dangerous conditions must be sent to the section chief as soon as possible.~~

(c) ~~The sanitarian may conduct an inspection of any child day care center as frequently as necessary in order to insure compliance with applicable sanitation standards.~~

Authority G.S. 110-91(1); 110-92; 143B-168.3.

10A NCAC 46 .0404 SCORING: APPROVAL/DISAPPROVAL

(a) ~~The sanitarian shall indicate on the Sanitation Standards Evaluation Form for Day Care Centers whether the center is approved or disapproved. The approval or disapproval of a child day care center is based on the center's compliance with the standards for construction and operation found in this Section.~~

(b) ~~The degree of the center's compliance is indicated by the total demerit point score which is shown on the Sanitation Standards Evaluation Form that the sanitarian completes.~~

- (1) ~~A center shall be classified as approved if the total demerit score is not more than 20 and no 6 demerit point item is violated.~~
- (2) ~~A center shall be classified as provisional if any 6 demerit point item is violated, or if the total demerit point score is more than 20 but not more than 40. This provisional period cannot exceed 7 days unless construction or renovation is necessary to correct any violation, in which case the sanitarian may allow a longer provisional period.~~
- (3) ~~A center shall be classified as disapproved if the demerit score is 41 or more, if conditions at the center are dangerous to the health of the children, or if conditions which resulted in a provisional classification have not been corrected in the time period specified by the sanitarian.~~

Authority G.S. 110-91(1); 110-92; 143B-168.3.

SECTION .0500 - SANITATION STANDARDS FOR CENTERS

10A NCAC 46 .0501 SANITATION REQUIREMENTS
~~Each day care center shall comply with specific sanitation requirements as provided in this Rule.~~

- (1) ~~Floors. All floors shall be easily cleanable, and shall be kept clean and in good repair.~~
- (2) ~~Walls and Ceilings. The walls and ceilings of all rooms and areas shall be kept clean and in good repair. All walls shall be easily cleanable. Walls in food service areas, diaper changing areas and toilets shall have nonabsorbent, washable surfaces to the highest level reached by splash or spray.~~
- (3) ~~Lighting and Ventilation. All rooms and areas shall be well lighted by natural or artificial means which is effective under actual use conditions. In no event shall the minimum required level of illumination exceed 30 foot candles on tasks. Ventilation shall be provided and installed as required by the North Carolina State Building Code. Copies of the North Carolina State Building Code may be obtained from the North Carolina Department of Insurance, P. O. Box 26387, Raleigh, North Carolina 27611.~~
~~In kitchens, effective and properly designed ventilation systems shall be provided. Adequate provision shall be made to admit make up air from a suitable location to replace that which is exhausted from the kitchen.~~
~~For child day care centers operated in private residences, domestic type ventilation systems should be considered acceptable if the performance is satisfactory.~~
~~Toilet rooms and infant rooms shall be well ventilated to the outside air through windows or gravity ducts having cross sectional areas of at least 72 square inches, or with mechanical ventilation systems complying with the requirements of the North Carolina Building Code Council.~~
- (4) ~~Toilet, Diaper Changing, and Lavatory Facilities. All child day care centers shall be provided with toilet and lavatory facilities which are adequate as determined by the sanitarian, except in no event can the minimum required exceed one water closet for every 15 children and staff and one lavatory for every 25 children and staff. Children in diapers need not be included when determining the number of water closets required.~~
~~Floor area shall be provided which is adequate as determined by the sanitarian, except in no~~

event can the minimum required exceed 15 square feet for the minimum sized toilet room containing one water closet and one lavatory, and eight additional square feet for each additional plumbing fixture. Fixtures shall be kept clean and in good repair.

Running water for use by children, or for washing and bathing children, shall be no hotter than 110 F. Soap and individual sanitary towels or other approved hand drying devices shall be supplied at lavatories provided for use by children. Separate lavatories supplied with hot and cold running water through mixing faucets (or with tempered warm water), soap, and individual sanitary towels or other approved hand drying devices shall be provided for use by staff in kitchens and other food preparation areas, and any diaper changing areas in addition to any lavatories which are provided in toilets, except where toilets with lavatories for use by staff only are immediately adjacent to these areas. Sinks used for washing utensils and equipment shall not be used as substitutes for required lavatories for the food preparation area or diaper changing area. Lavatories shall be kept clean and in good repair.

In centers which provide day care for children in diapers, each child must be changed while the child is in his own crib or on a nonabsorbent surface provided with a clean covering after each child's use or on a surface cleaned after each usage. An adequate supply of clean diapers shall be available at all times. Human feces from soiled diapers shall be disposed of through the sewage disposal system. Soiled diapers shall be placed in a plastic bag or plastic lined, covered, leak-proof container which must be emptied and cleaned daily.

Child day care centers in which training chairs are used shall provide adequate facilities for emptying and cleaning training chairs. Training chairs must be cleaned adequately after each use.

- (5) ~~Water Supply. The water supply used shall be located, constructed, maintained, and operated in accordance with the Commission for Health Services' rules governing water supplies. Copies of 10 NCAC 10A .1700 and 10 NCAC 10D .0600 through .2500 as amended through April 1, 1986 may be obtained from the Division of Health Services, Department of Human Resources, P. O. Box 2091, Raleigh, North Carolina 27602 2091. A sample of water from a private or public non community water supply serving a day care center shall be collected by the sanitarian and submitted at least once a year to the laboratory section of~~

~~the Department of Human Resources or other approved laboratory for bacteriological examination. No backflow connections or cross connections with an unapproved water supply shall exist. Hot water heating facilities shall be sufficient to meet the maximum expected requirements of the child day care center. Hot and cold water under pressure shall be easily accessible to all rooms where food is processed or handled, rooms in which utensils or equipment are washed, lavatories provided for use by staff, and other areas in which water is required for cleaning and sanitizing.~~

- (6) ~~Drinking Water Facilities: Ice Handling. Drinking fountains of an approved type or individual drinking utensils constitute adequate drinking water facilities. Drinking fountains, if provided, shall be of sanitary angle jet design properly regulated and kept clean. All multi-use utensils used for drinking purposes shall be easily cleanable and thoroughly cleaned and sanitized daily and before being used by any other individuals. Disposable utensils if used for drinking water must be stored and handled so as not to become contaminated.~~

~~Drinking water for children using baby bottles must be prepared, packaged and identified for the appropriate child. Drinking water in baby bottles must be stored and handled in such a manner as to be protected against possible contamination.~~

~~Ice, if used, shall be from an approved source and kept clean. Ice shall be handled, transported, stored and dispensed in such a manner as to be protected against contamination. Facilities used for the making, handling, transporting, storing and dispensing (scoops) of ice must be kept clean and in good repair and shall be so located as to be protected from splash, drip, dust, vermin and access by unauthorized persons.~~

- (7) ~~Liquid Wastes. All sewage and other liquid wastes shall be disposed of in a public sewer system or, in the absence of a public sewer system, by an approved, properly operating sanitary sewage system.~~

- (8) ~~Solid Wastes. All solid wastes containing food scraps or other putrescible materials shall, prior to disposal, be kept in durable, rust resistant, non absorbent, water tight, rodent proof and easily cleanable containers such as standard garbage cans which must be kept covered with tight fitting lids when filled or stored or not in continuous use. In order to ease cleaning, plastic garbage liners may be used. All refuse (including scrap paper, cardboard boxes, etc.) must be stored in~~

containers, rooms or designated areas in an approved manner.

Adequate cleaning facilities shall be provided and each container must be thoroughly cleaned after emptying or removal of garbage or refuse.

All solid wastes shall be disposed of with sufficient frequency and in such a manner as to prevent insect breeding and public health nuisances.

- (9) ~~Animal and Vermin Control: Premises. Pets and other animals shall not be allowed to wander throughout the child day care centers including the outdoor play area. Effective measures must be taken to keep insects, rodents and other vermin out of the child day care centers and to prevent their breeding or presence on the premises. The premises, including the outdoor play area, must be kept neat, clean, adequately drained and free of litter. All openings to the outer air must be effectively protected against the entrance of flying insects by closed doors, closed windows or other effective means.~~

~~Only those pesticides which have been properly registered with the appropriate federal regulatory agency and the North Carolina Department of Agriculture and approved for the purpose shall be used; such pesticides must be used in accordance with the directions on the label and must be so handled and stored as to avoid health hazards.~~

- (10) ~~Beds, Cots, Mats, Furniture and Linens. A separate bed, cot or mat, equipped with individual linen, shall be assigned and labeled for each child to use during rest periods, except for school children who are cared for only during after school hours; if a mat is used, it must be of a waterproof, washable material at least two inches thick and shall be folded so that the floor side does not touch the sleeping side. Beds and linen used by members of the household of the operator shall not be used for children receiving care in the child day care center.~~

~~Placement of beds, cots or mats must allow a reasonable distance between children's heads and a walking space between beds, cots or mats to allow access by staff members to each individual child.~~

~~If beds, cots, mats and linens are provided for school children who are cared for only during after school hours, individual linen and a separate labeled bed, cot or mat must be provided.~~

~~All beds, cots and mats must be in good repair, properly handled and stored, and kept clean. All mats, if used must be waterproof and~~

~~washable. All furniture and linen shall be kept clean and in good repair.~~

- (11) ~~Storage. Rooms or spaces shall be provided for the storage of necessary equipment, furniture, toys, clothes, beds, cots, mats and supplies and shall be kept clean.~~

~~All corrosive agents, insecticides, rodenticides, herbicides, bleaches, detergents, polishes, items containing petroleum products, any product which is under pressure in an aerosol dispensing can, and any substance which may be hazardous to a child if ingested, inhaled or handled (skin contact) shall be stored in a locked storage room or locked cabinet.~~

~~Medications shall be stored in a separate locked cabinet. Medications which require refrigeration shall be stored in a designated area for such storage in a refrigerator which is not accessible to children.~~

- (12) ~~Food Service Utensils and Equipment. All equipment and utensils shall be so constructed as to be easily cleaned and shall be kept in good repair. All surfaces with which food or drink comes in contact shall, in addition, be easily accessible for cleaning, nontoxic, corrosion resistant, relatively nonabsorbent and free of open crevices. Disposable articles must be made from nontoxic materials.~~

- (13) ~~Cleaning and Sanitizing of Food Service Utensils and Equipment. All multi-use eating and drinking utensils shall be thoroughly cleaned and sanitized after each usage, and the facilities needed for washing, rinsing and sanitizing shall be provided.~~

~~The facilities for washing, rinsing and sanitizing multi-use eating and drinking utensils needed by child day care centers shall depend upon the numbers and types of utensils in use; consequently, individual determinations of the acceptability of facilities for washing, rinsing and sanitizing multi use eating and drinking utensils shall be made by the sanitarian. If residential dishwashers which do not provide a sanitizing cycle are used for washing and rinsing, facilities for sanitizing shall be provided. Sanitizing may be accomplished by any of several procedures:~~

- (a) ~~immersion for at least one minute in clean hot water at a temperature of at least 170 degrees Fahrenheit or hotter;~~
- (b) ~~immersion for at least two minutes in clean water to which has been added enough chemical sanitizer to provide at least 50 parts per million of available chlorine or 12.5 parts per million of available iodine, or~~
- (c) ~~other procedures equivalent to (a) and (b) of this Subsection.~~

The facilities for washing, rinsing and sanitizing multi use eating and drinking utensils, preferred in all cases and required where the number of utensils justifies them, consist of standard three component sinks or dishwashing machines manufactured, installed and operated in accordance with the National Sanitation Foundation Standards or equal.

When necessary for the effective washing of pots, pans and vegetables, a two compartment sink with drainboards on each end shall be provided.

All kitchenware and food contact surfaces of equipment, exclusive of cooking surfaces of equipment, used in the preparation or serving of food or drink and all food storage utensils must be thoroughly cleaned after each use. Cooking surfaces of equipment must be cleaned at least once each day. Non food contact surfaces of equipment must be cleaned at such intervals as to keep them in a clean and sanitary condition.

No polish or other substance containing cyanide or other poisonous material shall be used for the cleaning or polishing of eating or cooking utensils.

- (14) ~~Storage and Handling of Food Service Utensils and Equipment.~~ All containers and sanitized utensils shall be stored in a clean place. Containers and sanitized utensils must be covered, inverted, stored in tight, clean cabinets or otherwise stored in such a manner as to prevent contamination. After cleaning, and until use, food contact surfaces of equipment shall be protected from contamination. Utensils must be handled in such a manner as to prevent contamination. Disposal utensils shall be purchased only in sanitary containers, shall be stored therein in a clean, dry place until used and must be handled in a sanitary manner.

- (15) ~~Food Supplies and Protection.~~

(a) ~~Formula, Juice and Baby Food.~~ Formula and juice served in a baby bottle shall be fully prepared and packaged (ready to feed) and identified for the appropriate child at the child's home and provided daily to the child day care center by the parents/guardians; or formula and juice served in a baby bottle shall be provided by the child day care center as a ready to feed, fully prepared and packaged single use item; or formula and juice may be provided in a manner specifically approved by the local health director. Any excess formula or juice must be discarded after each feeding. Formula and juice

which require refrigeration, and baby food (after opening and recovering), must be identified for the appropriate child and shall be refrigerated at 45 degrees Fahrenheit or below.

- (b) ~~Food Supplies.~~ All food shall be clean, wholesome, free from spoilage, free from adulteration and misbranding and safe for human consumption. No hermetically sealed food which has been processed in a place other than a commercial food processing establishment shall be used. All meat and meat products and all poultry and poultry products must have been inspected for wholesomeness under an official regulatory program; and, in all cases, the source shall be identifiable from labeling on carcasses, cuts, unit packages, bulk packages or from bills of sale.

Only Grade A pasteurized fluid milk and fluid milk products or evaporated milk shall be used. Dry milk and milk products may be used only for cooking purposes and flavored hot beverages unless otherwise prescribed by a physician.

When necessary to provide meals for children in a day care center which is not equipped with a kitchen, such meals must be obtained from a food handling establishment approved by the sanitarian. Disposable eating and drinking utensils must be used to serve such meals or food. The procedures and equipment used for transporting meals must be as approved by the sanitarian.

- (c) ~~Food Protection.~~ All foods, while being stored, prepared, served, and during transportation, must be protected from contamination. All perishable foods shall be stored at such temperatures as will protect against spoilage. All potentially hazardous food must be maintained at safe temperatures (45 degrees Fahrenheit or below, or 140 degrees Fahrenheit or above) except during necessary periods of preparation and serving. Frozen food must be kept at such temperatures as to remain frozen, except when being thawed for preparation or use. Potentially hazardous frozen food must be thawed at refrigerator temperatures of

~~45 degrees Fahrenheit or below, quick thawed as part of the cooking process or by a method approved by the sanitarian. An indicating thermometer must be located in each refrigerator. Raw fruits and vegetables must be washed thoroughly before use. Stuffings, poultry, stuffed meats and poultry, and pork and pork products, must be thoroughly cooked before being served. Salads made of meat, poultry, potatoes, fish, shellfish or eggs, and other potentially hazardous prepared food must be prepared, preferably from chilled products, with a minimum of manual contact and on surfaces and with utensils which are clean. Individual portions of food once served shall not be served again. Live pets shall not be allowed in any room or area in which food is prepared or stored. Live pets, unless caged and restricted from the immediate eating area, shall not be allowed in any room or area in which food is served.~~

~~Refrigeration facilities, hot food storage facilities, and effective insulated facilities, shall be provided as needed to assure the maintenance of all food at required temperatures during storage, preparation and serving.~~

~~Containers of food must be stored above the floor, on clean racks, dollies, slatted shelves or other clean surfaces, in such a manner as to be protected from splash and other contamination.~~

~~(16) Staff members. All staff members shall wear clean outer garments, maintain a high degree of personal cleanliness and conform to hygienic practices while on duty. They shall wash their hands thoroughly in an approved handwashing facility before starting work, after diaper changing activity, and otherwise as often as may be necessary to remove soil and contamination. No staff member shall resume work after visiting the toilet room without first washing his/her hands.~~

~~Hair nets, headbands, or caps shall be used by staff members engaged in the preparation of food to keep hair from falling in food and on food contact surfaces. Staff members shall not use tobacco in any form while engaged in food preparation or while working in equipment and utensil washing, food preparation areas, or while feeding children.~~

~~No person while infected with any disease in a communicable form, or while a carrier of such a disease, or while afflicted with boils, infected wound, sores, or an acute respiratory infection shall work in any capacity in which there is a likelihood of such person contaminating food or food contact surfaces with pathogenic organisms, or transmitting disease to other individuals; and no person known or suspected of being affected with any such disease or condition shall be employed in such area or capacity. If the operator has reason to suspect that any person has contracted any disease in a communicable form or has become a carrier of such disease, he/she must notify the local health department immediately.~~

Authority G.S. 110-91(1); 110-92; 143B-168.3.

10A NCAC 46 .0502 PROCEDURE WHEN INFECTION SUSPECTED

~~When reasonable suspicion arises as to the possibility of transmission of infection from any employee or by any food or drink, the local health director by authority of Article 6 of Chapter 130A-145 of the General Statutes of North Carolina may require any or all of the following measures:~~

- ~~(1) the immediate exclusion of the employee from employment in centers covered by these standards;~~
- ~~(2) the immediate closing of the center concerned until no further danger of disease outbreak exists in the opinion of the local health director;~~
- ~~(3) adequate medical examinations of the employee and of his/her associates with such laboratory examination as may be indicated;~~
- ~~(4) retention by the operator or portions of all suspected foods for sampling by the local health director. Such portions shall be collected, stored and handled as specified by the local health director.~~

Authority G.S. 110-91(1); 130A-145; 143B-168.3.

10A NCAC 46 .0503 SEVERABILITY

~~If any provision of these sanitation standards or the application thereof to any person or circumstance is held invalid, the remainder of the sanitation standards or the application of such provision to other persons or circumstances, shall not be affected thereby.~~

Authority G.S. 110-91(1); 143B-168.3.

TITLE 11 – DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Insurance/Manufactured Housing Board intends to adopt the rule cited as 11 NCAC 08 .0913.

Proposed Effective Date: October 1, 2005

Public Hearing:

Date: June 21, 2005

Time: 9:00 a.m.

Location: 322 Chapanoke Road, Raleigh, NC 27603

Reason for Proposed Action: Establish guidelines of escrow account for consumer deposits

Procedure by which a person can object to the agency on a proposed rule: The Manufactured Housing Board/Department of Insurance will accept written objections to the adoption of this rule until the expiration date of the comment period on August 1, 2005.

Written comments may be submitted to: Tim Bradley, 322 Chapanoke Road, Raleigh, NC, Phone (919)661-5880 ext. 244, tbradley@ncdoi.net.

Comment period ends: August 1, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 8 - ENGINEERING AND BUILDING CODES DIVISION

SECTION .0900 - MANUFACTURED HOUSING BOARD

11 NCAC 08 .0913 ESCROW ACCOUNT FOR CONSUMER DEPOSITS

(a) For purposes of this Rule, the following definitions shall apply:

- (1) Bank shall include any state or federally chartered bank, savings and loan association, or credit union.
(2) Deposit means any and all funds received by a dealer from a buyer, in excess of two thousand dollars (\$2,000), toward the purchase of a manufactured home.
(3) Escrow account means an account designated as such, established with a bank, and maintained by a dealer for receipt of buyer's deposits.

(b) Dealers shall establish an escrow account for buyers deposits received toward the purchase of a manufactured home.

(c) When a buyer cancels a purchase within the three-day cancellation period, the dealer shall return the buyer's deposit, as provided by law. After expiration of the three-day cancellation period, the dealer may use the deposit funds only to complete the steps necessary for site work, financing, installation, delivery and closing on the sale of the home and all accessories to the buyer described by the contract.

(d) The dealer shall maintain records which reflect the expenditures made prior to completion of the sale. Such records shall include the date, amount, purpose of the expenditure, and the person or firm to whom the disbursement was paid.

(e) The Board may inspect these records without prior notice. The Board may also inspect these records when the Board determines that they are pertinent to an investigation of any specific complaint against a licensee.

(f) If a buyer cancels a purchase after the three-day cancellation period, the dealer may retain actual damages from the deposit, in accordance with G.S. 143-143.21A. After retaining the allowed actual damages from the deposit, the dealer shall return any excess deposit to the buyer.

(g) In the event of the bankruptcy of the dealer, a buyer's deposit held in escrow by a dealer under this Rule shall be deemed to be held in trust for the benefit of the buyer, shall be the buyer's property, and shall be excludable from the property of the estate of the dealer.

Authority G.S. 143-143.21A.

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 02D .2301-.2311; 02Q .0810 and amend the rules cited as 15A NCAC 02D .0101, .0103, .1201, .1404, .1902-.1906, .2001; 02Q .0101, .0103, .0105, .0301, .0304-.0305, .0508, .0523, .0706 and .0808.

Proposed Effective Date: October 1, 2005

Public Hearing:

Date: June 22, 2005

Time: 7:00 p.m.

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

Reason for Proposed Action:

15A NCAC 02D .0101 is proposed to be amended to add a definition of "administrator."

15A NCAC 02D .0103 is proposed to be amended to update the addresses of regional offices.

15A NCAC 02D .1201 is proposed to be amended to change the order of which rules apply to incinerators.

15A NCAC 02D .1404 is proposed to be amended to remove an unnecessary reporting requirement.

15A NCAC 02D .1902 is proposed to be amended to add definitions for "air quality action day code 'orange' or above: and "air quality forecast areas" and to remove the definition of "ozone forecast area."

15A NCAC 02D .1903 is proposed to be amended to change ozone forecast areas to the air quality forecast areas, to allow burning at permanent fire training sites on code orange or higher forecast days, to remove the waiver to allow adding material to open burning piles between 6:00 p.m. and 8:00 a.m., and to reorganize some of the allowable open burning provisions.

15A NCAC 02D .1904 is proposed to be amended to change ozone forecast areas to the air quality forecast areas and to allow more discretion in approving waivers to the distance requirement.

15A NCAC 02D .1905 is proposed to be amended to update the addresses of regional offices.

15A NCAC 02D .1906 is proposed to be amended to update local program names.

15A NCAC 02D .2001 is proposed to be amended to clarify the applicability of the transportation conformity rules.

15A NCAC 02D .2301 through .2311 are proposed to establish a system to bank emission reduction credits for use as offsets in nonattainment areas. The rules describe the types of emission reduction credits that may be banked and how they may be used. They describe the procedures used for managing the banking systems.

15A NCAC 02Q .0101 is proposed to be amended to bring it in line with recent statutory changes on construction.

15A NCAC 02Q .0103 is proposed to be amended to add a definition of "administrator" and to modify the definition of "construction."

15A NCAC 02Q .0105 is proposed to be amended to update the addresses of regional offices.

15A NCAC 02Q .0301 is proposed to be amended to bring it in line with recent statutory changes on construction.

15A NCAC 02Q .0304-.0305 is proposed to be amended to make the emissions inventory an integral part of the permit application package.

15A NCAC 02Q .0508 is proposed to be amended to incorporate recent changes in the federal requirements for annual compliance certification.

15A NCAC 02Q .0523 is proposed to be amended to exempt notification of trades made under the nitrogen oxide budget trading program.

15A NCAC 02Q .0706 is proposed to be amended to clarify when emissions of unmodified sources at an affected facility needs to be reduced to achieve compliance with the air toxic rules.

15A NCAC 02Q .0808 is proposed to be amended to change the applicability limit from electrical energy produced to fuel consumption.

15A NCAC 02Q .0810 is proposed for air curtain burners.

Procedure by which a person can object to the agency on a proposed rule: *If you have any objections, you may contact Thomas Allen at Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641.*

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

Comment period ends: *August 1, 2005*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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** *15A NCAC 02D .1902-.1904, .1906*
- Local** *15A NCAC 02D .1902-.1904, .1906*
- Substantive** ($\geq \$3,000,000$)
- None** *15A NCAC 02D .0101, .0103, .1201, .1404, .1905, .2001, .2301-.2311; 02Q .0101, .0103, .0105, .0301, .0304-.0305, .0508, .0523, .0706, .0808 and .0810*

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02D - AIR POLLUTION CONTROL REQUIREMENTS

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) "Administrator" means when it appears in any Code of Federal Regulation incorporated by

- reference in this Subchapter, the Director of the Division of Air Quality unless:
- (a) a specific rule in this Subchapter specifies otherwise, or
- (b) the U.S. Environmental Protection Agency in its delegation or approval specifically states that a specific authority of the Administrator of the Environmental Protection Agency is not included in its delegation or approval.
- ~~(2)~~(3) "Air pollutant" means an air pollution agent or combination of such agents, including any physical, chemical, biological, ~~radiative~~ radioactive substance or matter emitted into or otherwise entering the ambient air.
- ~~(3)~~(4) "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)~~(5) "Approved" means approved by the Director of the Division of Air Quality according to these Rules.
- ~~(5)~~(6) "Capture system" means the equipment (including hoods, ducts, fans, etc.) used to contain, capture, or transport a pollutant to a control device.
- ~~(6)~~(7) "CFR" means "Code of Federal Regulations."
- ~~(7)~~(8) "Combustible material" means any substance that, when ignited, will burn in air.
- ~~(8)~~(9) "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.
- ~~(9)~~(10) "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.
- ~~(10)~~(11) "Day" means a 24-hour period beginning at midnight.
- ~~(11)~~(12) "Director" means the Director of the Division of Air Quality unless otherwise specified.
- ~~(12)~~(13) "Division" means Division of Air Quality.
- ~~(13)~~(14) "Dustfall" means particulate matter that settles out of the air and is expressed in units of grams per square meter per 30-day period.
- ~~(14)~~(15) "Emission" means the release or discharge, whether directly or indirectly, of any air pollutant into the ambient air from any source.
- ~~(15)~~(16) "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.
- ~~(16)~~(17) "FR" means Federal Register.
- ~~(17)~~(18) "Fugitive emission" means those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.
- ~~(18)~~(19) "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.
- ~~(19)~~(20) "Garbage" means any animal and vegetable waste resulting from the handling, preparation, cooking and serving of food.
- ~~(20)~~(21) "Incinerator" means a device designed to burn solid, liquid, or gaseous waste material.
- ~~(21)~~(22) "Opacity" means that property of a substance tending to obscure vision and is measured as percent obscuration.
- ~~(22)~~(23) "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.
- ~~(23)~~(24) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a facility, source, or air pollution control equipment.
- ~~(24)~~(25) "Particulate matter" means any material except uncombined water that exists in a finely divided form as a liquid or solid at standard conditions.
- ~~(25)~~(26) "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.
- ~~(26)~~(27) "Permitted" means any source subject to a permit under this Subchapter or Subchapter 15A NCAC 02Q.
- ~~(27)~~(28) "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.
- ~~(28)~~(29) "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.
- ~~(29)~~(30) "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.
- ~~(30)~~(31) "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.
- ~~(31)~~(32) "Refuse" means any garbage, rubbish, or trade waste.
- ~~(32)~~(33) "Rubbish" means solid or liquid wastes from residences, commercial establishments, or institutions.
- ~~(33)~~(34) "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.
- ~~(34)~~(35) "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.
- ~~(35)~~(36) "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.
- ~~(36)~~(37) "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 air pollutants emanate or are emitted, either directly or indirectly.
- ~~(37)~~(38) "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)~~(39) "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)~~(40) "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)~~(41) "ug" means micrograms.

Authority G.S. 143-213; 143-215.3(a)(1).

15A NCAC 02D .0103 COPIES OF REFERENCED FEDERAL REGULATIONS

(a) Copies of applicable Code of Federal Regulations sections referred to in this Subchapter are available for public inspection at Department of ~~Environment, Health, Environment~~ and Natural Resources regional offices. They are:

- (1) Asheville Regional Office, ~~Interchange Building, 59 Woodfin Place, Asheville, 2090 Highway 70, Swannanoa, North Carolina 28778; 28801;~~
- (2) Winston-Salem Regional Office, ~~Suite 100, 8025 North Point Boulevard, 585 Waughtown Street, Winston-Salem, North Carolina 27106; 27107;~~
- (3) Mooresville Regional Office, ~~919 North Main Street, 610 East Center Avenue, Suite 301, Mooresville, North Carolina 28115;~~
- (4) Raleigh Regional Office, 3800 Barrett Drive, Post Office Box 27687, Raleigh, North Carolina 27611;
- (5) Fayetteville Regional Office, ~~Wachovia Building, Suite 714, Systel Building, 225 Green Street, Suite 714, Fayetteville, North Carolina 28301;~~
- (6) Washington Regional Office, ~~1424 Carolina Avenue, Parish Building, 943 Washington Square Mall, Washington, North Carolina 27889;~~
- (7) Wilmington Regional Office, 127 Cardinal Drive Extension, Wilmington, North Carolina 28405.

(b) Copies of such rules can be made at these regional offices for ten cents (\$0.10) per page.

Authority G.S. 143-215.3; 150B-21.6.

SECTION .1200 - CONTROL OF EMISSIONS FROM INCINERATORS

15A NCAC 02D .1201 PURPOSE AND SCOPE

- (a) This Section sets forth rules for the control of the emissions of air pollutants from incinerators.
- (b) The rules in this Section apply to all types of incinerators as defined by 15A NCAC 02D .0101(20), including incinerators with heat recovery and industrial incinerators.
- (c) The rules in this Section do not apply to:
- (1) afterburners, flares, fume incinerators, and other similar devices used to reduce the emissions of air pollutants from processes, whose emissions shall be regulated as process emissions;
 - (2) any boilers or industrial furnaces that burn waste as a fuel, except hazardous waste as defined in 40 CFR 260.10;
 - (3) air curtain burners, which shall comply with Section .1900 of this Subchapter; or
 - (4) incinerators used to dispose of dead animals or poultry, that meet the following requirements:
 - (A) the incinerator is located on a farm and is owned and operated by the farm owner or by the farm operator;
 - (B) the incinerator is used solely to dispose of animals or poultry originating on the farm where the incinerator is located;

- (C) the incinerator is not charged at a rate that exceeds its design capacity; and
- (D) the incinerator complies with Rule .0521 (visible emissions) and .1806 (odorous emissions) of this Subchapter.

(d) If an incinerator can be defined as being more than one type of incinerator, then the following order shall be used to determine the standards and requirements to apply:

- (1) hazardous waste incinerators;
- (2) sewage sludge incinerators;
- (3) sludge incinerators;
- (4) municipal waste combustors;
- (5) ~~commercial and industrial solid waste incinerators; hospital, medical, or infectious waste incinerators (HMIWIs);~~
- (6) ~~hospital, medical, or infectious waste incinerators (HMIWIs); commercial and industrial solid waste incinerators;~~
- (7) conical incinerators;
- (8) crematory incinerators; and
- (9) other incinerators.

(e) In addition to any permit that may be required under 15A NCAC 02Q, Air Quality Permits Procedures, a permit may be required by the Division of Solid Waste Management as determined by the permitting rules of the Division of Solid Waste Management.

(f) Referenced document SW-846 "Test Methods for Evaluating Solid Waste," Third Edition, cited by rules in this Section is hereby incorporated by reference and does not include subsequent amendments or editions. A copy of this document is available for inspection at the North Carolina Department of Environment and Natural Resources Library located at 512 North Salisbury Street, Raleigh, NC 27603. Copies of this document may be obtained through the US Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954, or by calling (202) 783-3238. The cost of this document is three hundred nineteen dollars (\$319.00).

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(1),(3),(4),(5).

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, the owner or operator of the monitor shall:

- (A) use the procedures in 40 CFR 75.33 through 75.37 to supply the missing data; or
- (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-End of season~~ 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 of each year, 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,
 - (B) a method in 15A NCAC02D .0501, or
 - (C) the best available heat input 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).

SECTION .1900 - OPEN BURNING

15A NCAC 02D .1902 DEFINITIONS

For the purpose of this Section, the following definitions apply:

- (1) "Air Curtain Burner" means a stationary or portable combustion device that directs a plane of high velocity forced draft air through a manifold head into a pit or container with vertical walls in such a manner as to maintain a curtain of air over the surface of the pit and a recirculating motion of air under the curtain.
- (2) "Air Quality Action Day Code 'Orange' or above" means an air quality index greater than 100 as defined in 40 CFR Part 58, Appendix G.
- (3) "Air quality forecast area" means for
 - (a) Asheville air quality forecast area: Buncombe, Haywood, Henderson, Jackson, Madison, Swain, Transylvania, and Yancey Counties;
 - (b) Charlotte air quality forecast area: Cabarrus, Gaston, Iredell South of Interstate 40, Lincoln, Mecklenburg, Rowan, and Union Counties;
 - (c) Hickory air quality forecast area: Alexander, Burke, Caldwell, and Catawba Counties;
 - (d) Fayetteville air quality forecast area: Cumberland and Harnett Counties;
 - (e) Rocky Mount air quality forecast area: Edgecombe and Nash Counties;
 - (e) Triad air quality forecast area: Alamance, Caswell, Davidson, Davie, Forsyth, Guilford, Randolph, Rockingham, and Stokes Counties; and
 - (f) Triangle air quality forecast area: Chatham, Durham, Franklin, Granville, Johnston, Person, Orange, Vance, and Wake Counties.
- (2)(4) "Dangerous materials" means explosives or containers used in the holding or transporting of explosives.
- (3)(5) "HHCB" means the Health Hazards Control Branch of the Division of Epidemiology.
- (4)(6) "Initiated" means start or ignite a fire or reignite or rekindle a fire.
- (5)(7) "Land clearing" means the uprooting or clearing of vegetation in connection with construction for buildings; right-of-way; agricultural, residential, commercial, institutional, or industrial development; mining activities; or the initial clearing of vegetation to enhance property value; but does not include routine maintenance or property clean-up activities.
- (6)(8) "Log" means any limb or trunk whose diameter exceeds six inches.
- (7)(9) "Nonattainment area" means an area identified in 40 CFR 81.334 as nonattainment.

- (8)(10) "Nuisance" means causing physical irritation exacerbating a documented medical condition, visibility impairment, or evidence of soot or ash on property or structure other than the property on which the burning is done.
- (9)(11) "Occupied structure" means a building in which people may live or work or one intended for housing farm or other domestic animals.
- (10)(12) "Off-site" means any area not on the premises of the land-clearing activities.
- (11)(13) "Open burning" means the burning of any matter in such a manner that the products of combustion resulting from the burning are emitted directly into the atmosphere without passing through a stack, chimney, or a permitted air pollution control device.
- (12)(14) "Operator" as used in .1904(b)(6) and .1904(b)(2)(D) of this Section, means the person in operational control over the open burning.
- (13) "Ozone forecast area means" for
 - (a) Asheville ozone forecast area: Buncombe, Haywood, Henderson, Jackson, Madison, Swain, Transylvania, and Yancey Counties;
 - (b) Charlotte ozone forecast area: Cabarrus, Gaston, Iredell South of Interstate 40, Lincoln, Mecklenburg, Rowan, Union, and York Counties;
 - (c) Hickory ozone forecast area: Alexander, Burke, Caldwell, and Catawba Counties;
 - (d) Fayetteville ozone forecast area: Cumberland and Harnett Counties;
 - (e) Triad ozone forecast area: Alamance, Caswell, Davidson, Davie, Forsyth, Guilford, Randolph, Rockingham, and Stokes Counties; and
 - (f) Triangle ozone forecast area: Chatham, Durham, Franklin, Johnston, Orange, and Wake Counties.
- (14)(15) "Person" as used in 02D .1901(c), means:
 - (a) the person in operational control over the open burning; or
 - (b) the landowner or person in possession or control of the land when he has directly or indirectly allowed the open burning or has benefited from it.
- (15)(16) "Public pick-up" means the removal of refuse, yard trimmings, limbs, or other plant material from a residence by a governmental agency, private company contracted by a governmental agency or municipal service.
- (16)(17) "Public road" means any road that is part of the State highway system; or any road, street, or right-of-way dedicated or maintained for public use.

- (17)(18) "RACM" means regulated asbestos containing material as defined in 40 CFR 61.142.
- (18)(19) "Refuse" means any garbage, rubbish, or trade waste.
- (19)(20) "Regional Office Supervisor" means the supervisor of personnel of the Division of Air Quality in a regional office of the Department of Environment and Natural Resources.
- (20)(21) "Salvageable items" means any product or material that was first discarded or damaged and then all, or part, was saved for future use, and include insulated wire, electric motors, and electric transformers.
- (21)(22) "Synthetic material" means man-made material, including tires, asphalt materials such as shingles or asphaltic roofing materials, construction materials, packaging for construction materials, wire, electrical insulation, and treated or coated wood.

- (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 ~~roads~~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~~may 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. site;~~

Factors that the regional supervisor shall consider in deciding to grant the exception include: all the persons who need to sign the statement waiving the objection have signed it, the location of the burn, and the type, amount, and nature of the combustible substances;
 - (C) Only land cleared plant growth is burned. Heavy oils, asphaltic materials such as shingles and other

Authority G.S. 143-212; 143-213; 143-215.3(a)(1).

15A NCAC 02D .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-air quality~~ forecast area that the Department, or the Forsyth County Environmental Affairs Department for the Triad ~~ozone-air quality~~ forecast area, has forecasted to be in an ~~Ozone Air Quality 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.

- 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; 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)(8)~~ 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)(9)~~ fires purposely set for the instruction and training of fire-fighting personnel, ~~including fires personnel at permanent fire-fighting training facilities; 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~~
- (10) fires purposely set for the instruction and training of fire-fighting personnel 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;
- (11) fires not described in Subparagraph Subparagraphs (9) or (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, and scheduled.~~

(12) 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.

(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.

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

15A NCAC 02D .1904 AIR CURTAIN BURNERS

(a) Air quality permits shall be required for air curtain burners subject to 40 CFR 60.2245 through 60.2265 or located at permanent sites or where materials are transported in from another site. Air quality permits shall not be required for air curtain burners located at temporary land clearing or right-of-way maintenance sites for less than nine months if they are not subject to 40 CFR 60.2245 through 60.2265. The operation of air curtain burners in particulate and ozone nonattainment areas shall cease in any area that has been forecasted by the Department, or the Forsyth County Environmental Affairs Department for the Triad ~~ozone-air quality~~ forecast area, to be in an ~~Ozone-Air Quality~~ 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) Air curtain burners ~~described in Paragraph (a) of this Rule~~ shall comply with the following conditions and stipulations:

- (1) 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 shall be away from any area, including public ~~road~~ roads 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;
- (2) Only collected land clearing and yard waste materials may be burned. Heavy oils, asphaltic materials, items containing natural or synthetic rubber, tires, grass clippings, collected leaves, paper products, plastics, general trash, garbage, or any materials containing painted or treated wood materials shall not be burned. Leaves still on trees or brush may be burned;
- (3) No fires shall be started or material added to existing fires when the Division of Forest Resources has banned burning for that area;
- (4) Burning shall be conducted only between the hours of 8:00 a.m. and 6:00 p.m.;
- (5) The air curtain burner shall not be operated more than the maximum source operating hours-per-day and days-per-week. The maximum source operating hours-per-day and days-per-week shall be set to protect the

ambient air quality standard and prevention of significant deterioration (PSD) increment for particulate. The maximum source operating hours-per-day and days-per-week shall be determined using the modeling procedures in Rule .1106(b), (c), and (f) of this Subchapter. This Subparagraph shall not apply to temporary air curtain burners;

- (6) An air curtain burner with an air quality permit shall have onsite at all times during operation of the burner a visible emissions reader certified according to 40 CFR Part 60, Method 9 to read visible emissions, and the facility shall test for visible emissions within five days after initial operation and within 90 days before permit expiration;
- (7) Air curtain burners shall meet manufacturer's specifications for operation and upkeep to ensure complete burning of material charged into the pit. Manufacturer's specifications shall be kept on site and be available for inspection by Division staff;
- (8) Except during start-up, visible emissions shall not exceed ten percent opacity when averaged over a six-minute period except that one six-minute period with an average opacity of more than ten percent but no more than 35 percent shall be allowed for any one-hour period. During start-up, the visible emissions shall not exceed 35 percent opacity when averaged over a six-minute period. Start-up shall not last for more than 45 minutes, and there shall be no more than one start-up per day. Air curtain burners subject to 40 CFR 60.2245 through 60.2265 shall comply with the opacity standards in 40 CFR 60.2250 instead of the opacity standards in this Subparagraph;
- (9) The owner or operator of an air curtain burner shall not allow ash to build up in the pit to a depth higher than one-third of the depth of the pit or to the point where the ash begins to impede combustion, whichever occurs first. The owner or operator of an air curtain burner shall allow the ashes to cool and water the ash prior to its removal to prevent the ash from becoming airborne;
- (10) The owner or operator of an air curtain burner shall not load material into the air curtain burner such that it will protrude above the air curtain;
- (11) Only distillate oil, kerosene, diesel fuel, natural gas, or liquefied petroleum gas may be used to start the fire; and
- (12) The location of the burning shall be at least 500 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~~ may grant exceptions to the setback requirements if a signed, written statement waiving objections to the air curtain burning is obtained from a resident or an owner of each dwelling, commercial or institutional establishment, or other occupied structure within 500 feet of the burning site. In case of a lease or rental agreement, the lessee or renter, and the property owner shall sign the statement waiving objections to the burning. The statement shall be submitted to and approved by the regional office supervisor before initiation of the burn. Factors that the regional supervisor shall consider in deciding to grant the exception include: all the persons who need to sign the statement waiving the objection have signed it, the location of the burn, and the type, amount, and nature of the combustible substances;

Compliance with this Rule does not relieve any owner or operator of an air curtain burner from the necessity of complying with other rules in this Section or any other air quality rules.

(c) Recordkeeping Requirements. The owner or operator of an air curtain burner at a permanent site shall keep a daily log of specific materials burned and amounts of material burned in pounds per hour and tons per year. The logs at a permanent air curtain burner site shall be maintained on site for a minimum of two years and shall be available at all times for inspection by the Division of Air Quality. The owner or operator of an air curtain burner at a temporary site shall keep a log of total number of tons burned per temporary site. The owner or operator of air curtain burner subject to 40 CFR 60.2245 through 60.2265 shall comply with the monitoring, recordkeeping, and reporting requirements in 40 CFR 60.2245 through 60.2265.

(d) Title V Considerations. Burners that have the potential to burn 8,100 tons of material or more per year may be subject to Section 15A NCAC 02Q .0500, Title V Procedures.

(e) Prevention of Significant Deterioration Consideration. Burners that burn 16,200 tons per year or more may be subject to 15A NCAC 02D .0530, Prevention of Significant Deterioration.

(f) A person may use a burner using a different technology or method of operation than an air curtain burner as defined under Rule .1902 of this Section if he demonstrates to the Director that the burner is at least as effective as an air curtain burner in reducing emissions and if the Director approves the use of the burner. The Director shall approve the burner if he finds that it is at least as effective as an air curtain burner. This burner shall comply with all the requirements of this Rule.

(g) In addition to complying with the requirements of this rule, an air curtain burner that commenced construction after November 30, 1999, or that commenced reconstruction or modification on or after June 1, 2001, shall also comply with 40 CFR 60.2245 through 60.2265 in addition to the requirements of this Rule.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5),(10); 143-215.66; 143-215.108; 40 CFR 60.2865.

15A NCAC 02D .1905 REGIONAL OFFICE

LOCATIONS

Inquiries, requests and plans shall be handled by the appropriate Department of ~~Environmental, Health, and Natural Resources~~ regional offices. They are:

- (1) Asheville Regional Office, ~~Interchange Building, 59 Woodfin Place, Asheville, 2090 Highway 70, Swannanoa, North Carolina 28778 28801;~~
- (2) Winston-Salem Regional Office, 585 Waughtown Street, Winston-Salem, North Carolina 27107;
- (3) Mooresville Regional Office, ~~919 North Main Street, 610 East Center Avenue, Suite 301, Mooresville, North Carolina 28115;~~
- (4) Raleigh Regional Office, 3800 Barrett Drive, Raleigh, North Carolina 27611;
- (5) Fayetteville Regional Office, ~~Wachovia Building, Suite 714, Systel Building, 225 Green Street, Suite 714, Fayetteville, North Carolina 28301;~~
- (6) Washington Regional Office, ~~1424 Carolina Avenue, Farish Building, 943 Washington Square Mall, Washington, North Carolina 27889; and~~
- (7) Wilmington Regional Office, 127 Cardinal Drive Extension, Wilmington, North Carolina 28405.

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

15A NCAC 02D .1906 DELEGATION TO COUNTY GOVERNMENTS

(a) The governing body of any county or municipality or group of counties or municipalities may establish a partial air pollution control program to implement and enforce this Section provided that:

- (1) It has the administrative organization, staff, financial and other resources necessary to carry out such a program;
- (2) It has adopted appropriate ordinances, resolutions, and regulations to establish and maintain such a program; and
- (3) It has otherwise complied with G.S. 143-215.112 "Local Air Pollution Control Programs."

(b) The governing body shall submit to the Director documentation demonstrating that the requirements of Paragraph (a) of this Rule have been met. Within 90 days after receiving the submittal from the governing body, the Director shall review the documentation to determine if the requirements of Paragraph (a) of this Rule have been met and shall present his findings to the Commission. If the Commission determines that the air pollution program is adequate, it shall certify the local air pollution program to implement and enforce this Section within its area of jurisdiction.

(c) County and municipal governments shall not have the authority to issue permits for air curtain burners at a permanent site as defined in 15A NCAC 02D .1904.

(d) The three certified local air pollution programs, the Western North Carolina Regional Air ~~Pollution Quality~~ Control Agency, the Forsyth County Environmental Affairs Department, and the Mecklenburg County ~~Air Quality, a Division of Land Use and Environmental Services Agency~~ ~~Department of Environmental Affairs~~, shall continue to enforce open burning rules as part of their local air pollution programs.

Authority G.S. 143-215.3(a)(1); 143-215.112.

SECTION .2000 - TRANSPORTATION CONFORMITY

15A NCAC 02D .2001 PURPOSE, SCOPE AND APPLICABILITY

(a) The purpose of this Section is to assure the conformity of transportation plans, programs, and projects that are developed, funded, or approved by the United States Department of Transportation and by metropolitan planning organizations or other recipients of funds under Title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 et seq.), or State or Local only sources of funds, with all plans required of areas designated as nonattainment or maintenance under 40 CFR 81.334 ~~and or~~ listed in Paragraph (b), (c), or (d) of this Rule.

(b) This Section applies to the emissions of volatile organic compounds and nitrogen oxides in the following areas:

- (1) Davidson County,
- (2) Durham County,
- (3) Forsyth County,
- (4) Gaston County,
- (5) Guilford County,
- (6) Mecklenburg County,
- (7) Wake County,
- (8) Dutchville Township in Granville County, and that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek, and back to the Yadkin River.

(c) This Section applies to the emissions of carbon monoxide in the following areas:

- (1) Durham County,
- (2) Forsyth County,
- (3) Mecklenburg County, and
- (4) Wake County.

(d) This Section applies to the emissions of: ~~of~~

- (1) particulate matter in areas identified in 40 CFR 81.334 as nonattainment for fine particulate (PM2.5), or nonattainment or as not in compliance with a primary standard.

- (2) volatile organic compounds or nitrogen oxides in areas identified in 40 CFR 81.334 as nonattainment for ozone.

(e) This Section applies to FHWA/FTA projects or regionally significant State or local projects. For FHWA/FTA projects or regionally significant State or local projects in the areas identified in Paragraph (b), (c), or (d) of this Rule and for the pollutants identified in Paragraph (b), (c), or (d) of this Rule, this Section applies to:

- (1) the adoption, acceptance, approval, or support of transportation plans and transportation plan

- amendments developed pursuant to 23 CFR Part 450 or 49 CFR Part 613 by a metropolitan planning organization or the United States Department of Transportation;
- (2) the adoption, acceptance, approval, or support of transportation improvement programs or amendments to transportation improvement programs pursuant to 23 CFR Part 450 or 49 CFR Part 613 by a metropolitan planning organization or the United States Department of Transportation; or
- (3) the approval, funding, or implementation of FHWA/FTA projects.

Conformity determinations are not required under this Section for individual projects that are not FHWA/FTA projects. However, 40 CFR 93.121 shall apply to these projects if they are regionally significant projects.

(f) This Section applies to maintenance areas for 20 years from the date the Environment Protection Agency approves the area's request under Section 107(d) of the Clean Air Act for redesignation to attainment.

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

SECTION .2300 – BANKING EMISSION REDUCTION CREDITS

15A NCAC 02D .2301 PURPOSE

This Section provides for the creation, banking, transfer, and use of emission reduction credits for:

- (1) nitrogen oxides (NO_x),
- (2) volatile organic compounds (VOC),
- (3) sulfur dioxide (SO₂), and
- (4) fine particulate (PM_{2.5})

for offsets under 15A NCAC 02D .0531, Sources in Nonattainment Area.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2302 DEFINITIONS

For the purposes of this Section, the following definitions shall apply:

- (1) "Air permit" means a construction and operation permit issued under 15A NCAC 02Q .0300, Construction and Operation Permits, or .0500, Title V Procedures.
- (2) "Banking" means a system for recording emission reduction credits so that they may be used or transferred in the future.
- (3) "Enforceable" means enforceable by the Division. Methods for ensuring that emission reduction credits are enforceable include conditions in air permits issued.
- (4) "Federally designated ozone nonattainment area in North Carolina" means an area designated as nonattainment for ozone and described in 40 CFR 81.334.
- (5) "Federally designated fine particulate (PM_{2.5}) nonattainment area in North Carolina" means a

area designated as nonattainment for fine particulate (PM_{2.5}) and described in 40 CFR 81.334.

- (6) "Netting Demonstration" means the act of calculating a "net emissions increase" under the preconstruction review requirements of Title I, Part D of the Federal Clean Air Act and the regulations promulgated there under in 15A NCAC 02D .0530, Prevention of Significant Deterioration, or .0531, Sources in Nonattainment Area.
- (7) "Permanent means assured for the life of the corresponding emission reduction credit through an enforceable mechanism such as a permit condition or revocation.
- (8) "Quantifiable" means that the amount, rate, and characteristics of the emission reduction credit can be estimated through a reliable, reproducible method.
- (9) "Real" means a reduction in actual emissions emitted into the air.
- (10) "Surplus" means not required by any local, State, or federal law, rule, order, or requirement and in excess of reductions used by the Division in issuing any air permit, in excess of any conditions in an air permit to avoid an otherwise applicable requirement, or to demonstrate attainment of ambient air quality standards in 15A NCAC 02D .0400 or reasonable further progress towards achieving attainment of ambient air quality standards. For the purpose of determining the amount of surplus emission reductions, any seasonal emission limitation or standard shall be assumed to apply throughout the year. The following are not considered surplus:
 - (a) emission reductions that have previously been used to avoid 15A NCAC 02D .0530 or .0531 (new source review) through a netting demonstration;
 - (b) Emission reductions in hazardous air pollutants listed pursuant to Section 112(b) of the federal Clean Air Act to the extent needed to comply with 15A NCAC 02D .1109, .1111, or .1112; however, emission reductions in hazardous air pollutants that are also volatile organic compounds beyond that necessary to comply with 15A NCAC 02D .1109, .1111, or .1112 are surplus; or
 - (c) emission reductions used to offset excess emissions from another source as part of an alternative mix of controls ("bubble") demonstration under 15A NCAC 02D .0501.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2303 APPLICABILITY AND ELIGIBILITY

(a) Applicability. Any facility that has the potential to emit nitrogen oxides, volatile organic compounds, sulfur dioxide, or fine particulate (PM2.5) in amounts greater than 25 tons per year and that is in a federally designated ozone or fine particulate (PM2.5) nonattainment area in North Carolina shall be eligible to create and bank nitrogen oxides, volatile organic compounds, sulfur dioxide, or fine particulate (PM2.5) emission reduction credits.

(b) Eligibility of emission reductions.

(1) To be approved by the Director as an emission reduction credit, a reduction in emissions shall be real, permanent, quantifiable, enforceable, and surplus and shall have occurred:

(A) for ozone after December 31, 2002 for the Charlotte-Gastonia-Rock Hill, NC-SC nonattainment area, the Raleigh-Durham-Chapel Hill nonattainment area, the Rocky Mount nonattainment area, and the Haywood and Swain Cos (Great Smoky Mountains National Park) nonattainment area, and after December 31, 2000 for all other nonattainment areas.

(B) for fine particulate (PM2.5) after December 31, 2002 for the Greensboro-Winston-Salem-High Point, NC and Hickory-Morganton-Lenoir, NC nonattainment areas.

(2) To be eligible for consideration as emission reduction credits, emission reductions may be created by any of the following methods:

(A) installation of control equipment beyond what is necessary to comply with existing rules;

(B) a change in process inputs, formulations, products or product mix, fuels, or raw materials;

(C) a reduction in actual emission rate;

(D) a reduction in operating hours;

(E) production curtailment or reduction in throughput;

(F) shutdown of emitting sources or facilities; or

(G) any other enforceable method that the Director finds resulting in real, permanent, quantifiable, enforceable, and surplus reduction of emissions.

(c) Ineligible for emission reduction credit. The following shall not be eligible for emission reduction credits:

(1) sources covered under a special order or variance until compliance with the emission standards that are the subject of the special order or variance is achieved;

(2) sources that have operated less than 24 months; or

(3) emission allocations and allowances used in the nitrogen oxide budget trading program under 15A NCAC 02D .1419.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2304 QUALIFICATION OF EMISSION REDUCTION CREDITS

For purposes of calculating the amount of emission reduction that can be quantified as an emission reduction credit, the following procedures shall be followed:

(1) The source's average actual annual emissions before the emission reduction shall be calculated in tons per year. In calculating average actual annual emissions before the emission reduction, data from the 24-month period immediately preceding the reduction in emissions shall be used. The Director may allow the use of a different time period, not to exceed seven years immediately preceding the reduction in emissions if the owner or operator of the source documents that such period is more representative of normal source operation.

(2) The emission reduction credit generated by the emission reduction shall be calculated by subtracting the allowable annual emissions rate following the reduction from the average actual annual emissions prior to the reduction.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2305 CREATING AND BANKING EMISSION REDUCTION CREDITS

(a) The owner or operator of a source seeking to create and bank emission reduction credits shall submit over the signature of the responsible official for a Title V facility or the official identified in 15A NCAC 02Q .0304(j) for a non-Title V facility the following information, which may be on an application form provided by the Division:

(1) the company name, contact person and telephone number, and street address of the source seeking the emission reduction credit;

(2) a description of the type of source where the proposed emission reduction occurred or will occur;

(3) a detailed description of the method or methods to be employed to create the emission reduction;

(4) the date that the emission reduction occurred or will occur;

(5) quantification of the emission reduction credit as described under Rule .2304 of this Section;

(6) the proposed method for ensuring the reductions are permanent and enforceable, including any necessary application to amend the facility's air permit or, for a shutdown of an entire facility, a request for permit rescission;

- (7) whether any portion of the reduction in emissions to be used to create the emission reduction credit has previously been used to avoid 15A NCAC 02D .0530 (prevention of significant deterioration) or .0531 (nonattainment major new source review) through a netting demonstration;
 - (8) any other information necessary to demonstrate that the reduction in emissions is real, permanent, quantifiable, enforceable, and surplus; and
 - (9) a complete permit application if the permit needs to be modified to create or enforce the emission reduction credit.
- (b) If the Director finds that
- (1) all the information required to be submitted under Paragraph (a) of this Rule has been submitted;
 - (2) the source is eligible under Rule .2303 of this Section;
 - (3) a complete permit application has been submitted, if necessary, to implement the reduction in emissions; and
 - (4) the reduction in emissions is real, permanent, quantifiable, enforceable, and surplus; the Director shall issue the source a certificate of emission reduction credit once the facility's permit is modified, if necessary, to reflect permanently the reduction in emissions. The Director shall register the emission reduction credit for use only after the reduction has occurred.
- (c) Processing schedule.
- (1) The Division shall send written acknowledgement of receipt of the request to create and bank emission credits within 10 days of receipt of the request.
 - (2) The Division shall review all request to create and bank emission credits within 30 days to determine whether the application is complete or incomplete for processing purposes. If the application is incomplete the Division shall notify the applicant of the deficiency. The applicant shall have 90 days to submit the requested information. If the applicant fails to provide the requested information within 90 days, the Division shall return the application.
 - (3) The Director shall either approve or disapprove the request within 90 days after receipt of a complete application requesting the banking of emission reduction credits. Upon approval the Director shall issue a certificate of emission reduction credit.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2306 DURATION OF EMISSION REDUCTION CREDITS

Banked emission reduction credits are permanent until withdrawn by the owner or until withdrawn by the Director under Rule .2310 of this Section.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2307 USE OF EMISSION REDUCTION CREDITS

(a) Persons holding emission reduction credits may withdraw the emission reduction credits and may use them in any manner consistent with this Section.

(b) An emission reduction credit may be withdrawn only by the owner of record or by the Director under Rule .2310 of this Section and may be withdrawn in whole or in part. In the case of a partial withdrawal, the Director shall issue a revised certificate of emission reduction credit to the owner of record reflecting the new amount of the credit and shall revoke the original certificate.

(c) Emission reduction credits may be used for the following purposes:

- (1) as offsets or netting demonstrations required by 15A NCAC 02D .0531 for a major new source of:
 - (A) nitrogen oxides or volatile organic compounds in a federally designated ozone nonattainment area, or
 - (B) fine particulate (PM2.5) in a federally designated PM2.5 nonattainment area;
- (2) as offsets or netting demonstrations required by 15A NCAC 02D .0531 for a major modification to an existing major source of:
 - (A) nitrogen oxides or volatile organic compounds in a federally designated ozone nonattainment area, or
 - (B) fine particulate (PM2.5) in a federally designated PM2.5 nonattainment area;
- (3) as part of a netting demonstration required by 15A NCAC 02D .0530 when the source using the emission reduction credits is the same source that created and banked the emission reduction credits, and the emission reduction represented by the emission reduction credits occurred within the seven-year period before construction commences on the modification; or
- (4) to remove a permit condition that created an emission reduction credit.

(d) Emission reduction credits generated through reducing emissions of one pollutant shall not be used for trading with or offsetting of another pollutant, for example emission reduction credits for volatile organic compounds in an ozone nonattainment area shall not be used to offset nitrogen oxide emissions.

(e) Emission reduction credits used as offsets as required by 15A NCAC 02D .0531 within a federally designated ozone nonattainment area shall have been created within that federally designated ozone nonattainment area.

(f) Emission reduction credits used as offsets as required by 15A NCAC 02D .0531 within a federally designated PM2.5 nonattainment area shall have been created within that federally designated PM2.5 nonattainment area.

(g) Limitations on use of emission reduction credits.

(1) Emission reduction credits shall not be used to exempt a source from:

(A) prevention of significant deterioration requirements (15A NCAC 02D .0530) for netting demonstrations unless the emission reduction credits have been banked by the facility at which the new or modified source is located and have been banked during the period specified in 15A NCAC 02D .0530. This Subparagraph does not preclude the use of emission reductions not banked as emission credits to complete netting demonstrations.

(B) nonattainment major new source review (15A NCAC 02D .0531) unless the emission reduction credits have been banked by the facility at which the new or modified source is located and have been banked during the period specified in 15A NCAC 02D .0531. This Subparagraph does not preclude the use of emission reductions not banked as emission credits to complete netting demonstrations.

(C) new source performance standards (15A NCAC 02D .0524), national emission standards for hazardous air pollutants (15A NCAC 02D .1110), or maximum achievable control technology (15A NCAC 02D .1109, .1111, or .1112); or

(D) any other requirement of Subchapter 15A NCAC 02D unless the emission reduction credits have been banked by the facility at which the new or modified source is located.

(2) Emission reduction credits shall not be used to allow a source to emit above the limit established by a rule in Subchapter 15A NCAC 02D. (If the owner or operator wants to permit a source to emit above the limit established by a rule in Subchapter 15A NCAC 02D, he needs to follow the procedures in 15A NCAC 02D .0501 for an alternative mix of controls ["bubble"].)

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2308 CERTIFICATES AND REGISTRY

(a) Certificates of emission reduction credit issued by the Director shall contain the following information:

(1) the pollutant reduced (nitrogen oxides, volatile organic compounds, sulfur dioxide, fine particulate);

(2) the amount of the credit in tons per year;

(3) the date the reduction occurred;

(4) company name, the street address and county of the source where the reduction occurred; and

(5) the date of issuance of the certificate.

(b) The Division shall maintain an emission reduction credit registry that constitutes the official record of all certificates of emission reduction credit issued and all withdrawals made. The registry shall be available for public review. For each certificate issued, the registry shall show the amount of the emission reduction credit, the pollutant reduced, the name and location of the facility generating the emission reduction credit, and the facility contact person. The Division shall maintain records of all deposits, deposit applications, withdrawals, and transactions.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2309 TRANSFERING EMISSION REDUCTION CREDITS

(a) If the owner of a certificate of emission reduction credit transfers the certificate to a new owner, the Director shall issue a certificate of emission reduction credit to the new owner and shall revoke the certificate held by the current owner of record.

(b) If the owner of a certificate of emission reduction credit transfers part of the emission reduction credits represented by the certificate to a new owner, the Director shall issue a certificate of emission reduction credit to the new owner reflecting the transferred amount and shall issue a certificate of emission reduction credit to the current owner of record reflecting the amount of emission reduction credit remaining after the transfer. The Director shall revoke the original certificate of emission reduction credit.

(c) For any transferred emission reduction credits, the creator of the emission reduction credit shall continue to have enforceable conditions in the appropriate permit to assure permanency of the emission reduction and shall be held liable for compliance with those conditions; the user of any transferred emission reduction credits shall not be held liable for any failure of the creator to comply with its permit.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2310 REVOCATION OF EMISSION REDUCTION CREDITS

The Director may withdraw emission reduction credits if the emission reduction credits

(1) have already been used;

(2) are incorrectly calculated; or

(3) achieved are less than those claimed.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(12).

15A NCAC 02D .2311 MONITORING

The Director shall require the owner or operator of a source whose emissions are being reduced to create an emission reduction credit to verify the reduction in emissions with a source test, continuous emission monitoring, or other methods that measure the actual emissions or may require the use of parametric monitoring to show that the source or its control device is being operated in the manner that it is designed or is permitted.

Authority G.S. 143-215.3(a)(1); 143-215.66; 143-215.107(a)(12).

SUBCHAPTER 02Q - AIR QUALITY PERMITS PROCEDURES

SECTION .0100 - GENERAL PROVISIONS

15A NCAC 02Q .0101 REQUIRED AIR QUALITY PERMITS

(a) No owner or operator shall do any of the following activities, that is not otherwise exempted, without first applying for and obtaining an air quality permit:

- (1) construct, operate, or modify a source subject to an applicable standard, requirement, or rule that emits any regulated pollutant or one or more of the following:
 - (A) sulfur dioxide,
 - (B) total suspended particulates,
 - (C) particulate matter (PM10),
 - (D) carbon monoxide,
 - (E) nitrogen oxides,
 - (F) volatile organic compounds,
 - (G) lead and lead compounds,
 - (H) fluorides,
 - (I) total reduced sulfur,
 - (J) reduced sulfur compounds,
 - (K) hydrogen sulfide,
 - (L) sulfuric acid mist,
 - (M) asbestos,
 - (N) arsenic and arsenic compounds,
 - (O) beryllium and beryllium compounds,
 - (P) cadmium and cadmium compounds,
 - (Q) chromium(VI) and chromium(VI) compounds,
 - (R) mercury and mercury compounds,
 - (S) hydrogen chloride,
 - (T) vinyl chloride,
 - (U) benzene,
 - (V) ethylene oxide,
 - (W) dioxins and furans,
 - (X) ozone, or
 - (Y) any toxic air pollutant listed in 15A NCAC 02D .1104; or
- (2) construct, operate, or modify a facility that has the potential to emit at least 10 tons per year of any hazardous air pollutant or 25 tons per year of all hazardous air pollutants combined or that are subject to requirements established

under the following sections of the federal Clean Air Act:

- (A) Section 112(d), emissions standards;
- (B) Section 112(f), standards to protect public health and the environment;
- (C) Section 112(g), construction and reconstruction;
- (D) Section 112(h), work practice standards and other requirements;
- (E) Section 112(i)(5), early reduction;
- (F) Section 112(j), federal failure to promulgate standards;
- (G) Section 112(r), accidental releases, releases; or

~~(3) enter into an irrevocable contract for the construction, operation, or modification of an air cleaning device.~~

(b) There are two types of air quality permits:

- (1) Stationary Source Construction and Operation Permit: With the exception allowed by G.S. 143-215.108A, The the owner or operator of a new, modified, or existing facility or source shall not begin construction or operation without first obtaining a construction and operation permit in accordance with the standard procedures under Section .0300 of this Subchapter. Title V facilities are subject to the Title V procedures under Section .0500 of this Subchapter including the acid rain procedures under Section .0400 of this Subchapter. A facility may also be subject to the air toxic procedures under 15A NCAC 02Q .0700.
- (2) Transportation Facility Construction Permit. The owner or operator of a transportation facility subject to the requirements of 15A NCAC 02D .0800 shall obtain a construction only permit following the procedures under Section .0600 of this Subchapter.

(c) Fees shall be paid in accordance with the requirements of Section .0200 of this Subchapter.

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

15A NCAC 02Q .0103 DEFINITIONS

For the purposes of this Subchapter, the definitions in G.S. 143-212 and G.S. 143-213 and the following definitions apply:

- (1) "Administrator" means when it appears in any Code of Federal Regulation incorporated by reference in this Subchapter, the Director of the Division of Air Quality unless:
 - (a) a specific rule in this Subchapter specifies otherwise, or
 - (b) the U.S. Environmental Protection Agency in its delegation or approval specifically states that a specific authority of the Administrator of the Environmental Protection Agency is

- not included in its delegation or approval.
- ~~(+)(2)~~ "Air Pollutant" means an air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance or matter which is emitted into or otherwise enters the ambient air. Water vapor is not considered to be an air pollutant.
- ~~(2)(3)~~ "Allowable emissions" mean the maximum emissions allowed by the applicable rules contained in 15A NCAC02D or by permit conditions if the permit limits emissions to a lesser amount.
- ~~(3)(4)~~ "Alter or change" means to make a modification.
- ~~(4)(5)~~ "Applicable requirements" means:
- (a) any requirement of Section .0500 of this Subchapter;
 - (b) any standard or other requirement provided for in the implementation plan approved or promulgated by EPA through rulemaking under Title I of the federal Clean Air Act that implements the relevant requirements of the federal Clean Air Act including any revisions to 40 CFR Part 52;
 - (c) any term or condition of a construction permit for a facility covered under 15A NCAC 02D .0530, .0531, or .0532;
 - (d) any standard or other requirement under Section 111 or 112 of the federal Clean Air Act, but not including the contents of any risk management plan required under Section 112 of the federal Clean Air Act;
 - (e) any standard or other requirement under Title IV;
 - (f) any standard or other requirement governing solid waste incineration under Section 129 of the federal Clean Air Act;
 - (g) any standard or other requirement under Section 183(e), 183(f), or 328 of the federal Clean Air Act;
 - (h) any standard or requirement under Title VI of the federal Clean Air Act unless a permit for such requirement is not required under this Section;
 - (i) any requirement under Section 504(b) or 114(a)(3) of the federal Clean Air Act; or
 - (j) any national ambient air quality standard or increment or visibility requirement under Part C of Title I of the federal Clean Air Act, but only as it would apply to temporary sources permitted pursuant to 504(e) of the federal Clean Air Act.
- ~~(5)(6)~~ "Applicant" means the person who is applying for an air quality permit from the Division.
- ~~(6)(7)~~ "Application package" means all elements or documents needed to make an application complete.
- ~~(7)(8)~~ "CFR" means Code of Federal Regulations.
- ~~(8)(9)~~ "Construction" means change in the 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. The following activities are not construction:
- (a) clearing and grading;
 - (b) building access roads, driveways, and parking lots, except parking lots required to have a construction permit under 15A NCAC 02Q .0600;
 - (c) building and installing underground pipe work, including water, sewer, electric, and telecommunications utilities; or
 - (d) building ancillary structures, including fences and office buildings that are not a necessary component of an air contaminant source, equipment, or associated air cleaning device for which a permit is required under G.S. 143-215.108.
- ~~(9)(10)~~ "Director" means the Director of the Division of Air Quality.
- ~~(10)(11)~~ "Division" means the Division of Air Quality.
- ~~(11)(12)~~ "EPA" means the United States Environmental Protection Agency or the Administrator of the Environmental Protection Agency.
- ~~(12)(13)~~ "EPA approves" means full approval, interim approval, or partial approval by EPA.
- ~~(13)(14)~~ "Equivalent unadulterated fuels" means used oils that have been refined such that the content of toxic additives or contaminants in the oil are no greater than those in unadulterated fossil fuels.
- ~~(14)(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.
- ~~(15)(16)~~ "Federally enforceable" or "federal-enforceable" means enforceable by EPA.
- ~~(16)(17)~~ "Fuel combustion equipment" means any fuel burning source covered under 15A NCAC 02D .0503, .0504, .0536, or 40 CFR Part 60 Subpart D, Da, Db, or Dc.
- ~~(17)(18)~~ "Green wood" means wood with a moisture content of 18% or more.

~~(18)~~(19) "Hazardous air pollutant" means any pollutant which has been listed pursuant to Section 112(b) of the federal Clean Air Act. Pollutants listed only in 15A NCAC 02D .1104 (Toxic Air Pollutant Guidelines), but not pursuant to Section 112(b), are not included in this definition.

~~(19)~~(20) "Insignificant activities" means activities defined as insignificant activities because of category or as insignificant activities because of size or production rate under Rule .0503 of this Subchapter.

~~(20)~~(21) "Lesser quantity cutoff" means:

(a) for a source subject to the requirements of Section 112(d) or (j) of the federal Clean Air Act, the level of emissions of hazardous air pollutants below which the following are not required:

(i) maximum achievable control technology (MACT) or generally available control technology (GACT), including work practice standards, requirement under Section 112(d) of the federal Clean Air Act;

(ii) substitute MACT or GACT adopted under Section 112(l) of the federal Clean Air Act; or

(iii) a MACT standard established under Section 112(j) of the federal Clean Air Act;

(b) for modification of a source subject to, or may be subject to, the requirements of Section 112(g) of the federal Clean Air Act, the level of emissions of hazardous air pollutants below which MACT is not required to be applied under Section 112(g) of the federal Clean Air Act; or

(c) for all other sources, potential emissions of each hazardous air pollutant below 10 tons per year and the aggregate potential emissions of all hazardous air pollutants below 25 tons per year.

~~(21)~~(22) "Major facility" means a major source as defined under 40 CFR 70.2.

~~(22)~~(23) "Modification" means any physical change or change in method of operation that results in a change in emissions or affects compliance status of the source or facility.

~~(23)~~(24) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a facility, source, or air pollution control equipment.

~~(24)~~(25) "Peak shaving generator" means a generator that is located at a facility and is used only to serve that facility's on-site electrical load during peak demand periods for the purpose of reducing the cost of electricity; it does not generate electricity for resale. A peak shaving generator may also be used for emergency backup.

~~(25)~~(26) "Permit" means the legally binding written document, including any revisions thereto, issued pursuant to G.S. 143-215.108 to the owner or operator of a facility or source that emits one or more air pollutants and that allows that facility or source to operate in compliance with G.S. 143-215.108. This document specifies the requirements applicable to the facility or source and to the permittee.

~~(26)~~(27) "Permittee" means the person who has received an air quality permit from the Division.

~~(27)~~(28) "Potential emissions" means the rate of emissions of any air pollutant that would occur at the facility's maximum capacity to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a facility to emit an air pollutant shall be treated as a part of its design if the limitation is federally enforceable. Such physical or operational limitations include air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed. Potential emissions include fugitive emissions as specified in the definition of major source in 40 CFR 70.2. Potential emissions do not include a facility's secondary emissions such as those from motor vehicles associated with the facility and do not include emissions from insignificant activities because of category as defined under Rule .0503 of this Section. If a rule in 40 CFR Part 63 uses a different methodology to calculate potential emissions, that methodology shall be used for sources and pollutants covered under that rule.

~~(28)~~(29) "Portable generator" means a generator permanently mounted on a trailer or a frame with wheels.

~~(29)~~(30) "Regulated air pollutant" means:

(a) nitrogen oxides or any volatile organic compound as defined under 40 CFR 51.100;

(b) any pollutant for which there is an ambient air quality standard under 40 CFR Part 50;

(c) any pollutant regulated under 15A NCAC02D .0524, .1110, or .1111 or 40 CFR Part 60, 61, or 63;

- (d) any pollutant subject to a standard promulgated under Section 112 of the federal Clean Air Act or other requirements established under Section 112 of the federal Clean Air Act, including Section 112(g) (but only for the facility subject to Section 112(g)(2) of the federal Clean Air Act), (j), or (r) of the federal Clean Air Act; or
- (e) any Class I or II substance listed under Section 602 of the federal Clean Air Act.

~~(30)~~(31) "Sawmill" means a place or operation where logs are sawed into lumber consisting of one or more of these activities: debarking, sawing, and sawdust handling. Activities that are not considered part of a sawmill include chipping, sanding, planing, routing, lathing, and drilling.

~~(31)~~(32) "Source" means any stationary article, machine, process equipment, or other contrivance, or combination thereof, from which air pollutants emanate or are emitted, either directly or indirectly.

~~(32)~~(33) "Toxic air pollutant" means any of the carcinogens, chronic toxicants, acute systemic toxicants, or acute irritants that are listed in 15A NCAC 02D .1104.

~~(33)~~(34) "Transportation facility" means a complex source as defined at G.S. 143-213(22) that is subject to the requirements of 15A NCAC 02D .0800.

~~(34)~~(35) "Unadulterated fossil fuel" means fuel oils, coal, natural gas, or liquefied petroleum gas to which no toxic additives have been added that could result in the emissions of a toxic air pollutant listed under 15A NCAC 02D .1104.

Authority G.S. 143-212; 143-213; 143-215.3(a)(1).

15A NCAC 02Q .0105 COPIES OF REFERENCED DOCUMENTS

(a) Copies of applicable Code of Federal Regulations (CFR) sections referred to in this Subchapter are available for public inspection at Department of ~~Environment~~Environment, Health, and Natural Resources regional offices. The regional offices are:

- (1) Asheville Regional Office, ~~Interchange Building, 59 Woodfin Place, Asheville, 2090 Highway 70, Swannanoa, North Carolina 28778; 28804;~~
- (2) Winston-Salem Regional Office, ~~Suite 100, 8025 North Point Boulevard, 585 Waughtown Street, Winston Salem, North Carolina 27107 27106;~~
- (3) Mooresville Regional Office, ~~919 North Main Street, 610 East Center Avenue, Suite 301, Mooresville, North Carolina 28115;~~

- (4) Raleigh Regional Office, 3800 Barrett Drive, Post Office Box 27687, Raleigh, North Carolina 28115;
- (5) Fayetteville Regional Office, ~~Wachovia Building, Suite 714, Systel Building, 225 Green Street, Suite 714,~~Fayetteville, North Carolina 28301;
- (6) Washington Regional Office, ~~1424 Carolina Avenue, Farish Building, 943 Washington Square Mall,~~ Washington, North Carolina 27889;
- (7) Wilmington Regional Office, 127 Cardinal Drive Extension, Wilmington, North Carolina 28403.

(b) Permit applications and permits may be reviewed at the Central Files office in the ~~Arhdale Building, 512 North Salisbury Street, Parker Lincoln Building, 2758 Capital Boulevard,~~ Raleigh, North Carolina, excluding information entitled to confidential treatment under Rule .0107 of this Section.

(c) Copies of CFR, permit applications, and permits can be made for ten cents (\$0.10) per page.

Authority G.S. 143-215.3(a)(1); 150B-19(5).

SECTION .0300 - CONSTRUCTION AND OPERATION PERMITS

15A NCAC 02Q .0301 APPLICABILITY

(a) Except for the permit exemptions allowed under Rules .0102 and .0302 of this Subchapter, or as allowed under G.S. 143-215.108A, the owner or operator of a new, modified, or existing facility or source shall not begin construction or operation without first obtaining a construction and operation permit in accordance with the procedures under Section .0300; however, Title V facilities are subject to the Title V procedures under Section .0500 including the acid rain procedures under Section .0400 for Title IV sources.

(b) The owner or operator of a source required to have a permit under this Section may also be subject to the air toxic permit procedures under 15A NCAC 2Q .0700.

(c) The owner or operator of a source required to have a permit under this Section shall pay permit fees required under Section .0200 of this Subchapter.

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

15A NCAC 02Q .0304 APPLICATIONS

(a) Obtaining and filing application. Permit, permit modification, or permit renewal applications may be obtained and shall be filed in writing according to Rule .0104 of this Subchapter.

(b) Information to accompany application. Along with filing a complete application form, the applicant shall also file the following:

- (1) for a new facility or an expansion of existing facility, a consistency determination according to G.S. 143-215.108(f) that:
 - (A) bears the date of receipt entered by the clerk of the local government, or

- (B) consists of a letter from the local government indicating that all zoning or subdivision ordinances are met by the facility;
- (2) for a new facility or an expansion of existing facility in an area without zoning, an affidavit and proof of publication of a legal notice as required under Rule .0113 of this Subchapter;
- (3) for a new facility or modification of an existing facility, a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling according to G.S. 143-215.108(g); the description shall include:
 - (A) for an existing facility, a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling; or
 - (B) for a new facility, a summary of activities related to and plans for source reduction and recycling; ~~and~~
- ~~(4)~~ for permit renewal, an emissions inventory that contains the information specified under 15A NCAC 02D .0202, Registration of Air Pollution Sources (the applicant may use emission inventory forms provided by the Division to satisfy this requirement); and
- ~~(4)(5)~~ if required by the Director, information showing that:
 - (A) The applicant is financially qualified to carry out the permitted activities, or
 - (B) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been in substantial compliance with federal and state environmental laws and rules.

(c) When to file application. For sources subject to the requirements of 15A NCAC 02D .0530 (prevention of significant deterioration) or .0531 (new source review for sources in nonattainment areas), applicants shall file air permit applications at least 180 days before the projected construction date. For all other sources, applicants shall file air permit applications at least 90 days before the projected date of construction of a new source or modification of an existing source.

(d) Permit renewal and ownership changes with no modifications. If no modification has been made to the originally permitted source, application for permit renewal or ownership change may be made by letter to the Director at the address specified in Rule .0104 of this Subchapter. The renewal or ownership change letter must state that there have been no changes in the permitted facility since the permit was last issued.

However, the Director may require the applicant for ownership change to submit additional information showing that:

- (1) The applicant is financially qualified to carry out the permitted activities, or
- (2) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been in substantial compliance with federal and state environmental laws and rules.

To make a name or ownership change, the applicant shall send the Director the number of copies of letters specified in Rule .0305(a)(3) or (4) of this Section signed by a person specified in Paragraph (j) of this Rule.

(e) Applications for date and reporting changes. Application for changes in construction or test dates or reporting procedures may be made by letter to the Director at the address specified in Rule .0104 of this Section. To make changes in construction or test dates or reporting procedures, the applicant shall send the Director the number of copies of letters specified in Rule .0305(a)(5) of this Section signed by a person specified in Paragraph (j) of this Rule.

(f) When to file applications for permit renewal. Applicants shall file applications for renewals such that they are received by the Division at least 90 days before expiration of the permit.

(g) Ownership or name change. 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.

(h) Number of copies of additional information. The applicant shall submit the same number of copies of additional information as required for the application package.

(i) Requesting additional information. Whenever the information provided on the permit application forms does not adequately describe the source and its air cleaning device, the Director may request that the applicant provide any other information that the Director considers necessary to evaluate the source and its air cleaning device. 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.

(j) Signature on application. Permit applications submitted pursuant to this Rule shall be signed as follows:

- (1) for corporations, by a principal executive officer of at least the level of vice-president, or his duly authorized representative, if such representative is responsible for the overall operation of the facility from which the emissions described in the permit application form originates;
- (2) for partnership or limited partnership, by a general partner;
- (3) for a sole proprietorship, by the proprietor;
- (4) for municipal, state, federal, or other public entity, by a principal executive officer, ranking elected official, or other duly authorized employee.

(k) Application fee. With the exceptions specified in Rule .0203(i) of this Subchapter, a non-refundable permit application processing fee shall accompany each application. The permit

application processing fees are defined in Section .0200 of this Subchapter. A permit application is incomplete until the permit application processing fee is received.

(l) Correcting submittals of incorrect information. An applicant has a continuing obligation to submit relevant facts pertaining to his permit application and to correct incorrect information on his permit application.

(m) Retaining copy of permit application package. The applicant shall retain for the duration of the permit term one complete copy of the application package and any information submitted in support of the application package.

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

15A NCAC 02Q .0305 APPLICATION SUBMITTAL CONTENT

(a) If an applicant does not submit, at a minimum, the following information with his application package, the application package shall be returned:

- (1) for new facilities and modified facilities:
 - (A) an application fee as required under Section .0200 of this Subchapter;
 - (B) a consistency determination as required under Rule .0304(b)(1) of this Section;
 - (C) the documentation required under Rule .0304(b)(2) of this Section if required;
 - (D) a financial qualification or substantial compliance statement if required; and
 - (E) applications as required under Rule .0304(a) of this Section and Paragraph (b) of this Rule and signed as required by Rule .0304(j) of this Section;
- (2) for renewals: two copies of applications as required under Rule .0304(a) and (d) of this Section and signed as required by Rule .0304(j) of this ~~Section~~ Section; ~~and an emissions inventory that contains the information specified under 15A NCAC 02D .0202, Registration of Air Pollution Sources;~~
- (3) for a name change: two copies of a letter signed by the appropriate individual listed in Rule .0304(j) indicating the current facility name, the date on which the name change shall occur, and the new facility name;
- (4) for an ownership change: an application fee as required under Section .0200 of this Subchapter and:
 - (A) two copies of a letter sent by each the seller and the buyer indicating the change; or
 - (B) two copies of a letter sent by either bearing the signature of both the seller and buyer, containing a written agreement with a specific date for the transfer of permit responsibility,

coverage, and liability between the current and new permittee; and

- (5) for corrections of typographical errors; changes in name, address, or telephone number of any individual identified in the permit; changes in test dates or construction dates; or similar minor changes: two copies of a letter signed by the appropriate individual listed in Rule .0304(j) of this Section describing the proposed change and explaining the need for the proposed change.

(b) The applicant shall submit copies of the application package as follows:

- (1) six copies for sources subject to the requirements of 15A NCAC 02D .0530, .0531, or .1200; or
- (2) three copies for sources not subject to the requirements of 15A NCAC 02D .0530, .0531, or .1200.

The Director may at any time during the application process request additional copies of the complete application package from the applicant.

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

SECTION .0500 - TITLE V PROCEDURES

15A NCAC 02Q .0508 PERMIT CONTENT

(a) The permit shall specify and reference the origin and authority for each term or condition and shall identify any differences in form as compared to the applicable requirement on which the term or condition is based.

(b) The permit shall specify emission limitations and standards, including operational requirements and limitations, that assure compliance with all applicable requirements at the time of permit issuance.

(c) Where an applicable requirement of the federal Clean Air Act is more stringent than an applicable requirement of rules promulgated pursuant to Title IV, both provisions shall be placed in the permit. The permit shall state that both provisions are enforceable by EPA.

(d) The permit for sources using an alternative emission limit established under 15A NCAC 02D .0501(f) or 15A NCAC 02D .0952 shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.

(e) The expiration date contained in the permit shall be for a fixed term of five years for sources covered under Title IV and for a term of no more than five years from the date of issuance for all other sources including solid waste incineration units combusting municipal waste subject to standards under Section 129(e) of the federal Clean Air Act.

(f) The permit shall contain monitoring and related recordkeeping and reporting requirements as specified in 40 CFR 70.6(a)(3) and 70.6(c)(1) including conditions requiring:

- (1) the permittee to submit reports of any required monitoring at least every six months. The permittee shall submit reports:

- (A) on official forms obtained from the Division at the address in Rule .0104 of this Subchapter,
 - (B) in a manner as specified by a permit condition, or
 - (C) on other forms that contain the information required on official forms provided by the Division or as specified by a permit condition; and
- (2) the permittee to report malfunctions, emergencies, and other upset conditions as prescribed in 15A NCAC 02D .0524, .0535, .1110, or .1111 and to report by the next business day deviations from permit requirements not covered under 15A NCAC 02D .0524, .0535, .1110, or .1111. The permittee shall report in writing to either the Director or Regional Supervisor all other deviations from permit requirements not covered under 15A NCAC 02D .0535 within two business days after becoming aware of the deviation. The permittee shall include the probable cause of such deviation and any corrective actions or preventive measures taken. All deviations from permit requirements shall be certified by a responsible official.

At the request of the permittee, the Director may allow records to be maintained in computerized form in lieu of maintaining paper records.

(g) The permit for facilities covered under 15A NCAC 02D .2100, Risk Management Program, shall contain:

- (1) a statement listing 15A NCAC 02D .2100 as an applicable requirement;
- (2) conditions that require the owner or operator of the facility to submit:
 - (A) a compliance schedule for meeting the requirements of 15A NCAC 02D .2100 by the dates provided in 15A NCAC 02D .2101(a); or
 - (B) as part of the compliance certification under Paragraph (t) of this Rule, a certification statement that the source is in compliance with all requirements of 15A NCAC 02D .2100, including the registration and submission of the risk management plan.

The content of the risk management plan need not itself be incorporated as a permit term or condition.

(h) The permit shall contain a condition prohibiting emissions exceeding any allowances that a facility lawfully holds under Title IV. The permit shall not limit the number of allowances held by a permittee, but the permittee may not use allowances as a defense to noncompliance with any other applicable requirement.

(i) The permit shall contain a severability clause so that various permit requirements will continue to be valid in the event of a challenge to any other portion of the permit.

(j) The permit shall state that noncompliance with any condition of the permit is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(k) The permit shall state that the permittee may not use as a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of the permit.

(l) The permit shall state that the Director may reopen, modify, revoke and reissue, or terminate the permit for reasons specified in Rule .0517 or .0519 of this Section. The permit shall state that the filing of a request by the permittee for a permit revision, revocation and reissuance, or termination, notification of planned changes, or anticipated noncompliance does not stay any permit condition.

(m) The permit shall state that the permit does not convey any property rights of any sort, or any exclusive privileges.

(n) The permit shall state that the permittee shall furnish to the Division, in a timely manner, any reasonable information that the Director may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. The permit shall state that the permittee shall furnish the Division copies of records required to be kept by the permit when such copies are requested by the Director. For information claimed to be confidential, the permittee may furnish such records directly to EPA along with a claim of confidentiality.

(o) The permit shall contain a provision to ensure that the permittee pays fees required under Section .0200 of this Subchapter.

(p) The permit shall state the terms and conditions for reasonably anticipated operating scenarios identified by the applicant in the application. These terms and conditions shall:

- (1) require the permittee, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the operating scenario under which it is operating;
- (2) extend the permit shield described in Rule .0512 of this Section to all terms and conditions under each such operating scenario; and
- (3) ensure that each operating scenario meets all applicable requirements of Subchapter 02D of this Chapter and of this Section.

(q) The permit shall identify which terms and conditions are enforceable by:

- (1) both EPA and the Division;
- (2) the Division only;
- (3) EPA only; and
- (4) citizens under the federal Clean Air Act.

(r) The permit shall state that the permittee shall allow personnel of the Division to:

- (1) enter the permittee's premises where the permitted facility is located or emissions-related activity is conducted, or where records are kept under the conditions of the permit;

- (2) have access to and copy, at reasonable times, any records that are required to be kept under the conditions of the permit;
 - (3) inspect at reasonable times and using reasonable safety practices any source, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit; and
 - (4) sample or monitor substances or parameters, using reasonable safety practices, for the purpose of assuring compliance with the permit or applicable requirements at reasonable times.
- (s) When a compliance schedule is required under 40 CFR 70.5(c)(8) or under a rule contained in Subchapter 02D of this Chapter, the permit shall contain the compliance schedule and shall state that the permittee shall submit at least semiannually, or more frequently if specified in the applicable requirement, a progress report. The progress report shall contain:
- (1) dates for achieving the activities, milestones, or compliance required in the compliance schedule, and dates when such activities, milestones, or compliance were achieved; and
 - (2) an explanation of why any dates in the compliance schedule were not or will not be met, and any preventive or corrective measures adopted.
- (t) The permit shall contain requirements for compliance certification with the terms and conditions in the permit, permit that are enforceable by EPA under Title V of the federal Clean Air Act, including emissions limitations, standards, or work practices. The permit shall specify:
- (1) the frequency (not less than annually or more frequently as specified in the applicable requirements or by the Director) of submissions of compliance certifications;
 - (2) a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices; and
 - (3) a requirement that the compliance certification include:
 - (A) the identification of each term or condition of the permit that is the basis of the certification;
 - (B) the status of compliance with the terms and conditions of the permit for the period covered by the certification, based on the methods or means designated in 40 CFR 70.6(c)(5)(iii)(B). The certification shall identify each deviation and take it into account in the compliance certification. The certification shall also identify as possible exceptions to compliance any periods during which compliance is required and in which an excursion or exceedance as defined under 40 CFR 64 occurred;
- (i) ~~each deviation and take it into account in the compliance certification; and~~
 - (ii) ~~identify as possible, exceptions to compliance, any periods during which compliance is required in which an excursion or exceedance as defined under 40 CFR 64 occurred;~~
- (C) whether compliance was continuous or intermittent;
- (D) the identification of the method(s) or other means used by the owner and operator for determining the compliance status with each term and condition during the certification ~~period, period, and whether such methods or other means provide continuous or intermittent data, (including these methods shall include, at a minimum, the methods and means required under 40 CFR Part 70.6(a)(3); 70.6(a)(3), and identifying any other necessary material information that must be included in this certification to comply with Section 113(e)(2) of the Federal Clean Air Act, which prohibits knowingly making a false certification or omitting material information); and~~
- (E) such other facts as the ~~permitting authority~~ Director may require to determine the compliance status of the source;
- (4) that all compliance certifications be submitted to EPA as well as to the Division.
 - (u) The permit shall contain a condition that authorizes the permittee to make Section 502(b)(10) changes, off-permit changes, or emission trades in accordance with Rule .0523 of this Section.
 - (v) The permit shall include all applicable requirements for all sources covered under the permit.
 - (w) The permit shall specify the conditions under which the permit shall be reopened before the expiration of the permit.
 - (x) If regulated, fugitive emissions shall be included in the permit in the same manner as stack emissions.
 - (y) The permit shall contain a condition requiring annual reporting of actual emissions as required under Rule .0207 of this Subchapter.
 - (z) The permit shall include all sources including insignificant activities.
 - (aa) The permit may contain such other provisions as the Director considers appropriate.
- Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.66; 143-215.107(a)(10); 143-215.108.*

15A NCAC 02Q .0523 CHANGES NOT REQUIRING PERMIT REVISIONS

- (a) Section 502(b)(10) changes:
- (1) The permittee may make Section 502(b)(10) changes without having his permit revised if:
 - (A) The changes are not a modification under 15A NCAC 02D or Title I of the federal Clean Air Act;
 - (B) The changes do not cause the emissions ~~allowable~~allowed under the permit to be exceeded;
 - (C) The permittee notifies the Director and EPA with written notification at least seven days before the change is made; and
 - (D) The permittee shall attach the notice to the relevant permit.
 - (2) The written notification required under Part (a)(1)(C) of this Rule shall include:
 - (A) a description of the change,
 - (B) the date on which the change will occur,
 - (C) any change in emissions, and
 - (D) any permit term or conditions that is no longer applicable as a result of the change.
 - (3) Section 502(b)(10) changes shall be made in the permit the next time that the permit is revised or renewed, whichever comes first.
- (b) Off-permit changes. A permittee may make changes in his operation or emissions without revising his permit if:
- (1) The change affects only insignificant activities and the activities remain insignificant after the change, or
 - (2) The change is not covered under any applicable requirement.
- (c) Emissions trading.
- (1) To the extent that emissions trading is allowed under 15A NCAC 02D, including subsequently adopted maximum achievable control technology standards, emissions trading shall be allowed without permit revisions provided that:
 - (A) All applicable requirements are met;
 - (B) The permittee complies with all terms and conditions of the permit in making the emissions trade; and
 - (C) The permittee notifies the Director and EPA with written notification at least seven days before the trade is made; this notification requirement shall not apply to trades made under 15A NCAC02D .1419, Nitrogen Oxide Budget Trading Program.
~~made.~~
 - (2) If an emissions cap has been established by a permit condition for the purposes of limiting emissions below that allowed by an otherwise

applicable requirement, emissions trading shall be allowed to the extent allowed by the permit if:

- (A) An emissions cap is established in the permit to limit emissions;
 - (B) The permit specifies the emissions limits with which each source shall comply under any applicable requirement;
 - (C) The permittee complies with all permit terms that ensure the emissions trades are enforceable, accountable, and quantifiable;
 - (D) The permittee complies with all applicable requirements;
 - (E) The permittee complies with the emissions trading procedures in the permit;
 - (F) The permittee notifies the Director and EPA with written notification at least seven days before the trade is made.
- (3) The written notification required under Subparagraph (1) of this Paragraph shall include:
- (A) a description of the change,
 - (B) the date on when the change will occur,
 - (C) any change in emissions,
 - (D) the permit requirement with which the facility or source will comply using the emissions trading provision of the applicable provision of 15A NCAC 02D, and
 - (E) the pollutants emitted subject to the emissions trade.
- This Subparagraph shall not apply to trades made under 15A NCAC 02D .1419, Nitrogen Oxide Budget Trading Program.
- (4) The written notification required under Subparagraph (2) of this Paragraph shall include:
- (A) a description of the change,
 - (B) the date on when the change will occur,
 - (C) changes in emissions that will result and how the increases and decrease in emissions will comply with the terms and conditions of the permit.
- (d) The permit shield allowed under Rule .0512 of this Section shall not apply to changes made under Paragraphs (a), (b), or (c) of this Rule.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.

SECTION .0700 - TOXIC AIR POLLUTANT PROCEDURES

15A NCAC 02Q .0706 MODIFICATIONS

(a) For modification of any facility undertaken after September 30, 1993, that:

- (1) is required to have a permit because of applicability of a Section in Subchapter 02D of this Chapter other than Section .1100 of Subchapter 02D of this Chapter except for facilities whose emissions of toxic air pollutants result only from insignificant activities as defined in 15A NCAC 02Q ~~.0101(19)~~ .0103(19) or sources exempted under Rule .0102 of this Subchapter;
- (2) has one or more sources subject to a MACT or GACT standard that has previously been promulgated under Section 112(d) of the federal Clean Air Act or established under Section 112(e) or 112(j) of the Clean Air Act; or
- (3) has a standard industrial classification code that has previously been called under Rule .0705 of this Section;

the owner or operator of the facility shall comply with Paragraphs (b) and (c) of this Rule.

(b) The owner or operator of the facility shall submit a permit application to comply with 15A NCAC 02D .1100 if:

- (1) The modification results in:
 - (A) a net increase in emissions of any toxic air pollutant that the facility was emitting before the modification; or
 - (B) emissions of any toxic air pollutant that the facility was not emitting before the modification if such emissions exceed the levels contained in Rule .0711 of this Section; or
- (2) The Director finds that the modification of the facility will cause an acceptable ambient level in 15A NCAC 02D .1104 to be exceeded. The Director shall provide the findings to the owner or operator of the facility. The Director may require the owner or operator of a facility subject to this Subparagraph to provide an evaluation showing what the resultant emissions and impacts on ambient levels for air toxics from the modified facility will be.

(c) The permit application filed pursuant to this Rule shall include an evaluation for all toxic air pollutants covered under 15A NCAC 02D .1104 for which there is:

- (1) a net increase in emissions of any toxic air pollutant that the facility was emitting before the modification; and
- (2) emission of any toxic air pollutant that the facility was not emitting before the modification if such emissions exceed the levels contained in Rule .0711 of this Section.

All sources at the facility, excluding sources exempt from evaluation in Rule .0702 of this Section, emitting these toxic air pollutants shall be included in the evaluation. A permit application filed pursuant to Subparagraph (b)(2) of this Rule shall include an evaluation for all toxic air pollutants identified

by the Director as causing an acceptable ambient level in 15A NCAC 02D .1104 to be exceeded.

(d) If a source is included in an air toxic evaluation, but is not the source that is being added or modified at the facility, and if the emissions from this source must be reduced in order for the facility to comply with the rules in this Section and 15A NCAC 02D .1100, then the emissions from this source shall be reduced by the time that the new or modified source begins operating such that the facility shall be in compliance with the rules in this Section and 15A NCAC 02D .1100 when the new or modified source begins operating.

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

SECTION .0800 - EXCLUSIONARY RULES

15A NCAC .02Q .0808 PEAK SHAVING GENERATORS

(a) This Rule applies to facilities whose only sources requiring a permit is one or more peak shaving generators and their associated fuel storage tanks.

(b) For the purpose of this Rule, potential emissions shall be determined using actual total ~~energy production—fuel consumption.~~

(c) Any facility whose total ~~energy production—fuel consumption~~ from by one or more peak shaving generators is less than or equal to 6,500,000 kw hrs per year shall be exempted from the requirements of Section .0500 of this ~~Subchapter.~~ Subchapter if the facility uses:

- (1) natural gas burning turbine driven generators that combust less than or equal to 5,625,000 therms per year;
- (2) distillate oil burning turbine driven generators that combust less than or equal to 1,496,000 gallons per year;
- (3) combined fuel (natural gas and six percent or more distillate oil) burning engine generators that combust less than or equal to 633,320 therms natural gas and 24,330 gallons distillate oil per year; or
- (4) distillate oil burning engine driven generators that combust less than or equal to 410,580 gallons per year.

(d) The owner or operator of any peak shaving generator 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) the name and location of the facility;
- (2) the number and size of all peak shaving generators located at the facility;
- (3) the total number of hours of operation of all peak shaving generators located at the facility;
- (4) the actual total amount of energy production per year from all peak shaving generators located at the facility; and
- (5) the 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 facility exempted by this Rule from Section .0500 of this Subchapter shall provide documentation of number, size, number of hours of operation, and amount of total energy production per rolling 12 month period and type of fuel burned per calendar year from all peak shaving generators located at the facility to the Director upon request. The owner or operator of a facility exempted by this Rule from Section .0500 of this Subchapter shall retain records to document the amount of total energy production per year for the previous three years.

(f) For facilities covered by this Rule, the owner or operator shall report to the Director any exceedance of a requirement in this Rule if the total fuel combusted by all peak shaving generators located at the facility exceeds the applicable fuel limit in Paragraph (c) of this Rule within one week of its occurrence. occurrence that the facility has exceeded the fuel consumption in Paragraph (c) of this Rule.

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

15A NCAC 02Q .0810 AIR CURTAIN BURNERS

(a) This Rule applies to facilities whose only sources requiring a permit is one or more air curtain burners.

(b) Any facility whose air curtain burners combust less than 8,100 tons of land clearing debris per year shall be exempted from the requirements of Section .0500 of this Subchapter.

(c) The owner or operator of any air curtain burner 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) the name and location of the facility;
- (2) the quantity of material combusted during the previous calendar year; and
- (3) the signature of the appropriate official as identified in Rule .0304(j) of this Subchapter certifying as to the truth and accuracy of the report.

(d) The owner or operator of any facility exempted by this Rule from Section .0500 of this Subchapter shall provide documentation of the quantity of material combusted to the Director upon request. The owner or operator of a facility exempted by this Rule from Section .0500 of this Subchapter shall retain records to document the amount of material combusted per year for the previous three years.

(e) For facilities 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.

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 02G .0602 and repeal the rule cited as 15A NCAC 02G .0601.

Proposed Effective Date: October 1, 2005

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Contact Rob Emens: AWC Program, 1611 MSC, Raleigh, NC 27699, phone (919)715-5452, email rob.emens@ncmail.net.

Reason for Proposed Action: Language is inconsistent with General Statutes – Chapter 113A, Article 15, 113A-223 & 224, Text contains dated material (e.g., department name, commons names of plants), wording redundant to 113-22(a)(3), Additional species meet criteria outlined in 113A-222 (a) – Eichhornia crassipes (water hyacinth), Myriophyllum aquaticum (parrotfeather), Pista stratiotes (water lettuce), List "(2) Additional Noxious Weeds" needs to be alphabetized by scientific name for reasons of consistency and logic.

Procedure by which a person can object to the agency on a proposed rule: Division of Water Resources, Attn: Lynette Ivey, 1611 MSC, Raleigh, NC 27699-1611.

Written comments may be submitted to: Rob Emens, 1611 MSC, Raleigh, NC 27699-1611, phone (919)715-5452, email rob.emens@ncmail.net.

Comment period ends: August 1, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02G - WATER RESOURCES PROGRAMS

SECTION .0600 - AQUATIC WEED CONTROL

15A NCAC 02G .0601 THE AQUATIC WEED CONTROL ACT

The North Carolina Aquatic Weed Control Act of 1991 empowers the State of North Carolina to control, eradicate, and regulate plants designated as noxious aquatic weeds. The Aquatic Weed Control Act and the existing powers of the Commissioner of Agriculture prohibit importation, sale, use, culture, collection, transportation, and distribution of these plants in North Carolina. Permits for the movement of noxious aquatic weeds may be obtained from the Commissioner of Agriculture pursuant to 2 NCAC 48A .1705 and .1706, subject to the conditions stated therein.

Authority G.S. 106-420; 113A-222; 113A-223; 113A-224.

15A NCAC 02G .0602 NOXIOUS AQUATIC WEED LIST

The Secretary of the Department of Environment, Health, Environment and Natural Resources has determined that designated the following aquatic plants exhibit characteristics which threaten or may threaten the health or safety of the people of North Carolina or beneficial uses of the waters of North Carolina as noxious aquatic weeds:

- (1) Aquatic Species Listed on the Federal Noxious Weed List.
 - Azolla pinnata R. Brown - Pinnate mosquitofern
 - Eichhornia azurea (Sw.) Kunth - Anchored waterhyacinth
 - Hydrilla verticillata (L.f.) Royle - Hydrilla
 - Hygrophila polysperma (roxb.) T. Anderson - Indian hygrophila
 - Ipomoea aquatica Forsk. - Swamp morningglory, water spinach
 - Lagarosiphon major (Ridley) Moss - African elodea
 - Limnophila sessiliflora (Vahl) Blume-Limnophila
 - Melaleuca quinquenervia (Cav.) Blake-Melaluca
 - Monochoria hastata (L.) Solms - Arrowleaved monochoria
 - Monochoria vaginalis (Burm. f.) Kunth - Monochoria
 - Sagittaria sagittifolia L. - Arrowhead
 - Salvinia auriculata Aubl. - Giant salvinia
 - Salvinia biloba Raddi - Giant salvinia
 - Salvinia herzogii de la Sota - Giant salvinia
 - Salvinia molesta Mitch. - Giant salvinia
 - Sparganium erectum L. - Branched burreed
 - Stratiotes aloides L. - Crab's claw, Water-aloe
- (2) Additional Noxious Aquatic Weeds.
 - ~~Crassula helmsii - Swamp stonecrop~~
 - ~~Lagarosiphon spp. (All species) - African elodea~~
 - ~~Salvinia spp. (All except S. rotundifolia) - Water fern~~
 - ~~Trapa spp. (All species) - Water Chestnut~~
 - ~~Ludwigia uruguayensis (Camb.) Hara - Uruguay waterprimrose~~

- ~~Lythrum salicaria L. - Purple loosestrife~~
- ~~Phragmites australis (Cav.) Trin. ex Steud. - Common reed~~
- ~~Alternanthera philoxeroides (Mart.) Griseb - Alligatorweed~~
- ~~Egeria densa Planch. - Brazilian elodea~~
- ~~Myriophyllum spicatum L. - Eurasian watermilfoil~~
- ~~Najas minor All. - Brittleleaf naiad~~
- ~~Alternanthera philoxeroides (Mart.) Griseb - Alligatorweed~~
- ~~Crassula helmsii - Swamp stonecrop~~
- ~~Egeria densa Planch. - Brazilian elodea~~
- ~~Eichhornia crassipes (Mart.) Solms. - Waterhyacinth~~
- ~~Lagarosiphon spp. (All species) - African elodea~~
- ~~Ludwigia uruguayensis (Camb.) Hara - Uruguay waterprimrose, Creeping waterprimrose~~
- ~~Lythrum salicaria L. - Purple loosestrife~~
- ~~Myriophyllum aquaticum (Vell.) Verdc. - Parrotfeather~~
- ~~Myriophyllum spicatum L. - Eurasian watermilfoil~~
- ~~Najas minor All. - Brittleleaf naiad, Slender naiad~~
- ~~Phragmites australis (Cav.) Trin. ex Steud. - Common reed~~
- ~~Pistia stratiotes L. - Water lettuce~~
- ~~Salvinia spp. (All except S. rotundifolia) - Water fern~~
- ~~Trapa spp. (All species) - Water Chestnut~~

Authority G.S. 113A-222.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to amend the rules cited as 15A NCAC 07H .0304, .0309; 07O .0105.

Proposed Effective Date: December 1, 2005

Public Hearing:

Date: June 16, 2005

Time: 4:45 p.m.

Location: Hilton Greenville, 207 SW Greenville Boulevard, Greenville, NC

Reason for Proposed Action:

15A NCAC 07H .0304 – This amendment is being proposed in order to remove the unvegetated beach designation from portions of New Hanover, Pender, Onslow and Carteret counties. The designation was applied to these areas in 1996 following widespread vegetation loss after Hurricane Fran. The agency has determined that there has been sufficient recovery in these areas such that the unvegetated designation is no longer appropriate.

15A NCAC 07H .0309 – This amendment proposes to address a recurring conflict between the Commission's rule and some local ordinances. Some coastal municipalities, through local zoning ordinances, require the installation of concrete driveways for residential structures. This requirement is in conflict with this rule, which prohibits concrete driveways in the oceanfront setback. The CRC proposed to allow the use of concrete, asphalt, or turfstone for residential structures, subject to certain conditions.

15A NCAC 07O .0105 – The current rule identifies only eight of the ten sites that have been acquired for inclusion in the NC Coastal Reserve system since its inception. The proposed amendment will add the other two sites to the rule. The sites to be added are (1) Bird Island in Brunswick County, acquired in 2002, and (2) Emily and Richardson Preyer Buckridge in Tyrrell County, acquired in 1998.

Procedure by which a person can object to the agency on a proposed rule: Objections may be filed in writing and addressed to the Director, Division of Coastal Management, 400 Commerce Avenue, Morehead City, NC 28557.

Written comments may be submitted to: Charles S. Jones, 400 Commerce Avenue, Morehead City, NC 28557, phone (252) 808-2808, fax (252) 247-3330 or email charles.s.jones@ncmail.net.

Comment period ends: August 1, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 07 - COASTAL MANAGEMENT

SUBCHAPTER 07H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0300 - OCEAN HAZARD AREAS

15A NCAC 07H .0304 AECS WITHIN OCEAN

HAZARD AREAS

The ocean hazard system of AECs contains all of the following areas:

- (1) Ocean Erodible Area. This is the area in which there exists a substantial possibility of excessive erosion and significant shoreline fluctuation. The seaward boundary of this area is the ~~mean-normal~~ low water line. The landward extent of this area is determined as follows:
 - (a) a distance landward from the first line of stable natural vegetation to the recession line that would be established by multiplying the long-term annual erosion rate times 60, provided that, where there has been no long-term erosion or the rate is less than two feet per year, this distance shall be set at 120 feet landward from the first line of stable natural vegetation. For the purposes of this Rule, the erosion rates shall be the long-term average based on available historical data. The current long-term average erosion rate data for each segment of the North Carolina coast is depicted on maps entitled "Long Term Annual Shoreline Change Rates updated through 1998 and approved by the Coastal Resources Commission on January 29, 2004" (except as such rates may be varied in individual contested cases, declaratory or interpretive rulings). The maps are available without cost from any local permit officer or the Division of Coastal Management; and
 - (b) a distance landward from the recession line established in Sub-Item (1)(a) of this Rule to the recession line that would be generated by a storm having a one percent chance of being equaled or exceeded in any given year.
- (2) The High Hazard Flood Area. This is the area subject to high velocity waters (~~including, but not limited to,~~ including hurricane wave wash) in a storm having a one percent chance of being equaled or exceeded in any given year, as identified as zone V1-30 on the flood insurance rate maps of the Federal Insurance Administration, U.S. Department of Housing and Urban Development.
- (3) Inlet Hazard Area. The inlet hazard areas are natural-hazard areas that are especially vulnerable to erosion, flooding and other adverse effects of sand, wind, and water because of their proximity to dynamic ocean

inlets. This area shall extend landward from the ~~mean-normal~~ low water line a distance sufficient to encompass that area within which the inlet ~~will, shall,~~ based on statistical analysis, migrate, and shall consider such factors as previous inlet territory, structurally weak areas near the inlet (~~such as an unusually narrow barrier island, an unusually long channel feeding the inlet, or an overwash area~~), and external influences such as jetties and channelization. The areas identified as suggested Inlet Hazard Areas included in the report entitled INLET HAZARD AREAS, The Final Report and Recommendations to the Coastal Resources Commission, 1978, as amended in 1981, by Loie J. Priddy and Rick Carraway are incorporated by reference without future changes are hereby designated as Inlet Hazard Areas except that the Cape Fear Inlet Hazard Area as shown on said map shall not extend northeast of the Baldhead Island marina entrance channel. In all cases, this area shall be an extension of the adjacent ocean erodible area and in no case shall the width of the inlet hazard area be less than the width of the adjacent ocean erodible area. This report is available for inspection at the Department of Environment and Natural Resources, Division of Coastal Management, ~~1638 Mail Service Center, Raleigh~~ 400 Commerce Avenue, Morehead City, North Carolina. Small scaled photo copies are available at no charge.

- (4) Unvegetated Beach Area. Beach areas within the Ocean Hazard Area where no stable natural vegetation is present may be designated as an unvegetated beach area on either a permanent or temporary basis:
- (a) An area appropriate for permanent designation as an unvegetated beach area is a dynamic area that is subject to rapid unpredictable landform change from wind and wave action. The areas in this category shall be designated following detailed studies by the Coastal Resources Commission. These areas shall be designated on maps approved by the Commission and available without cost from any local permit officer or the Division of Coastal Management.
 - (b) An area that is suddenly unvegetated as a result of a hurricane or other major storm event may be designated as an unvegetated beach area for a specific period of time. At the expiration of the time specified by the Commission, the area shall return to its pre-storm designation. Areas

appropriate for such designation are those in which vegetation has been lost over such a large land area that extrapolation of the vegetation line under the procedure set out in Rule .0305(e) of this Section is inappropriate.

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

The Commission designates as temporary unvegetated beach areas those oceanfront areas on Hatteras Island west of the new inlet breach in Dare County in which the vegetation line as shown on Dare County orthophotographs dated 4 February 2002 through 10 February 2002 was destroyed as a result of Hurricane Isabel on September 18, 2003 and the remnants of which were subsequently buried by the construction of an emergency berm. This designation shall continue until such time as stable, natural vegetation has reestablished or until the area is permanently designated as an unvegetated beach area pursuant to Sub-Item 4(a) of this Rule.

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

15A NCAC 07H .0309 USE STANDARDS FOR OCEAN HAZARD AREAS: EXCEPTIONS

(a) The following types of development ~~may shall~~ be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

- (1) campsites;
- (2) parking areas with clay, packed sand or gravel;
- (3) elevated decks not exceeding a footprint of 500 square feet;
- (4) beach accessways consistent with Rule .0308(c) of this Subchapter;
- (5) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- (6) uninhabitable, single-story storage sheds with a foundation or floor consisting of wood, clay, packed sand or gravel, and a footprint of 200 square feet or less;
- (7) temporary amusement stands;
- (8) sand fences; and
- (9) swimming pools.

In all cases, this development shall be permitted only if it is landward of the vegetation line; involves no alteration or removal of primary or frontal dunes which would compromise the integrity of the dune as a protective landform or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

(b) Where strict application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, single family residential structures ~~may~~ shall be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas, if each of the following conditions are met:

- (1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;
- (2) The development is at least 60 feet landward of the vegetation line;
- (3) The development is not located on or in front of a frontal dune, but is entirely behind the landward toe of the frontal dune;
- (4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.
 - (A) All pilings shall have a tip penetration that extends to at least four feet below mean sea level;
 - (B) The footprint of the structure shall be no more than 1,000 square feet or 10 percent of the lot size, whichever is greater.
 - (C) Driveways and parking ~~area~~ areas shall be constructed of clay, packed sand or ~~gravel~~ gravel except in those cases where the development does not abut the ocean and is located landward of a paved public street or highway currently in use. In those cases concrete, asphalt or turfstone may also be used.
- (5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system ~~must~~ shall be submitted as part of the CAMA permit application.

(c) Reconfiguration of lots and projects that have a grandfather status under Paragraph (b) of this Rule shall be allowed provided that the following conditions are met:

- (1) Development is setback from the first line of stable natural vegetation a distance no less than that required by the applicable exception;
- (2) Reconfiguration ~~will~~ shall not result in an increase in the number of buildable lots within

the Ocean Hazard AEC or have other adverse environmental consequences; and

- (3) Development on lots qualifying for the exception in Paragraph (b) of this Rule ~~must~~ shall meet the requirements of Paragraphs (1) through (5) of that Paragraph.

For the purposes of this Rule, an existing lot is a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership. The footprint is defined as the greatest exterior dimensions of the structure, including covered decks, porches, and stairways, when extended to ground level.

(d) The following types of water dependent development shall be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of this Section if all other provisions of this Subchapter and other state and local regulations are met:

- (1) piers providing public access (excluding any pier house, office, or other enclosed areas); and
- (2) maintenance and replacement of existing state-owned bridges and causeways and accessways to such bridges.

(e) Where application of the oceanfront setback requirements of Rule .0306(a) of this Section would preclude replacement of a pier house associated with an existing ocean pier, replacement of the pier house shall be permitted if each of the following conditions are met:

- (1) The associated ocean pier provides public access for fishing or other recreational purposes whether on a commercial, public, or nonprofit basis;
- (2) The pier house is set back from the ocean the maximum feasible distance while maintaining existing parking and sewage treatment facilities and is designed to reduce encroachment into the setback area;
- (3) The pier house shall not be enlarged beyond its original dimensions as of January 1, 1996;
- (4) The pier house shall be rebuilt to comply with all other provisions of this Subchapter; and
- (5) If the associated pier has been destroyed or rendered unusable, replacement of the pier house shall be permitted only if the pier is also being replaced and returned to its original function.

(f) In addition to the development authorized under Paragraph (d) of this Rule, small scale, non-essential development that does not induce further growth in the Ocean Hazard Area, such as the construction of single family piers and small scale erosion control measures that do not interfere with natural ocean front processes, ~~may~~ shall be permitted on those non-oceanfront portions of shoreline within a designated Ocean Hazard Area that exhibit features characteristic of Estuarine Shoreline. Such features include the presence of wetland vegetation, lower wave energy and lower erosion rates than in the adjoining Ocean Eroderible Area. Such development shall be permitted under the standards set out in Rule .0208 of this Subchapter. For the purpose of this Rule, small scale is defined as those projects

which are eligible for authorization under 15A NCAC 07H .1100, .1200 and 07K .0203.

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

SUBCHAPTER 070 - NORTH CAROLINA COASTAL RESERVE

SECTION .0100 - GENERAL PROVISIONS

15A NCAC 070 .0105 RESERVE COMPONENTS

(a) The North Carolina Coastal Reserve includes the following components:

- (1) Zeke's Island;
(2) Rachel Carson;
(3) Currituck Banks;
(4) Masonboro Island;
(5) Permuda Island;
(6) Buxton Woods;
(7) Bald Head Woods; and
(8) Kitty Hawk Woods; Kitty Hawk Woods;
(9) Bird Island; and
(10) Emily and Richardson Preyer Buckridge.

The North Carolina National Estuarine Research Reserve includes components in Subparagraphs (1) - (4) of this Rule.

(b) Detailed boundary maps for each component are maintained and available for inspection at the Division of Coastal Management, PO Box 27687, Raleigh, North Carolina 27611-7687, 400 Commerce Avenue, Morehead City NC 28557.

Authority G.S. 113-3; 113-8; 143B-10.

Notice is hereby given in accordance with G.S. 150B-21.2 that the DENR, Commission for Health Services intends to amend the rules cited as 15A NCAC 13A .0110-.0113.

Proposed Effective Date: October 1, 2005

Public Hearing:

Date: July 7, 2005

Time: 2:00 p.m.

Location: Room G1-A, 1330 St. Mary's Street, Raleigh, NC

Reason for Proposed Action:

15A NCAC 13A .0110 - To specify a required minimum of two feet of aisle space to any area of facility operation or potential emergency.

15A NCAC 13A .0111 - Re-defines the term used by generators of hazardous waste to label each container and tank holding recyclable materials utilized for precious metal recovery at off-site re-cycling facilities, to specify each container shall be labeled or clearly marked with the words "Recyclable Material". Provides that the facility/generator shall not apply a new rule for on-site accumulation of waste, but apply the 90 day or less on-site accumulation of time rule unless authorized with a permit or having attained interim status.

15A NCAC 13A .0112 - The proposed amendment adds 40 CFR 268.20 "Waste specific prohibitions—Dyes and/or pigments production wastes" to Paragraph (b) (Subpart C), "Prohibitions on Land Disposal" and adds additional provisions for land disposal.

15A NCAC 13A .0113 - The proposed rule will exempt precious metal recyclers from the requirement to have a permit in North Carolina while remaining in compliance with the Rule to restrict the on-site accumulation of waste for more than 90 days or less without obtaining a permit or acquiring interim status.

Procedure by which a person can object to the agency on a proposed rule: Objections may be filed in writing by contacting: Elizabeth W. Cannon, Section Chief, Hazardous Waste Section, 1646 Mail Service Center, Raleigh, NC 27699-1646.

Written comments may be submitted to: Elizabeth W. Cannon, Section Chief, Hazardous Waste Section, 1646 Mail Service Center, Raleigh, NC 27699-1646, phone (919)908-8534, fax (919)715-3605, email Elizabeth.cannon@ncmail.net.

Comment period ends: August 1, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 13 – SOLID WASTE MANAGEMENT

SUBCHAPTER 13A - HAZARDOUS WASTE MANAGEMENT

SECTION .0100 - HAZARDOUS WASTE

15A NCAC 13A .0110 INTERIM STATUS STDS FOR OWNERS-OP OF HWTSD FACILITIES - PART 265

(a) 40 CFR 265.1 through 265.4 (Subpart A), "General", are incorporated by reference including subsequent amendments and editions.

(b) 40 CFR 265.10 through 265.19 (Subpart B), "General Facility Standards", are incorporated by reference including subsequent amendments and editions.

(c) 40 CFR 265.30 through 265.37 (Subpart C), "Preparedness and Prevention", are incorporated by reference including subsequent amendments and editions. editions, except that 265.35 is not incorporated by reference.

The following shall be substituted for the provisions of 265.35. Required aisle space: The owner or operator must maintain aisle space of at least two feet to allow the unobstructed movement of personnel, fire prevention equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency.

(d) 40 CFR 265.50 through 265.56 (Subpart D), "Contingency Plan and Emergency Procedures", are incorporated by reference including subsequent amendments and editions.

(e) 40 CFR 265.70 through 265.77 (Subpart E), "Manifest System, Recordkeeping, and Reporting", are incorporated by reference including subsequent amendments and editions.

(f) 40 CFR 265.90 through 265.94 (Subpart F), "Ground-Water Monitoring", are incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 265.110 through 265.121 (Subpart G), "Closure and Post-Closure", are incorporated by reference including subsequent amendments and editions.

(h) 40 CFR 265.140 through 265.151 (Subpart H), "Financial Requirements", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 265.143(a)(3), (a)(4), (a)(5), (a)(6), and 40 CFR 265.145(a)(3), (a)(4), (a)(5), are not incorporated by reference.

(1) The following shall be substituted for the provisions of 40 CFR 265.143(a)(3) which were not incorporated by reference: The owner or operator shall deposit the full amount of the closure cost estimate at the time the fund is established. Within one year of the effective date of these Rules, an owner or operator using a closure trust fund established prior to the effective date of these Rules shall deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or shall obtain other financial assurance as specified in this Section.

(2) The following shall be substituted for the provisions of 40 CFR 265.143(a)(6) which were not incorporated by reference: After the trust fund is established, whenever the current closure cost estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator within 60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other

financial assurance as specified in this Section to cover the difference; and

(3) The following shall be substituted for the provisions of 40 CFR 265.145(a)(3) which were not incorporated by reference:

(A) Except as otherwise provided in Part (h)(3)(B) of this Rule, the owner or operator shall deposit the full amount of the post-closure cost estimate at the time the fund is established.

(B) If the Department finds that the owner or operator of an inactive hazardous waste disposal unit cannot provide financial assurance for post-closure through any other option (e.g. surety bond, letter of credit, or corporate guarantee), a plan for annual payments to the trust fund during the interim status period may be established by the Department by use of an Administrative Order.

(i) 40 CFR 265.170 through 265.178 (Subpart I), "Use and Management of Containers", are incorporated by reference including subsequent amendments and editions. Additionally, the owner or operator shall keep records and results of required inspections for at least three years from the date of the inspection.

(j) 40 CFR 265.190 through 265.202 (Subpart J), "Tank Systems", are incorporated by reference including subsequent amendments and editions.

(k) 40 CFR 265.220 through 265.231 (Subpart K), "Surface Impoundments", are incorporated by reference including subsequent amendments and editions.

(l) 40 CFR 265.250 through 265.260 (Subpart L), "Waste Piles", are incorporated by reference including subsequent amendments and editions.

(m) 40 CFR 265.270 through 265.282 (Subpart M), "Land Treatment", are incorporated by reference including subsequent amendments and editions.

(n) 40 CFR 265.300 through 265.316 (Subpart N), "Landfills", are incorporated by reference including subsequent amendments and editions.

(o) 40 CFR 265.340 through 265.352 (Subpart O), "Incinerators", are incorporated by reference including subsequent amendments and editions.

(p) 40 CFR 265.370 through 265.383 (Subpart P), "Thermal Treatment", are incorporated by reference including subsequent amendments and editions.

(q) 40 CFR 265.400 through 265.406 (Subpart Q), "Chemical, Physical, and Biological Treatment", are incorporated by reference including subsequent amendments and editions.

(r) 40 CFR 265.440 through 265.445 (Subpart W), "Drip Pads", are incorporated by reference including subsequent amendments and editions.

(s) 40 CFR 265.1030 through 265.1049 (Subpart AA), "Air Emission Standards for Process Vents", are incorporated by reference including subsequent amendments and editions.

- (t) 40 CFR 265.1050 through 265.1079 (Subpart BB), "Air Emission Standards for Equipment Leaks", are incorporated by reference including subsequent amendments and editions.
- (u) 40 CFR 265.1080 through 265.1091 (Subpart CC), "Air Emission Standards for Tanks, Surface Impoundments, and Containers", are incorporated by reference including subsequent amendments and editions.
- (v) 40 CFR 265.1100 through 265.1102 (Subpart DD), "Containment Buildings", are incorporated by reference including subsequent amendments and editions.
- (w) 40 CFR 265.1200 through 265.1202 (Subpart EE), "Hazardous Waste Munitions and Explosives Storage", are incorporated by reference including subsequent amendments and editions.
- (x) Appendices to 40 CFR Part 265 are incorporated by reference including subsequent amendments and editions.

Authority G.S. 130A-294(c); 150B-21.6.

15A NCAC 13A .0111 STDS FOR THE MGMT OF SPECIFIC HW/TYPES HWM FACILITIES - PART 266

- (a) 40 CFR 266.20 through 266.23 (Subpart C), "Recyclable Materials Used in a Manner Constituting Disposal", are incorporated by reference including subsequent amendments and editions.
- (b) 40 CFR 266.70 (Subpart F), "Recyclable Materials Utilized for Precious Metal Recovery", is incorporated by reference including subsequent amendments and editions. Off-site recycling facilities that receive materials described in 40 CFR 266.70(a) must manage the materials in accordance with and comply with 40 CFR 262.34(a) as incorporated by reference in 15A NCAC 13A .0107(c), excluding 262.34(a)(3). Each container and tank holding recyclable materials at off-site recycling facilities must be labeled or marked with the words, "Recyclable Material".
- (c) 40 CFR 266.80 (Subpart G), "Spent Lead-Acid Batteries Being Reclaimed", is incorporated by reference including subsequent amendments and editions.
- (d) 40 CFR 266.100 through 266.112 (Subpart H), "Hazardous Waste Burned in Boilers and Industrial Furnaces", are incorporated by reference including subsequent amendments and editions.
- (e) 40 CFR 266.200 through 266.206 (Subpart M), "Military Munitions", are incorporated by reference including subsequent amendments and editions.
- (f) 40 CFR 266.210 through 266.360 (Subpart N), "Conditional Exemption for Low-Level Mixed Waste Storage, Treatment, Transportation and Disposal", are incorporated by reference including subsequent amendments and editions.
- (g) Appendices to 40 CFR Part 266 are incorporated by reference including subsequent amendments and editions.

Authority G.S. 130A-294(c); 150B-21.6.

15A NCAC 13A .0112 LAND DISPOSAL RESTRICTIONS - PART 268

- (a) 40 CFR 268.1 through 268.14 (Subpart A), "General", are incorporated by reference including subsequent amendments and editions.

- (b) ~~40 CFR 268.20~~ ~~40 CFR 268.30~~ through 268.39 (Subpart C), "Prohibitions on Land Disposal", are incorporated by reference including subsequent amendments and ~~editions.~~ editions, except that 40 CFR 268.21 through 268.29 are not incorporated by reference.
- (c) 40 CFR 268.40 through 268.49 (Subpart D), "Treatment Standards", are incorporated by reference including subsequent amendments and editions.
- (d) 40 CFR 268.50 (Subpart E), "Prohibitions on Storage", is incorporated by reference including subsequent amendments and editions.
- (e) Appendices to 40 CFR Part 268 are incorporated by reference including subsequent amendments and editions.

Authority G.S. 130A-294(c); 150B-21.6.

15A NCAC 13A .0113 THE HAZARDOUS WASTE PERMIT PROGRAM - PART 270

- (a) 40 CFR 270.1 through 270.6 (Subpart A), "General Information", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 26, 1983" shall be substituted for "July 26, 1982" contained in 40 CFR 270.1(c).
- (b) 40 CFR 270.10 through 270.29 (Subpart B), "Permit Application", are incorporated by reference including subsequent amendments and editions.
- (c) The following are additional Part B information requirements for all hazardous waste facilities:
 - (1) Description and documentation of the public meetings as required in 15A NCAC 13A .0109(r)(7);
 - (2) A description of the hydrological and geological properties of the site including flood plains, depth to water table, ground water travel time, seasonal and long-term groundwater level fluctuations, proximity to public water supply watersheds, consolidated rock, soil pH, soil cation exchange capacity, soil characteristics and composition and permeability, existence of cavernous bedrock and seismic activity, slope, mines, climate, location and withdrawal rates of surface water users within the immediate drainage basin and well water users within a one mile radius of the facility; water quality information of both surface and groundwater within ~~4000-ft.~~ 1000 feet of the facility, and a description of the local air quality;
 - (3) A description of the facility's proximity to and potential impact on wetlands, endangered species habitats, parks, forests, wilderness areas, historical sites, mines, and air quality;
 - (4) A description of local land use including residential, industrial, commercial, recreational, agricultural and the proximity to schools and airports;
 - (5) A description of the proximity of the facility to waste generators and population centers; a description of the method of waste

transportation; the comments of the local community and state transportation authority on the proposed route, and route safety. Comments shall include proposed alternative routes and restrictions necessary to protect the public health;

- (6) A description of facility aesthetic factors including visibility, appearance, and noise level; and
- (7) A description of any other objective factors that the Department determines are reasonably related and relevant to the proper siting and operation of the facility.

(d) In addition to the specific Part B information requirements for hazardous waste disposal facilities, owners and operators of hazardous waste landfills or longterm storage facilities shall provide the following information:

- (1) Design drawings and specifications of the leachate collection and removal system;
- (2) Design drawings and specifications of the artificial impervious liner;
- (3) Design drawings and specifications of the clay or clay-like liner below the artificial liner, and a description of the permeability of the clay or clay-like liner; and
- (4) A description of how hazardous wastes will be treated prior to placement in the facility.

(e) In addition to the specific Part B information requirements for surface impoundments, owners and operators of surface impoundments shall provide the following information:

- (1) Design drawings and specifications of the leachate collection and removal system;
- (2) Design drawings and specifications of all artificial impervious liners;
- (3) Design drawings and specifications of all clay or clay-like liners and a description of the clay or clay-like liner; and
- (4) Design drawings and specifications that show that the facility has been constructed in a manner that will prevent landsliding, slippage, or slumping.

(f) 40 CFR 270.30 through 270.33 (Subpart C), "Permit Conditions", are incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 270.40 through 270.43 (Subpart D), "Changes to Permit", are incorporated by reference including subsequent amendments and editions.

(h) 40 CFR 270.50 through 270.51 (Subpart E), "Expiration and Continuation of Permits", are incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 270.60 through 270.68 (Subpart F), "Special Forms of Permits", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 270.68 is not incorporated by reference.

(j) 40 CFR 270.70 through 270.73 (Subpart G), "Interim Status", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 1, 1986" shall be substituted for "November 8, 1985" contained in 40 CFR 270.73(c).

(k) 40 CFR 270.235, (Subpart I), "Integration with Maximum Achievable Control Technology (MACT) Standards", is incorporated by reference including subsequent amendments and editions.

(l) The following are additional permitting requirements for hazardous waste facilities.

- (1) An applicant applying for a permit for a hazardous waste facility shall submit a disclosure statement to the Department as a part of the application for a permit or any time thereafter specified by the Department. The disclosure statement shall be supported by an affidavit attesting to the truth and completeness of the facts asserted in the statement and shall include:

- (A) A brief description of the form of the business (e.g. partnership, sole proprietorship, corporation, association, or other);
- (B) The name and address of any hazardous waste facility constructed or operated after October 21, 1976 by the applicant or any parent or subsidiary corporation if the applicant is a corporation; and
- (C) A list identifying any legal action taken against any facility identified in Part (l)(1)(B) of this Rule involving:
 - (i) any administrative ruling or order issued by any state, federal or local authority relating to revocation of any environmental or waste management permit or license, or to a violation of any state or federal statute or local ordinance relating to waste management or environmental protection;
 - (ii) any judicial determination of liability or conviction under any state or federal law or local ordinance relating to waste management or environmental protection; and
 - (iii) any pending administrative or judicial proceeding of the type described in this Part.
- (D) The identification of each action described in Part (l)(1)(C) of this Rule shall include the name and location of the facility that the action concerns, the agency or court that heard or is hearing the matter, the title, docket or case number, and the status of the proceeding.

- (2) In addition to the information set forth in Subparagraph (l)(1) of this Rule, the

Department shall require from any applicant such additional information as it deems necessary to satisfy the requirements of G.S. 130A-295. Such information may include; ~~include, but shall not be limited to:~~

- (A) The names, addresses, and titles of all officers, directors, or partners of the applicant and of any parent or subsidiary corporation if the applicant is a corporation;
- (B) The name and address of any company in the field of hazardous waste management in which the applicant business or any of its officers, directors, or partners, hold an equity interest and the name of the officer, director, or partner holding such interest; and
- (C) A copy of any administrative ruling or order and of any judicial determination of liability or conviction described in Part (1)(1)(C) of this Rule, and a description of any pending administrative or judicial proceeding in that item.

- (3) If the Department finds that any part or parts of the disclosure statement is not necessary to satisfy the requirements of G.S. 130A-295, such information shall not be required.

(m) An applicant for a new, or modification to an existing, commercial facility permit, shall provide a description and justification of the need for the facility.

(n) Requirements for Off-site Recycling Facilities.

- ~~(1) The permit requirements of this Rule apply to owners and operators of off-site recycling facilities.~~
- ~~(2) The following provisions of 40 CFR Part 264, as incorporated by reference, shall apply to owners and operators of off-site recycling facilities:~~
 - ~~(A) Subpart B - General Facility Standards;~~
 - ~~(B) Subpart C - Preparedness and Prevention;~~
 - ~~(C) Subpart D - Contingency Plan and Emergency Procedures;~~
 - ~~(D) Subpart E - Manifest System, Recordkeeping and Reporting;~~
 - ~~(E) Subpart G - Closure and Post-closure;~~
 - ~~(F) Subpart H - Financial Requirements;~~
 - ~~(G) Subpart I - Use and Management of Containers;~~
 - ~~(H) Subpart J - Tank Systems;~~
 - ~~(I) 264.101 - Corrective Action for Solid Waste Management Units;~~
 - ~~(J) Subpart X - Miscellaneous Units; and~~
 - ~~(K) Subpart DD - Containment Buildings.~~
- (1) The permit requirements of 15A NCAC 13A .0109 apply to owners and operators of off-site

recycling facilities unless excluded in Subparagraphs (2) and (3) of Paragraph (n).

- ~~(2) Requirements of 15A NCAC 13A .0113(n)(4), (5), (6), (7) and (8) do not apply to owners and operators of off-site recycling facilities that recycle only precious metals as described in 40 CFR 266.70(a), as incorporated by reference in 15A NCAC 13A .0111(b), when they meet the following legitimacy criteria:~~
 - ~~(A) The material to be recycled is managed as a commodity that has value; and~~
 - ~~(B) The material provides a necessary contribution to the recycling process or to a product of the recycling process; and~~
 - ~~(C) The recycling process yields a product or intermediate that is:

 - ~~(i) Sold to a third party; or~~
 - ~~(ii) Used by the recycler as an effective substitute for a commercial product or as a necessary ingredient in an industrial process; and~~~~
 - ~~(D) The product of the recycling process:

 - ~~(i) Does not contain hazardous constituents that are not found in products produced without the material listed in 40 CFR 266.70 as incorporated in 15A NCAC 13A.0111(b); and~~
 - ~~(ii) Does not exhibit a hazardous characteristic that products produced without the material listed in 40 CFR 266.70 as incorporated in 15A NCAC 13A .0111(b) do not exhibit.~~~~

- ~~(3) Off-site facilities that recycle precious metals and meet the criteria in Subparagraph (2) of Paragraph (n) shall follow the regulations as described in 15A NCAC 13A .0111(b).~~
- ~~(4) Notwithstanding any other statement of applicability the following provisions of 40 CFR Part 264, as incorporated by reference, shall apply to owners and operators of off-site recycling facilities:

 - ~~(A) Subpart B - General Facility Standards;~~
 - ~~(B) Subpart C - Preparedness and Prevention;~~
 - ~~(C) Subpart D - Contingency Plan and Emergency Procedures;~~
 - ~~(D) Subpart E - Manifest System, Recordkeeping and Reporting;~~
 - ~~(E) Subpart G - Closure and Post-closure;~~
 - ~~(F) Subpart H - Financial Requirements;~~~~

recycling facilities unless excluded in Subparagraphs (2) and (3) of Paragraph (n).

- (2) Requirements of 15A NCAC 13A .0113(n)(4), (5), (6), (7) and (8) do not apply to owners and operators of off-site recycling facilities that recycle only precious metals as described in 40 CFR 266.70(a), as incorporated by reference in 15A NCAC 13A .0111(b), when they meet the following legitimacy criteria:
 - (A) The material to be recycled is managed as a commodity that has value; and
 - (B) The material provides a necessary contribution to the recycling process or to a product of the recycling process; and
 - (C) The recycling process yields a product or intermediate that is:

 - (i) Sold to a third party; or
 - (ii) Used by the recycler as an effective substitute for a commercial product or as a necessary ingredient in an industrial process; and
 - (D) The product of the recycling process:

 - (i) Does not contain hazardous constituents that are not found in products produced without the material listed in 40 CFR 266.70 as incorporated in 15A NCAC 13A.0111(b); and
 - (ii) Does not exhibit a hazardous characteristic that products produced without the material listed in 40 CFR 266.70 as incorporated in 15A NCAC 13A .0111(b) do not exhibit.
- (3) Off-site facilities that recycle precious metals and meet the criteria in Subparagraph (2) of Paragraph (n) shall follow the regulations as described in 15A NCAC 13A .0111(b).
- (4) Notwithstanding any other statement of applicability the following provisions of 40 CFR Part 264, as incorporated by reference, shall apply to owners and operators of off-site recycling facilities:
 - (A) Subpart B - General Facility Standards;
 - (B) Subpart C - Preparedness and Prevention;
 - (C) Subpart D - Contingency Plan and Emergency Procedures;
 - (D) Subpart E - Manifest System, Recordkeeping and Reporting;
 - (E) Subpart G - Closure and Post-closure;
 - (F) Subpart H - Financial Requirements;

- (G) Subpart I - Use and Management of Containers;
- (H) Subpart J - Tank Systems;
- (I) 264.101 - Corrective Action for Solid Waste Management Units;
- (J) Subpart X - Miscellaneous Units; and
- (K) Subpart DD - Containment Buildings.
- ~~(3)~~(5) The requirements listed in ~~Subparagraph (n)(2)~~ Subparagraph (n)(4) of this Rule apply to the entire off-site recycling facility, including all recycling units, staging and process areas, and permanent and temporary storage areas for wastes.
- ~~(4)~~(6) The following provisions of 15A NCAC 13A .0109 shall apply to owners and operators of off-site recycling facilities:
 - (A) The substitute financial requirements of Rule .0109(i)(1), (2) and (4); and
 - (B) The additional standards of Rule .0109(r)(1), (2), (3), (6) and (7).
- ~~(5)~~(7) The owner or operator of an off-site recycling facility shall keep a written operating record at his facility.
- ~~(6)~~(8) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:
 - (A) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or recycling at the facility;
 - (B) The location of all hazardous waste within the facility and the quantity at each location. This information must include cross-references to specific manifest document numbers if the waste was accompanied by a manifest; and
- (C) Documentation of the fate of all hazardous wastes received from off-site or generated on-site. This shall include records of the sale, reuse, off-site transfer, or disposal of all waste materials.
- (o) Permit Fees for Commercial Hazardous Waste Facilities.
 - (1) An applicant for a permit modification for a commercial hazardous waste facility shall pay an application fee as follows:
 - (A) Class 1 permit modification \$100;
 - (B) Class 2 permit modification \$1,000; or
 - (C) Class 3 permit modification \$5,000.
 - Note: Class 1 permit modifications which do not require prior approval of the Division Director are excluded from the fee requirement.
 - (2) The application fee for a new permit, permit renewal, or permit modification must accompany the application, and is non-refundable. The application shall be considered incomplete until the fee is paid. Checks shall be made payable to: Division of Waste Management.

Authority G.S. 130A-294(c); 130A-294.1; 130A-295(a)(1),(2), (c); 150B-21.6.

APPROVED RULES

*This Section includes the Register Notice citation to rules approved by the Rules Review Commission (RRC) at its meeting April 21, 2005, 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	
10A	NCAC	13B	.4511*	19:08	NCR
10A	NCAC	13F	.1104*	19:10	NCR
10A	NCAC	13G	.0303*	19:10	NCR
10A	NCAC	13G	.0309*	19:10	NCR
10A	NCAC	13G	.0601*	19:10	NCR
10A	NCAC	13G	.1103*	19:10	NCR
15A	NCAC	02D	.0531*	19:02	NCR
15A	NCAC	10B	.0101	19:09	NCR
15A	NCAC	10B	.0105*	19:09	NCR
15A	NCAC	10B	.0107*	19:09	NCR
15A	NCAC	10B	.0120	19:09	NCR
15A	NCAC	10B	.0202	19:09	NCR
15A	NCAC	10B	.0215	19:09	NCR
15A	NCAC	10B	.0302-.0303	19:09	NCR
15A	NCAC	10C	.0107*	19:09	NCR
15A	NCAC	10C	.0110-.0111*	19:09	NCR
15A	NCAC	10C	.0205-.0206*	19:09	NCR
15A	NCAC	10C	.0209*	19:09	NCR
15A	NCAC	10C	.0211*	19:09	NCR
15A	NCAC	10C	.0301*	19:09	NCR
15A	NCAC	10C	.0305	19:09	NCR
15A	NCAC	10C	.0401*	19:09	NCR
15A	NCAC	10C	.0407	19:09	NCR
15A	NCAC	10F	.0308	19:12	NCR
15A	NCAC	10F	.0311*	19:12	NCR
15A	NCAC	10F	.0327	19:12	NCR
15A	NCAC	10F	.0355	19:12	NCR
15A	NCAC	10F	.0366	19:12	NCR
15A	NCAC	10F	.0369	19:12	NCR
15A	NCAC	10H	.0104*	19:09	NCR
15A	NCAC	10H	.0901	19:09	NCR
15A	NCAC	10H	.0904*	19:09	NCR
15A	NCAC	10J	.0102*	19:09	NCR
15A	NCAC	18A	.2609*	19:11	NCR
18	NCAC	06	.1205*	19:12	NCR
18	NCAC	06	.1313*	19:12	NCR
21	NCAC	14A	.0101	19:06	NCR
21	NCAC	36	.0702	19:10	NCR
21	NCAC	52	.0205*	19:04	NCR
23	NCAC	02C	.0210*	19:07	NCR
23	NCAC	03A	.0101*	19:12	NCR
23	NCAC	03A	.0102	19:12	NCR

*pending fee consultation per G.S. 12-3.1
pending fee consultation per G.S. 12-3.1*

This rule is subject to the next Legislative Session. (See G.S. 150B-21.3(b1))

15A	NCAC	02D	.0530*	19:02	NCR
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**TITLE 10A – DEPARTMENT OF HEALTH
& HUMAN SERVICES**

**10A NCAC 13B .4511 MEDICATION
ADMINISTRATION**

(a) A facility shall establish and maintain policies and procedures governing the administration of medications which shall be enforced and implemented by administration and staff. Policies and procedures shall include:

- (1) accountability of controlled substances as defined by the G.S. 90, Article 5; and
- (2) dispensing and administering behavior modifying drugs, and psychotherapeutic agents; insulin; intravenous fluids and medications; cardiovascular drugs; antibiotics; and cytotoxic and related agents.

(b) All medications and treatments shall be administered and discontinued in accordance with signed medical staff orders which are recorded in the patient's medical record.

(c) The categories of staff that are privileged to administer medications shall be delineated by the operational policies of the facility. These policies shall be in agreement with current rules of North Carolina Occupational Boards for each category of staff.

(d) Medications shall be scheduled and administered according to the established policies of the facility.

(e) Variances to the medication administration policy shall be reviewed and evaluated by the nurse executive or her designee.

(f) The person administering medications shall identify each patient in accordance with the facility's policies and procedures prior to administering any medication.

(g) Medication administered to a patient shall be recorded in the patient's medication administration record immediately after administration in accordance with the facility's policies and procedures.

(h) Omission of medication and the reason for the omission shall be indicated in the patient's medical record.

(i) The person administering medications which are ordered to be given as needed (PRN) shall justify the need for the same in the patient's medical record.

(j) Medication administration records shall provide identification of the drug and strength of drug, quantity of drug administered, route administered, name and title of person administering the medication, and time and date of administration.

(k) Self-administration of medications shall be permitted only if prescribed by the medical staff. Directions must be printed on the container.

(l) The administration of one patient's medications to another patient is prohibited except in the case of an emergency. In the event of such as emergency, steps shall be taken by a pharmacist to ensure that the borrowed medications shall be replaced and so documented.

(m) Verbal orders shall be signed in accordance with Rule .3707(c) of this Subchapter.

*History Note: Authority G.S. 131E-75; 143B-165;
Eff. January 1, 1996;*

Amended Eff. May 1, 2005.

**10A NCAC 13F .1104 ACCOUNTING FOR
RESIDENT'S PERSONAL FUNDS**

(a) To document a resident's receipt of the State-County Special Assistance personal needs allowance after payment of the cost of care, a statement shall be signed by the resident or marked by the resident with two witnesses' signatures. The statement shall be maintained in the home.

(b) Upon the written authorization of the resident or his legal representative or payee, an administrator or the administrator's designee may handle the personal money for a resident, provided an accurate accounting of monies received and disbursed and the balance on hand is available upon request of the resident or his legal representative or payee.

(c) A record of each transaction involving the use of the resident's personal funds according to Paragraph (b) of this Rule shall be signed by the resident, legal representative or payee or marked by the resident, if not adjudicated incompetent, with two witnesses' signatures at least monthly verifying the accuracy of the disbursement of personal funds. The record shall be maintained in the home.

(d) A resident's personal funds shall not be commingled with facility funds. The facility shall not commingle the personal funds of residents in an interest-bearing account.

(e) All or any portion of a resident's personal funds shall be available to the resident or his legal representative or payee upon request during regular office hours, except as provided in Rule .1105 of this Subchapter.

(f) The resident's personal needs allowance shall be credited to the resident' account within 24 hours of the check being deposited following endorsement.

*History Note: Authority G.S. 131D-2; 143B-165;
Eff. July 1, 2005.*

10A NCAC 13G .0303 LOCATION

(a) A family care home shall be in a location approved by local zoning boards.

(b) The home shall be located so that hazards to the occupants are minimized.

(c) The site of the home 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
- (5) be free from exposure to pollutants known to the applicant or licensee.

*History Note: Authority G.S. 131D-2; 143B-165;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;*

*Amended Eff. July 1, 2005; July 1, 1990; April 1, 1984;
Recodified from 10A NCAC 13G .0301 Eff. July 1, 2005.*

10A NCAC 13G .0309 BATHROOM

- (a) Adult care homes licensed on or after April 1, 1984, shall have one full bathroom for each five or fewer persons including live-in staff and family.
- (b) The bathrooms shall be designed to provide privacy. A bathroom 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.
- (c) Entrance to the bathroom shall not be through a kitchen, another person's bedroom, or another bathroom.
- (d) The required residents' bathrooms shall be located so that there is no more than 40 feet from any residents' bedroom door to a resident use bathroom door.
- (e) Hand grips shall be installed at all commodes, tubs and showers used by the residents.
- (f) Nonskid surfacing or strips must be installed in showers and bath areas.
- (g) The bathrooms shall be lighted to provide 30 foot candles of light at floor level and have mechanical ventilation at the rate of two cubic feet per minute for each square foot of floor area. These vents shall be vented directly to the outdoors.
- (h) The bathroom floor shall have a non-slippery water-resistant covering.

*History Note: Authority G.S. 131D-2; 143B-165;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. July 1, 2005; July 1, 1990; April 1, 1984;
Recodified from 10A NCAC 13G .0308 Eff. July 1, 2005.*

10A NCAC 13G .0601 MANAGEMENT AND OTHER STAFF

- (a) A family care home administrator shall be responsible for the total operation of a family care home and shall also be responsible to the Division of Facility Services and the county department of social services for meeting and maintaining the rules of this Subchapter. The co-administrator, when there is one, shall share equal responsibility with the administrator for the operation of the home and for meeting and maintaining the rules of this Subchapter. The term administrator also refers to co-administrator where it is used in this Subchapter.
- (b) At all times there shall be one administrator or supervisor-in-charge who is directly responsible for assuring that all required duties are carried out in the home and for assuring that at no time is a resident left alone in the home without a staff member. Except for the provisions cited in Paragraph (c) of this Rule regarding the occasional absence of the administrator or supervisor-in-charge, one of the following arrangements shall be used:

- (1) The administrator shall be in the home or reside within 500 feet of the home with a means of two-way telecommunication with the home at all times. When the administrator does not live in the licensed home, there shall be at least one staff member who lives in the home or one on each shift and the

- (2) administrator shall be directly responsible for assuring that all required duties are carried out in the home;
- (2) The administrator shall employ a supervisor-in-charge to live in the home or reside within 500 feet of the home with a means of two-way telecommunication with the home at all times. When the supervisor-in-charge does not live in the licensed home, there shall be at least one staff member who lives in the home or one on each shift and the supervisor-in-charge shall be directly responsible for assuring that all required duties are carried out in the home; or
- (3) When there is a cluster of licensed homes located adjacently on the same site, there shall be at least one staff member in each home, either live-in or on a shift basis, and at least one administrator or supervisor-in-charge who lives within 500 feet of each home with a means of two-way telecommunication with each home at all times and who is directly responsible for assuring that all required duties are carried out in each home.

(c) When the administrator or supervisor-in-charge is absent from the home or not within 500 feet of the home, the following shall apply:

- (1) For absences of a non-routine nature that do not exceed 24 hours per week, a relief-person-in-charge designated by the administrator shall be in charge of the home during the absence and in the home or within 500 feet of the home according to the requirements in Paragraph (b) of this Rule. The administrator shall assure that the relief-person-in-charge is prepared to respond appropriately in case of an emergency in the home. The relief-person-in-charge shall be 18 years or older.
- (2) For recurring or planned absences, a relief-supervisor-in-charge designated by the administrator shall be in charge of the home during the absence and in the home or within 500 feet of the home according to the requirements in Paragraph (b) of this Rule. The relief-supervisor-in-charge shall meet all of the qualifications required for the supervisor-in-charge as specified in Rule .0402 of this Subchapter with the exception of Item (4) pertaining to the continuing education requirement.

- (d) Additional staff shall be employed as needed for housekeeping and the supervision and care of the residents.
- (e) Information on required staffing shall be posted in the facility according to G.S. 131D-4.3(a)(5).

*History Note: Authority G.S. 131D-2; 143B-153;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. July 1, 2005; July 1, 1990; April 1, 1987;
April 1, 1984; June 26, 1980.*

10A NCAC 13G .1103 ACCOUNTING FOR RESIDENT'S PERSONAL FUNDS

- (a) To document a resident's receipt of the State-County Special Assistance personal needs allowance after payment of the cost of care, a statement shall be signed by the resident or marked by the resident with two witnesses' signatures. The statement shall be maintained in the home.
- (b) Upon the written authorization of the resident or his legal representative or payee, an administrator or the administrator's designee may handle the personal money for a resident, provided an accurate accounting of monies received and disbursed and the balance on hand is available upon request of the resident or his legal representative or payee.
- (c) A record of each transaction involving the use of the resident's personal funds according to Paragraph (b) of this Rule shall be signed by the resident, legal representative or payee or marked by the resident, if not adjudicated incompetent, with two witnesses' signatures at least monthly verifying the accuracy of the disbursement of personal funds. The record shall be maintained in the home.
- (d) A resident's personal funds shall not be commingled with facility funds. The facility shall not commingle the personal funds of residents in an interest-bearing account.
- (e) All or any portion of a resident's personal funds shall be available to the resident or his legal representative or payee upon request during regular office hours, except as provided in Rule .1105 of this Subchapter.
- (f) The resident's personal needs allowance shall be credited to the resident's account within 24 hours of the check being deposited following endorsement.

History Note: Authority G.S. 131D-2; 143B-165; Eff. April 1, 1984; Amended Eff. July 1, 2005; April 1, 1987.

TITLE 15A - DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

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 November 7, 2003, except those provisions noticed as stayed in 69 FR 40274.
- (b) For the purposes of this Rule the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply except the definitions of "baseline actual emissions" and "pollution control projects."
 - (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, if the owner or operator demonstrates that it is more representative of normal source operation.

- (i) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.
- (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) For an existing emission unit (other than an electric utility steam generating unit), 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. However, if the State has taken credit in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G) for an emission limitation that is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of the Code of Federal Regulations, the baseline actual emissions shall be adjusted to account for such emission reductions.

- (iv) For an electric utility steam generating unit, the average rate shall be adjusted downward to reflect any emissions reductions under G.S. 143-215.107D and for which cost recovery is sought pursuant to G.S. 62-133.6.
 - (v) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period shall be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period for each regulated NSR pollutant can be used for each regulated NSR pollutant.
 - (vi) 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.
- (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) of this Subparagraph may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.166(v)(2) and (v)(5). The following are the rebuttable presumption pollution control projects described above:
- (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.
 - (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.
- (3) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years.
 - (4) 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 (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) New natural gas-fired electrical utility generating units shall install best available control technology for NO_x and SO₂.

(i) 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 [plant wide applicability limit] level, the Director shall renew the PAL at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

(j) The owner or operator of a major stationary source 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).

(k) 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).

(l) 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 02Q .0300 or .0500.

(m) 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.

(n) Volatile organic compounds exempted from coverage in 40 CFR 51.100(s) shall also be exempted when calculating source applicability and control requirements under this Rule.

(o) 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.

(p) 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.

(q) 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).

(r) 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.

(s) 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 shall 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.

(t) 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 Subchapter or Subchapter 02Q of this Title and any other requirements under local, state, or federal law.

(u) 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.

(v) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the owner or operator shall notify the director of the modification. The notification shall include:

- (1) a description of the project,
- (2) identification of sources whose emissions could be affected by the project,
- (3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated,
- (4) the calculated baseline emissions and an explanation of how the baseline emissions were calculated, and
- (5) any netting calculations if applicable.

If upon reviewing the notification, the Director finds that it will cause a prevention of significant deterioration evaluation, then the Director shall notify the owner or operator of his findings. The owner or operator shall not make the modification until it has received a permit issued pursuant to this Rule. If a permit revision is not required pursuant to this rule, the owner or operator shall maintain records of emissions related to the modifications 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 these records shall be maintained for five years.

(w) The reference to the Code of Federal Regulations (CFR) in this Rule are incorporated by reference unless a specific reference states otherwise. The version of the Code of Federal Regulations incorporated in this Rule is that as of November 7, 2003, except those provisions noticed as stayed in 69 FR 40274, and does not include any subsequent amendments or editions to the referenced material.

History Note: 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; Eff. June 1, 1981; Amended Eff. December 1, 1992; August 1, 1991; Temporary Amendment Eff. March 8, 1994, for a period of 180 days or until the permanent rule is effective, whichever is sooner; Amended Eff. July 1, 1997; February 1, 1995; July 1, 1994; Amended Eff. Pending Legislative Review.

15A NCAC 02D .0531 SOURCES IN NONATTAINMENT AREAS

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

- (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, if the owner or operator demonstrates that it is more representative of normal source operation.

- (i) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

- (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) For an existing emission unit (other than an electric utility steam generating unit), 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. However, if the State has taken credit in an attainment demonstration or maintenance plan consistent

- with the requirements of 40 CFR 51.165(a)(3)(ii)(G) for an emission limitation that is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of the Code of Federal Regulations, the baseline actual emissions shall be adjusted to account for such emission reductions.
- (iv) For an electric utility steam generating unit, the average rate shall be adjusted downward to reflect any emissions reductions under G.S. 143-215.107D and for which cost recovery is sought pursuant to G.S. 62-133.6.
 - (v) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period shall be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period for each regulated NSR pollutant.
 - (vi) 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.
- (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) of this Subparagraph may qualify for a case specific PCP exclusion pursuant to the requirements of 40 CFR 51.165(e)(2) and (e)(5). The following are the rebuttable presumption pollution control projects described above:
 - (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.
- (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.
- (3) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.165(a)(1)(vi)(C)(1) shall be seven years.
- (b) 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.
- (c) Applicability. This Rule applies to the following areas:
- (1) Ozone Nonattainment Areas, 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:
 - (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 (l) 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.

(d) 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); or
- (5) emission of compounds listed under 40 CFR 51.100(s) as having been determined to have

negligible photochemical reactivity except carbon monoxide.

(e) 15A NCAC 02Q .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 02Q .0300 or .0500.

(f) To issue a permit to a source to which this Rule applies, the Director shall determine that the source meets 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 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 less 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); 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.

(g) New natural gas-fired electrical utility generating units shall install lowest achievable emission rate technology for NO_x and SO₂.

(h) 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.

(i) The owner or operator of a major stationary source 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).

(j) 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).

(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 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.

(l) 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.

(m) 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.

(n) 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 issue permits only 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.

(o) Paragraphs (f) and (l) 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 (c)(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 run the model only 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.

(p) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the owner or operator shall notify the director of the modification. The notification shall include:

- (1) a description of the project,
- (2) identification of sources whose emissions could be affected by the project,

- (3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated,
- (4) the calculated baseline emissions and an explanation of how the baseline emissions were calculated, and
- (5) any netting calculations if applicable.

If upon reviewing the notification, the Director finds that it will cause a prevention of significant deterioration evaluation, then the Director shall notify the owner or operator of his findings. The owner or operator shall not make the modification until it has received a permit issued pursuant to this Rule. If a permit revision is not required pursuant to this Rule, the owner or operator shall maintain records of emissions related to the modifications 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 51.165(a)(1)(x), when compared to the pre-modification potential to emit; otherwise these records shall be maintained for five years.

(q) The version of the Code of Federal Regulations incorporated in this Rule is that as of November 7, 2003, except those provisions noticed as stayed in 69 FR 40274, and does not include any subsequent amendments or editions to the referenced material.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); 143-215.108(b); Eff. June 1, 1981; Amended Eff. December 1, 1993; December 1, 1992; Temporary Amendment Eff. March 8, 1994 for a period of 180 days or until the permanent rule is effective, whichever is sooner; Amended Eff. May 1, 2005; July 1, 1998; July 1, 1996; July 1, 1995; July 1, 1994.

15A NCAC 10B .0105 MIGRATORY GAME BIRDS

(a) Cooperative State Rules:

- (1) The taking of sea ducks (scoter, eider and old squaw) during any special federally-announced season for these species shall be limited to the waters of the Atlantic Ocean, and to those coastal waters south of US 64 which are separated by a distance of at least 800 yards of open water from any shore, island or marsh.
- (2) Tundra swans may be taken during the open season by permit only subject to annual limitations imposed by the U.S. Fish and Wildlife Service. Based upon the annual limitations imposed by the U.S. Fish and Wildlife Service, the Wildlife Resources Commission shall issue nontransferable swan permits to applicants who will be selected at random by computer, and only one swan may be taken under each permit which must be cancelled at the time of the kill by cutting out the month and day of the kill. Accompanying the permit is a tag which must be affixed to the

swan at the time and place of the kill. The tag must be affixed in accordance with instructions provided with the permit. In addition, a preaddressed post-paid card is supplied to each permittee on which to report the number of days hunted and the details of the kill if made. It is unlawful to hunt swans without having the permit and the tag in possession or to possess a swan without the cancelled permit in possession and the tag properly affixed to the swan. It is unlawful to possess a swan permit or tag while hunting that was assigned to another person or to alter the permit or tag in any way other than cutting out the proper month and day of kill.

(b) Notwithstanding the provisions of G.S. 113-291.1(a) and (b), the following restrictions apply to the taking of migratory game birds:

- (1) No migratory game bird may be taken:
 - (A) With a rifle;
 - (B) With a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so as to limit its total capacity to not more than three shells.
- (2) No migratory game bird may be taken:
 - (A) From or by the use of a sinkbox or any other type of low floating device affording the hunter a means of concealment beneath the surface of the water;
 - (B) With the aid of bait, or on, over or within 300 yards of any place where any grain, salt or other feed is exposed so as to constitute an attraction to migratory game birds or has been so exposed during any of the 10 consecutive days preceding the taking, except that this Part shall not apply to standing crops, flooded croplands, grain crops properly shocked on the field where grown, or grains found scattered solely as the result of normal agricultural planting or harvesting;
 - (C) With the aid of live decoys, or on, over or within 300 yards of any place where tame or captive migratory game birds are present, unless such birds are and have been for a period of 10 consecutive days prior to such taking confined within an enclosure which substantially reduces the audibility of their calls and totally conceals them from the sight of wild migratory game birds.

- (3) Waterfowl hunting and harassment and other unauthorized activities shall be prohibited on posted waterfowl management areas established by the Wildlife Resources Commission for Canada Geese and ducks restoration.
- (4) In that area of Roanoke Sound adjacent to and immediately Northeast of Roanoke Island as marked by buoys designating the waterfowl rest area, it shall be unlawful to harass or take any waterfowl.
- (5) The area east of US 17 shall be designated as an experimental September teal season zone as referenced by the Federal frameworks calling for state rules designating experimental areas.
- (6) It shall be unlawful to harass or take any geese during established goose hunting season that occurs after October 1 in each year in the Gaddy Goose Refuge, which is in that area of Anson County starting at the NC 109 bridge over the Pee Dee River and following NC 109 south to Dennis Road (SR1650); west on Dennis Road to Pleasant Grove Church Road (SR 1649); continue west on Pleasant Grove Church Road to US 52; south on US 52 to Lockhart Road (SR 1652); west on Lockhart Road to Brown Creek Church-Cox Road (SR 1641); west on Brown Creek Church-Cox Road to NC 742; northwest on NC 742 to Lanes Creek; Lanes Creek north (downstream) to Rocky River; Rocky River downstream to the Pee Dee River; and from Pee Dee River downstream to the beginning of the NC 109 bridge.

History Note: Authority G.S. 113-134; 113-274; 113-291.1; 113-291.2; 50 C.F.R. 20.21; 50 C.F.R. 20.105; Eff. February 1, 1976; Amended Eff. July 1, 1995; April 1, 1992; February 1, 1990; September 1, 1989; Temporary Amendment Eff. September 10, 1998; Amended Eff. June 1, 2005; May 1, 2004; July 1, 2000.

15A NCAC 10B .0107 BLACK BEAR

It is unlawful to take or possess a female bear with a cub or cubs at its side, or to take or possess a cub bear. For the purpose of this Rule, a cub bear is defined as any bear weighing less than 50 pounds.

History Note: Authority G.S. 113-134; 113-291.2; 113-291.7; Eff. February 1, 1976; Amended Eff. June 1, 2005; July 1, 1985.

15A NCAC 10C .0107 SPECIAL REGULATIONS: JOINT WATERS

In order to effectively manage all fisheries resources in joint waters and in order to confer enforcement powers on both fisheries enforcement officers and wildlife enforcement officers

with respect to certain rules, the Marine Fisheries Commission and the Wildlife Resources Commission deem it necessary to adopt special rules for joint waters. Such rules supersede any inconsistent rules of the Marine Fisheries Commission or the Wildlife Resources Commission that would otherwise be applicable in joint waters under the provisions of 15A NCAC 10C .0106:

- (1) Striped Bass
 - (a) It shall be unlawful to possess any striped bass or striped bass hybrid taken by any means which is less than 18 inches long (total length).
 - (b) It shall be unlawful to possess more than one daily creel limit of striped bass or their hybrids, in the aggregate, per person per day, regardless of the number of management areas fished, and fish possessed by the individual shall be in compliance with the size and creel limits for the management area being fished.
 - (c) It shall be unlawful to engage in net fishing for striped bass or their hybrids in joint waters except as authorized by rules of the Marine Fisheries Commission.
- (2) Lake Mattamuskeet
 - (a) It shall be unlawful to set or attempt to set any gill net in Lake Mattamuskeet canals designated as joint waters.
 - (b) It shall be unlawful to use or attempt to use any trawl net or seines in Lake Mattamuskeet canals designated as joint waters.
- (3) Cape Fear River. It shall be unlawful to use or attempt to use any net or net stakes within 800 feet of the dam at Lock No. 1 on the Cape Fear River.
- (4) Shad: It shall be unlawful to possess more than 10 American shad or hickory shad, in the aggregate, per person per day taken by hook-and-line.

History Note: Authority G.S. 113-132; 113-134; 113-138; 113-292; Eff. January 1, 1977; Amended Eff. May 1, 2005; August 1, 2000; July 1, 1993; November 1, 1991; January 1, 1991; August 1, 1985.

15A NCAC 10C .0110 MANAGEMENT RESPONSIBILITY FOR ESTUARINE STRIPED BASS IN JOINT WATERS

- (a) The management areas for estuarine striped bass fisheries in coastal North Carolina are designated in 15A NCAC 03R .0201.
- (b) In order to effectively manage the recreational hook and line harvest in joint waters of the Albemarle Sound-Roanoke River stock of striped bass, the Marine Fisheries Commission and the Wildlife Resources Commission deem it necessary to establish

two management areas: the Albemarle Sound Management Area and the Roanoke River Management Area as designated in 15A NCAC 03R .0201. The Wildlife Resources Commission shall have principal management responsibility for the stock when it is in the joint and inland fishing waters of the Roanoke River Management Area. The Marine Fisheries Commission shall have principal management responsibility for the stock in the coastal, joint and inland waters of the Albemarle Sound Management Area. The annual quota for recreational harvest of the Albemarle Sound-Roanoke River striped bass stock shall be divided equally between the two management areas. Each Commission shall implement management actions for recreational harvest within their respective management areas that shall be consistent with the North Carolina Estuarine Striped Bass Fishery Management Plan.

*History Note: Authority G.S. 113-132; 113-134; 113-138; 113-292;
Eff. January 1, 1991;
Amended Eff. June 1, 2005.*

15A NCAC 10C .0111 IMPLEMENTATION OF ESTUARINE STRIPED BASS MANAGEMENT PLANS: RECREATIONAL FISHING

The Marine Fisheries and Wildlife Resources Commissions shall implement their respective striped bass management plans for recreational fishing pursuant to their respective rulemaking powers. To preserve jurisdictional authority of each Commission, the following means are established through which management measures can be implemented by a single instrument in the following management areas:

- (1) In the Roanoke River Management Area, the exclusive authority to open and close seasons and areas and establish size and creel limits, whether inland or joint fishing waters, shall be vested in the Wildlife Resources Commission. An instrument closing any management area in joint waters shall operate as a jointly issued instrument opening or closing seasons or areas to harvest in the Roanoke River Management Area.
- (2) In the Albemarle Sound Management Area, the exclusive authority to open and close seasons and areas and establish size and creel limits, whether coastal or joint fishing waters shall be vested in the Marine Fisheries Commission. The season shall close by Marine Fisheries Commission proclamation if the quota is about to be exceeded. In the Albemarle Sound Management Area administered by the Marine Fisheries Commission, a proclamation affecting the harvest in joint and coastal waters, excluding the Roanoke River Management Area shall automatically be implemented and effective as a Wildlife Resources Commission action in the inland waters and tributaries to the waters affected.

*History Note: Authority G.S. 113-132; 113-134; 113-138; 113-292;
Eff. January 1, 1991;
Amended Eff. June 1, 2005.*

15A NCAC 10C .0205 PUBLIC MOUNTAIN TROUT WATERS

(a) Designation of Public Mountain Trout Waters. The waters listed herein or in 15A NCAC 10D .0104 are designated as Public Mountain Trout Waters and further classified as Wild Trout Waters or Hatchery Supported Waters. For specific classifications, see Subparagraphs (1) through (6) of this Paragraph. These waters are posted and lists thereof are filed with the clerks of superior court of the counties in which they are located:

- (1) Hatchery Supported Trout Waters. The listed waters in the counties in Subparagraphs (a)(1)(A) through (Y) are classified as Hatchery Supported Public Mountain Trout Waters. Where specific watercourses or impoundments are listed, indentation indicates that the watercourse or impoundment listed is tributary to the next preceding watercourse or impoundment listed and not so indented. This classification applies to the entire watercourse or impoundment listed except as otherwise indicated in parentheses following the listing. Other clarifying information may also be included parenthetically. The tributaries of listed watercourses or impoundments are not included in the classification unless specifically set out therein. Otherwise, Wild Trout regulations apply to the tributaries.
 - (A) Alleghany County:
 - New River (not trout water)
 - Little River (Whitehead to McCann Dam)
 - Crab Creek
 - Brush Creek (except where posted against trespass)
 - Big Pine Creek
 - Laurel Branch
 - Big Glade Creek
 - Bledsoe Creek
 - Pine Swamp Creek
 - South Fork New River (not trout water)
 - Prather Creek
 - Cranberry Creek
 - Piney Fork
 - Meadow Fork
 - Yadkin River (not trout water)
 - Roaring River (not trout water)
 - East Prong Roaring River (that portion on Stone Mountain State Park)
 - [Delayed Harvest

- Regulations apply. See Subparagraph (a)(5) of this Rule.]
- (B) Ashe County:
- New River (not trout waters)
 - North Fork New River (Watauga Co. line to Sharp Dam)
 - Helton Creek (Virginia State line to New River) [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
 - Big Horse Creek (Mud Creek at SR 1363 to Tuckerdale)
 - Buffalo Creek (headwaters to junction of NC 194-88 and SR 1131)
 - Big Laurel Creek
 - Three Top Creek (portion not on game lands)
 - Hoskins Fork (Watauga County line to North Fork New River)
 - South Fork New River (not trout waters)
 - Cranberry Creek (Alleghany County line to South Fork New River)
 - Nathans Creek
 - Peak Creek (headwaters to Trout Lake, except Blue Ridge Parkway waters)
 - Trout Lake [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
 - Roan Creek
 - North Beaver Creek
 - Pine Swamp Creek (all forks)
 - Old Fields Creek
 - Mill Creek (except where posted against trespass)
- (C) Avery County:
- Nolichucky River (not trout waters)
 - North Toe River (headwaters to Mitchell County line, except where posted against trespass)
- Squirrel Creek
 - Elk River (SR 1305 crossing immediately upstream of Big Falls to the Tennessee State line, including portions of tributaries on game lands)
 - Catawba River (not trout water)
 - Johns River (not trout water)
 - Wilson Creek [not Hatchery Supported trout water, see Subparagraph (a)(2) of this Rule.]
 - Lost Cove Creek [not Hatchery Supported trout water, see Subparagraph (a)(4) of this Rule.]
 - Buck Timber Creek [not Hatchery Supported trout water, see Subparagraph (a)(2) of this Rule.]
 - Cary Flat Branch [not Hatchery Supported trout water, see Subparagraph (a)(2) of this Rule.]
 - Boyde Coffey Lake
 - Archie Coffey Lake
 - Linville River [Land Harbor line (below dam) to Blue Ridge Parkway boundary line, except where posted against trespass]
 - Milltimber Creek
- (D) Buncombe County:
- French Broad River (not trout water)
 - Ivy Creek (Ivy River) (Dillingham Creek to US 19-23 bridge)
 - Dillingham Creek (Corner Rock Creek to Ivy Creek)
 - Stony Creek
 - Mineral Creek (including portions of tributaries on game lands)
 - Corner Rock Creek (including tributaries, except Walker Branch)
 - Reems Creek (Sugar Camp Fork to US 19-23 bridge, except where posted against trespass)

- Swannanoa River (SR 2702 bridge near Ridgecrest to Wood Avenue Bridge, intersection of NC 81W and US 74A in Asheville, except where posted against trespass)
- Bent Creek (headwaters to N.C. Arboretum boundary line, including portions of tributaries on game lands)
- Lake Powhatan
- Cane Creek (headwaters to SR 3138 bridge)
- (E) Burke County:
- Catawba River (Muddy Creek to the City of Morganton water intake dam) [Special Regulations apply. See Subparagraph (a)(7) of this Rule.]
- South Fork Catawba River (not trout water)
- Henry Fork (lower South Mountains State Park line downstream to SR 1919 at Ivy Creek)
- Jacob Fork (Shinny Creek to lower South Mountain State Park boundary)
- [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
- Johns River (not trout water)
- Parks Creek (portion not on game lands not trout water)
- Carroll Creek (game lands portion above SR 1405 including tributaries)
- Linville River (game lands portion below the Blue Ridge Parkway including portions of tributaries on game lands and from first bridge on SR 1223 below Lake James powerhouse to Muddy Creek)
- (F) Caldwell County:
- Catawba River (not trout water)
- Johns River (not trout water)
- Wilson Creek (Phillips Branch to Browns Mountain Beach dam,
- except where posted against trespass)
- Estes Mill Creek (not trout water)
- Thorps Creek (falls to NC 90 bridge)
- Mulberry Creek (portion not on game lands not trout water)
- Boone Fork [not Hatchery Supported trout water. See Subparagraph (a)(2) of this Rule.]
- Boone Fork Pond
- Yadkin River (not trout water)
- Buffalo Creek (mouth of Joes Creek to McCloud Branch)
- Joes Creek (first falls upstream of SR 1574 to confluence with Buffalo Creek)
- (G) Cherokee County:
- Hiwassee River (not trout water)
- Shuler Creek (headwaters to Tennessee line, except where posted against trespass including portions of tributaries on game lands)
- North Shoal Creek (Crane Creek) (headwaters to SR 1325, including portions of tributaries on game lands)
- Persimmon Creek
- Davis Creek (confluence of Bald and Dockery creeks to Hanging Dog Creek)
- Beaver Dam Creek (headwaters to SR 1326 bridge, including portions of tributaries on game lands)
- Valley River
- Hyatt Creek (including portions of tributaries on game lands)
- Webb Creek (including portions of tributaries on game lands)
- Junaluska Creek (Ashturn Creek to Valley River, including portions of tributaries on game lands)
- (H) Clay County:
- Hiwassee River (not trout water)
- Fires Creek (first bridge above the lower game land

- line on US Forest Service road 442 to SR 1300)
 - Tusquitee Creek (headwaters to lower SR 1300 bridge, including portions of Bluff Branch on game lands)
 - Big Tuni Creek (including portions of tributaries on game lands)
 - Chatuge Lake (not trout water)
 - Shooting Creek (SR 1349 bridge to US 64 bridge at SR 1338)
 - Hothouse Branch (including portions of tributaries on gamelands)
 - Vineyard Creek (including portions of tributaries on game lands)
- (I) Graham County:
 - Little Tennessee River (not trout water)
 - Calderwood Reservoir (Cheoah Dam to Tennessee State line)
 - Cheoah River (not trout water)
 - Yellow Creek
 - Santeetlah Reservoir (not trout water)
 - West
 - Buffalo Creek
 - Little
 - Buffalo Creek
 - Santeetlah Creek (Johns Branch to mouth including portions of tributaries within this section located on game lands, excluding Johns Branch and Little Santeetlah Creek)
 - (Big) Snowbird Creek (old railroad junction to mouth, including portions of tributaries on game lands)
 - Mountain Creek (game lands boundary to SR 1138 bridge)
 - Long
 - Creek (portion not on game lands)
- (J) Haywood County:
 - Pigeon River (Stamey Cove Branch to US 19-23 bridge)
 - Cold Springs Creek (including portions of tributaries on game lands)
 - Jonathans Creek - lower (SR 1394 bridge to Pigeon River)
 - Jonathans Creek - upper [SR 1302 bridge (west) to SR 1307 bridge]
 - Hemphill Creek
 - West Fork Pigeon River (triple arch bridge on highway NC 215 to Queens Creek, including portions of tributaries within this section located on game lands, except Middle Prong)
 - Richland Creek (Russ Avenue bridge to US 19A-23 bridge)
 - West Fork Pigeon River (Queen Creek to the first game land boundary upstream of Lake Logan) [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
- (K) Henderson County:
 - (Rocky) Broad River (one-half mile north of Bat Cave to Rutherford County line)
 - Green River - upper (mouth of Rock Creek to mouth of Bobs Creek)
 - Green River - lower (Lake Summit Dam to I-26 bridge)
 - Camp Creek (SR 1919 to Polk County line)
 - (Big) Hungry River
 - Little Hungry River
- Tulula
 - Creek (headwaters to lower bridge on SR 1275)
 - Franks
 - Creek
 - Cheoah Reservoir
 - Fontana Reservoir (not trout water)
 - Stecoah Creek
 - Sawyer Creek
 - Panther Creek
 - (including portions of tributaries on game lands)

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| <p>French Broad River (not trout water)
 Cane Creek (SR 1551 bridge to US 25 bridge)
 Mud Creek (not trout water)
 Clear Creek (SR 1591 bridge at Jack Mountain Lane to SR 1572)
 Mills River (not trout water)
 North Fork Mills River (game lands portion below the Hendersonville watershed dam). [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]</p> <p>(L) Jackson County:
 Tuckasegee River (confluence with West Fork Tuckasegee River to SR 1534 bridge at Wilmot) [Delayed Harvest Regulations apply to that portion between NC 107 bridge at Love Field and the Dillsboro dam. See Subparagraph (a)(5) of this Rule.]
 Scott Creek (entire stream, except where posted against trespass)
 Dark Ridge Creek (Jones Creek to Scotts Creek)
 Buff Creek (uppermost crossing on SR 1457 to Scott Creek)
 Savannah Creek (Headwaters to Bradley's Packing House on NC 116)
 Greens Creek (Greens Creek Baptist Church on SR 1730 to Savannah Creek)
 Cullowhee Creek (Tilley Creek to Tuckasegee River)
 Bear Creek Lake
 Wolf Creek [not Hatchery Supported trout water, see Subparagraph (a)(2) of this Rule.]
 Wolf Creek Lake
 Balsam Lake
 Tanasee Creek [not Hatchery Supported trout water, see Subparagraph (a)(2) of this Rule.]
 Tanasee Creek Lake
 West Fork Tuckasegee River (Shoal Creek to existing water level of Little Glenville Lake)
 Shoal Creek (Glenville Reservoir pipeline to mouth)</p> <p>(M) Macon County:</p> | <p>Little Tennessee River (not trout water)
 Nantahala River (Nantahala Dam to Swain County line) [Delayed Harvest Regulations apply to the portion from Whiteoak Creek to the Nantahala Power and Light powerhouse discharge canal. See Subparagraph (a)(5) of this Rule.]
 Queens Creek Lake
 Burningtown Creek (including portions of tributaries on game lands)
 Cullasaja River Sequoyah Dam to US 64 bridge near junction of SR 1672, including portions of tributaries on game lands, excluding those portions of Buck Creek and Turtle Pond Creek on game lands. [Wild Trout Regulations apply. See Subparagraphs (a)(2) and (a)(6) of this Rule.]
 Ellijay Creek (except where posted against trespass, including portions of tributaries on game lands)
 Skitty Creek
 Cliffside Lake
 Cartoogechaye Creek (US 64 bridge to Little Tennessee River)
 Tessentee Creek (Nichols Branch to Little Tennessee River, except where posted against trespassing)
 Savannah River (not trout water)
 Big Creek (base of falls to Georgia State line, including portions of tributaries within this Section located on game lands)</p> <p>(N) Madison County:
 French Broad River (not trout water)
 Shut-In Creek (including portions of tributaries on game lands)
 Spring Creek (junction of NC 209 and NC 63 to lower US Forest Service boundary)</p> |
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line, including portions of
tributaries on game lands)

Meadow Fork Creek

Roaring Fork
(including portions of
tributaries on game lands)

Little Creek

Max Patch Pond

Big Laurel Creek (Mars Hill
Watershed boundary to the
SR 1318 bridge, also known
as Big Laurel Road bridge,
downstream of Bearpen
Branch)

Big Laurel Creek (NC 208
bridge to US 25-70 bridge)
[Delayed Harvest
Regulations apply. See
Subparagraph (a)(5) of this
Rule.]

Spillcorn Creek (entire
stream, excluding
tributaries)

Shelton Laurel Creek
(confluence of Big
Creek and Mill Creek to
NC 208 bridge at Belva)
Shelton Laurel Creek
(NC 208 bridge at Belva
to the confluence with
Big Laurel Creek)
[Delayed Harvest
Regulations apply. See
Subparagraph (a)(5) of
this Rule.]

Mill Creek
(headwaters to confluence with Big
Creek)

Puncheon Fork
(Hampton Creek to Big
Laurel Creek)

Big Pine Creek (SR
1151 bridge to French Broad
River)

(O) McDowell County:

Catawba River (Catawba Falls
Campground to Old Fort
Recreation Park)

Buck Creek (portion not on
game lands, not trout water)

Little Buck Creek
(game land portion including
portions of tributaries on
game
lands)

Curtis Creek game lands
portion downstream of US
Forest Service boundary at
Deep Branch. [Delayed

Harvest Regulations apply.
See Subparagraph (a)(5) of
this Rule.]

North Fork Catawba River
(headwaters to SR 1569
bridge)

Armstrong Creek (Cato
Holler line downstream to
upper Greenlee line)

Mill Creek (upper railroad
bridge to U.S. 70 Bridge,
except where posted against
trespass)

(P) Mitchell County:

Nolichucky River (not trout
water)

Big Rock Creek (headwaters
to NC 226 bridge at SR 1307
intersection)

Little Rock Creek
(Green Creek Bridge to
Big Rock Creek, except
where posted against
trespass)

Cane Creek (SR 1219 to NC
226 bridge)

Cane Creek (NC 226 bridge
to NC 80 bridge) [Delayed
Harvest Regulations apply.
See Subparagraph (a)(5) of
this Rule.]

Grassy Creek (East Fork
Grassy Creek to mouth)

East Fork Grassy Creek
North Toe River (Avery
County line to SR 1121
bridge)

(Q) Polk County:

Broad River (not trout water)

North Pacolet River (Pacolet
Falls to NC 108 bridge)

Fork Creek (Fork Creek
Church on SR 1100 to
North Pacolet River)

Big Fall Creek (portion
above and below water
supply reservoir)

Green River (Fishtop Falls
Access Area to mouth of
Brights Creek) [Delayed
Harvest Regulations apply to
the portion from Fishtop
Falls Access Area to Cove
Creek. See Subparagraph
(a)(5) of this Rule.]

Little Cove Creek
(including portions of
tributaries on game lands)

- Cove Creek (including portions of tributaries on game lands)
- Camp Creek [Henderson County line (top of falls) to Green River]
- (R) Rutherford County:
 (Rocky) Broad River (Henderson County line to US 64/74 bridge, except where posted against trespass)
- (S) Stokes County:
 Dan River (Virginia State line downstream to a point 200 yards below the end of SR 1421)
- (T) Surry County:
 Yadkin River (not trout water)
 Ararat River (SR 1727 bridge downstream to the NC 103 bridge)
 Stewarts Creek (not trout water)
 Pauls Creek (Virginia State line to 0.3 mile below SR 1625 bridge - lower Caudle property line)
 Fisher River (Cooper Creek) (Virginia State line to SR 1331 bridge)
 Little Fisher River (Virginia State line to NC 89 bridge)
 Mitchell River (0.6 mile upstream of the end of SR 1333 to the SR 1330 bridge below Kapps Mill Dam) [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
- (U) Swain County:
 Little Tennessee River (not trout water)
 Calderwood Reservoir (Cheoah Dam to Tennessee State line)
 Cheoah Reservoir
 Fontana Reservoir (not trout water)
 Alarka Creek (game lands boundary to Fontana Reservoir)
 Nantahala River (Macon County line to existing Fontana Reservoir water level)
- Tuckasegee River (not trout water)
 Deep Creek (Great Smoky Mountains National Park boundary line to Tuckasegee River)
 Connelly Creek (including portions of tributaries on game lands)
- (V) Transylvania County:
 French Broad River (junction of west and north forks to US 276 bridge)
 Davidson River (Avery Creek to Ecusta intake)
 East Fork French Broad River (Glady Fork to French Broad River) [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
 Little River (confluence of Lake Dense outflow to Hooker Falls) [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
 Middle Fork French Broad River
 West Fork French Broad River (SR 1312 and SR 1309 intersection to junction of west and north forks, including portions of tributaries within this section located on game lands)
- (W) Watauga County:
 New River (not trout waters)
 North Fork New River (from confluence with Maine and Mine branches to Ashe County line)
 Maine Branch (headwaters to North Fork New River)
 South New Fork River (not trout water)
 Meat Camp Creek
 Norris Fork Creek
 Howards Creek (downstream from lower falls)
 Middle Fork New River (Lake Chetola Dam to South Fork New River)
 Yadkin River (not trout water)
 Stony Fork (headwaters to Wilkes County line)

- Elk Creek (headwaters to gravel pit on SR 1508, except where posted against trespass)
- Watauga River (SR 1557 bridge to NC 105 bridge and SR 1114 bridge to NC 194 bridge at Valle Crusis). [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
- Beech Creek
- Buckeye Creek Reservoir
- Coffee Lake
- Beaverdam Creek (confluence of Beaverdam Creek and Little Beaverdam Creek to an unnamed tributary adjacent to the intersection of SR 1201 and SR 1203)
- Laurel Creek
- Cove Creek (SR 1233 bridge at Zionville to SR 1233 bridge at Amantha)
- Dutch Creek (second bridge on SR 1134 to mouth)
- (X) Wilkes County:
- Yadkin River (not trout water)
- Roaring River (not trout water)
- East Prong Roaring River (Bullhead Creek to Brewer's Mill on SR 1943) [Delayed Harvest Regulations apply to portion on Stone Mountain State Park. See Subparagraph (a)(5) of this Rule.]
- Stone Mountain Creek [Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.]
- Middle Prong Roaring River (headwaters to second bridge on SR 1736)
- Bell Branch Pond
- Boundary Line Pond
- West Prong Roaring River (not trout waters)
- Pike Creek
- Pike Creek Pond
- Reddies River (not trout water)
- Middle Fork Reddies River (Clear Prong) (headwaters to bridge on SR 1580)
- South Fork Reddies River (headwaters to confluence with Middle Fork Reddies River)
- North Fork Reddies River (Vannoy Creek) (headwaters to Union School bridge on SR 1559)
- Darnell Creek (North Prong Reddies River) (downstream ford on SR 1569 to confluence with North Fork Reddies River)
- Lewis Fork Creek (not trout water)
- South Prong Lewis Fork (headwaters to Lewis Fork Baptist Church)
- Fall Creek (except portions posted against trespass)
- (Y) Yancey County:
- Nolichucky River (not trout water)
- Cane River [Bee Branch (SR 1110) to Bowlens Creek]
- Bald Mountain Creek (except portions posted against trespass)
- Indian Creek (not trout water)
- Price Creek (junction of SR 1120 and SR 1121 to Indian Creek)
- North Toe River (not trout water)
- South Toe River (Clear Creek to lower boundary line of Yancey County recreation park except where posted against trespass)
- (2) Wild Trout Waters. All waters designated as Public Mountain Trout Waters on the game lands listed in Subparagraph (b)(2) of 15A NCAC 10D .0104, are classified as Wild Trout Waters unless specifically classified otherwise in Subparagraph (a)(1) of this Rule. The trout

waters listed in this Subparagraph are also classified as Wild Trout Waters.

- (A) Alleghany County:
 - Big Sandy Creek (portion on Stone Mountain State Park)
 - Ramey Creek (entire stream)
 - Stone Mountain Creek (that portion on Stone Mountain State Park)
- (B) Ashe County:
 - Big Horse Creek (Virginia State Line to Mud Creek at SR 1363) [Catch and Release/Artificial Lures Only Regulations apply. See Subparagraph (a)(3) of this Rule.]
 - Unnamed tributary of Three Top Creek (portion located on Three Top Mountain Game Land) [Catch and Release/Artificial Lures Only Regulations apply. See Subparagraph (a)(3) of this Rule.]
- (C) Avery County:
 - Birchfield Creek (entire stream)
 - Cow Camp Creek (entire stream)
 - Cranberry Creek (headwaters to US 19E/NC 194 bridge)
 - Elk River (portion on Lees-McRae College property, excluding the millpond) [Catch and Release/Artificial Flies Only Regulations apply. See Subparagraph (a)(4) of this Rule.]
 - Gragg Prong (entire stream)
 - Horse Creek (entire stream)
 - Jones Creek (entire stream)
 - Kentucky Creek (entire stream)
 - North Harper Creek (entire stream)
 - Plumtree Creek (entire stream)
 - Roaring Creek (entire stream)
 - Rockhouse Creek (entire stream)
 - South Harper Creek (entire stream)
 - Webb Prong (entire stream)
 - Wilson Creek [Catch and Release/Artificial Lures Only Regulations apply. See Subparagraph (a)(3) of this Rule.]
- (D) Buncombe County:
 - Carter Creek (game land portion) [Catch and Release/Artificial Lures only Regulations apply. See Subparagraph (a)(3) of this Rule.]
- (E) Burke County:
 - All waters located on South Mountain State Park, except the main stream of Jacob Fork
 - Between the mouth of Shinny Creek and the lower park boundary where

- Delayed Harvest Regulations apply, and Henry Fork and tributaries where Catch and Release/Artificial Lures Only Regulations apply. See Subparagraphs (a)(3) and (a)(5) of this Rule.
- (F) Nettle Branch (game land portion)
 - Caldwell County:
 - Buffalo Creek (Watauga County line to Long Ridge Branch)
 - Joel Creek (Watauga County line to first falls upstream of the end of SR 1574)
 - Rockhouse Creek (entire stream)
 - (G) Cherokee County:
 - Bald Creek (game land portions, including tributaries) [Wild Trout/Natural Bait Waters Regulations apply. See Subparagraph (a)(6) of this Rule.]
 - Dockery Creek (game land portions, including tributaries) [Wild Trout/Natural Bait Waters Regulations apply. See Subparagraph (a)(6) of this Rule.]
 - (H) Graham County:
 - South Fork Squally Creek (entire stream)
 - Squally Creek (entire stream)
 - (I) Haywood County:
 - Hurricane Creek (including portions of tributaries on game lands) [Wild Trout/Natural Bait Waters Regulations apply. See Subparagraph (a)(6) of this Rule.]
 - (J) Henderson County:
 - Green River (I-26 bridge to Henderson/Polk County line)
 - (K) Jackson County:
 - Gage Creek (entire stream)
 - North Fork Scott Creek (entire stream)
 - Tanasee Creek (entire stream)
 - Whitewater River (downstream from Silver Run Creek to South Carolina State line)
 - Wolf Creek (entire stream, except Balsam Lake and Wolf Creek Lake)
 - (L) Madison County:
 - Big Creek (headwaters to the lower game land boundary, including tributaries) [Wild Trout/Natural Bait Waters Regulations apply. See Subparagraph (a)(6) of this Rule.]
 - (M) Mitchell County:
 - Green Creek (headwaters to Green Creek Bridge, except where posted against trespass)

- Little Rock Creek (headwaters to Green Creek Bridge, including all tributaries, except where posted against trespass)
Wiles Creek (game land boundary to mouth)
- (N) Polk County
Green River (Henderson County line to Fishtop Falls Access Area)
Pulliam (Fulloms) Creek and tributaries (game lands portions)
- (O) Transylvania County:
All waters located on Gorges State Park
Whitewater River (downstream from Silver Run Creek to South Carolina State line)
- (P) Watauga County:
Dutch Creek (headwaters to second bridge on SR 1134)
Howards Creek (headwaters to lower falls)
Watauga River (Avery County line to steel bridge at Riverside Farm Road)
- (Q) Wilkes County:
Big Sandy Creek (portion on Stone Mountain State Park)
Garden Creek (portion on Stone Mountain State Park)
Harris Creek and tributaries (portions on Stone Mountain State Park) [Catch and Release
Artificial Lures Only Regulations apply. See Subparagraph (a)(4) of this Rule.]
Widow Creek (portion on Stone Mountain State Park)
- (R) Yancey County:
Cattail Creek (Bridge at Mountain Farm Community Road (Pvt) to NC 197 bridge)
Lickskillet Creek (entire stream)
Middle Creek (game land boundary to mouth)
Rock Creek (game land boundary to mouth)
South Toe River (game land boundary downstream to Clear Creek)
- (3) Catch and Release/Artificial Lures Only Trout Waters. Those portions of designated wild trout waters as listed in this Subparagraph, including tributaries except as noted, are further classified as Catch and Release/Artificial Lures Only waters. Only artificial lures having one single hook may be used. No fish may be harvested or be in possession while fishing these streams:
- (A) Ashe County:
Big Horse Creek (Virginia State line to Mud Creek at SR 1363 excluding tributaries)
Unnamed tributary of Three Top Creek (portion located on Three Top Mountain Game Lands)
- (B) Avery County:
Wilson Creek (game land portion)
- (C) Buncombe County:
Carter Creek (game land portion)
- (D) Burke County:
Henry Fork (portion on South Mountains State Park)
- (E) Jackson County:
Flat Creek
Tuckasegee River (upstream of Clarke property)
- (F) McDowell County:
Newberry Creek (game land portion)
- (G) Wilkes County:
Harris Creek (portion on Stone Mountain State Park)
- (H) Yancey County:
Lower Creek
Upper Creek
- (4) Catch and Release/Artificial Flies Only Trout Waters. Those portions of designated wild trout waters as listed in this Subparagraph, including tributaries except as noted, are further classified as Catch and Release/Fly Fishing Only waters. Only artificial flies having one single hook may be used. No fish may be harvested or be in possession while fishing these streams:
- (A) Avery County:
Elk River (portion on Lees-McRae College property, excluding the millpond)
Lost Cove Creek (game land portion, excluding Gragg Prong and Rockhouse Creek)
- (B) Transylvania County:
Davidson River (headwaters to Avery Creek, excluding Avery Creek, Looking Glass Creek and Grogan Creek)
- (C) Yancey County:
South Toe River (portion from the concrete bridge above Black Mountain Campgroup downstream to game land boundary, excluding Camp Creek and Big Lost Cove Creek)
- (5) Delayed Harvest Trout Waters. Those portions of designated Hatchery Supported Trout Waters as listed in this Subparagraph, excluding tributaries except as noted, are

further classified as Delayed Harvest Waters. Between 1 October and one-half hour after sunset on the Friday before the first Saturday of the following June, inclusive, it is unlawful to possess natural bait and only artificial lures with one single hook may be used. No fish may be harvested or be in possession while fishing these streams during this time. These waters are closed to fishing between one-half hour after sunset on the Friday before the first Saturday in June and 6:00 a.m. on the first Saturday in June. At 6:00 a.m. on the first Saturday in June these streams open for fishing under Hatchery Supported Waters rules:

- (A) Ashe County:
Trout Lake
Helton Creek (Virginia state line to New River)
- (B) Burke County:
Jacob Fork (Shinny Creek to lower South Mountains State Park boundary)
- (C) Haywood County:
West Fork Pigeon River (Queen Creek to the first game land boundary upstream of Lake Logan)
- (D) Henderson County:
North Fork Mills River (game land portion below the Hendersonville watershed dam)
- (E) Jackson County:
Tuckasegee River (NC 107 bridge at Love Field Downstream to the Dillsboro dam)
- (F) Macon County:
Nantahala River (portion from Whiteoak Creek to the Nantahala Power and Light power house discharge canal)
- (G) Madison County:
Big Laurel Creek (NC 208 bridge to the US 25-70 bridge)
Shelton Laurel Creek (NC 208 bridge at Belva to the confluence with Big Laurel Creek)
- (H) McDowell County:
Curtis Creek (game lands portion downstream of U.S. Forest Service boundary at Deep Branch)
- (I) Mitchell County:
Cane Creek (NC 226 bridge to NC 80 bridge)
- (J) Polk County:
Green River (Fishtop Falls Access Area to confluence with Cove Creek)
- (K) Surry County:

Mitchell River (0.6 mile upstream of the end of SR 1333 to the SR 1330 bridge below Kapps Mill Dam)

- (L) Transylvania County:
East Fork French Broad River (Glady Fork to French Broad River)
Little River (confluence of Lake Dense outflow to Hooker Falls)
 - (M) Watauga County:
Watauga River (SR 1557 bridge to NC 105 bridge and SR 1114 bridge to NC 194 bridge at Valle Crucis)
 - (N) Wilkes County:
East Prong Roaring River (from Bullhead Creek downstream to the Stone Mountain State Park lower boundary)
Stone Mountain Creek (from falls at Allegheny County line to confluence with East Prong Roaring River and Bullhead Creek in Stone Mountain State Park)
- (6) Wild Trout/Natural Bait Waters. Those portions of designated Wild Trout Waters as listed in this Subparagraph, including tributaries except as noted, are further classified as Wild Trout/Natural Bait Waters. All artificial lures and natural baits, except live fish, are allowed provided they are fished using only one single hook. The creel limit, size limit, and open season are the same as other Wild Trout Waters [see 15A NCAC 10C .0305(a)].
- (A) Cherokee County:
Bald Creek (game land portions)
Dockery Creek (game land portions)
Tellico River (Fain Ford to Tennessee state line excluding tributaries)
 - (B) Clay County:
Buck Creek (game land portion downstream of US 64 bridge)
 - (C) Graham County:
Deep Creek
Long Creek (game land portion)
 - (D) Haywood County:
Hurricane Creek (including portions of tributaries on game lands)
 - (E) Jackson County:
Chattooga River (SR 1100 bridge to South Carolina state line)
(lower) Fowler Creek (game land portion)
Scotsman Creek (game land portion)
 - (F) Macon County:
Chattooga River (SR 1100 bridge to South Carolina state line)
Jarrett Creek (game land portion)
Kimsey Creek
Overflow Creek (game land portion)

- Park Creek
- Tellico Creek (game land portion)
- Turtle Pond Creek (game land portion)
- (G) Madison County:
 - Big Creek (headwaters to the lower game land boundary, including tributaries)
- (H) Transylvania County:
 - North Fork French Broad River (game land portions downstream of SR 1326)
 - Thompson River (SR 1152 to South Carolina state line, except where posted against trespass, including portions of tributaries within this section located on game lands)

(7) Special Regulation Trout Waters. Those portions of Designated Public Mountain Trout Waters as listed in this Subparagraph, excluding tributaries as noted, are further classified as Special Regulation Trout Waters. Regulations specific to each water are defined below:

- Burke County
 - Catawba River (Muddy Creek to City of Morganton water intake dam).
 - Regulation: The daily creel limit is 7 trout and only one of which may be greater than 14 inches in length; no bait restrictions; no closed season.

(b) Fishing in Trout Waters

- (1) Hatchery Supported Trout Waters. It is unlawful to take fish of any kind by any manner whatsoever from designated public mountain trout waters during the closed seasons for trout fishing. The seasons, size limits, creel limits and possession limits apply in all waters, whether designated or not, as public mountain trout waters. Except in power reservoirs and city water supply reservoirs so designated, it is unlawful to fish in designated public mountain trout waters with more than one line. Night fishing is not allowed in most hatchery supported trout waters on game lands [see 15A NCAC 10D .0104(b)(1)].
- (2) Wild Trout Waters. Except as otherwise provided in Subparagraphs (a)(3), (a)(4), and (a)(6) of this Rule, the following rules apply to fishing in wild trout waters.
 - (A) Open Season. There is a year round open season for the licensed taking of trout.
 - (B) Creel Limit. The daily creel limit is four trout.
 - (C) Size Limit. The minimum size limit is seven inches.

- (D) Manner of Taking. Only artificial lures having only one single hook may be used. No person shall possess natural bait while fishing wild trout waters except those waters listed in 15A NCAC 10C .0205(a)(6).
- (E) Night Fishing. Fishing on wild trout waters is not allowed between one-half hour after sunset and one-half hour before sunrise.

History Note: Authority G.S. 113-134; 113-272; 113-292; Eff. February 1, 1976;
Amended Eff. July 1, 1998; July 1, 1997; July 1, 1996;
July 1, 1995; July 1, 1994; July 1, 1993; October 1, 1992;
Temporary Amendment Eff. July 1, 1999;
Amended Eff. July 1, 2000;
Temporary Amendment Eff. July 1, 2001
Temporary Amendment Eff. July 1, 2002;
Amended Eff. August 1, 2002 (approved by RRC on 06/21/01 and 04/18/02);
Temporary Amendment Eff. June 1, 2003;
Amended Eff. June 1, 2004 (this amendment replaces the amendment approved by RRC on July 17, 2003);
Amended Eff. June 1, 2005.

15A NCAC 10C .0206 TROTLINES AND SET-HOOKS

Trotlines and set-hooks may be set in the inland waters of North Carolina, provided no live bait is used; except that no trotlines or set-hooks may be set in designated public mountain trout waters or in any of the impounded waters on the Sandhills Game Land. In Lake Waccamaw, trotlines or set-hooks may be set only from October 1 through April 30. For the purposes of this Rule, a set-hook is defined as any hook and line which is attached at one end only to a stationary or floating object and which is not under immediate control and attendance of the person using such device. Each trotline and set-hook, except jug-hooks, shall have attached the name and address of the user legibly and indelibly inscribed. For purposes of this Rule, a "jug-hook" is a single hook and line attached to a floating jug. Each trotline shall be conspicuously marked at each end and each set-hook conspicuously marked at one end with a flag, float, or other prominent object so that its location is readily discernable by boat operators and swimmers. Trotlines must be set parallel to the nearest shore in all inland fishing waters unless otherwise prohibited. All trotlines and throwlines must be fished at least once daily and all fish removed at that time. Untended trotlines and set-hooks other than jug hooks may be removed from the water by wildlife enforcement officers when located in areas of multiple water use. For purposes of this Rule, a trotline or set-hook is considered "untended" when no bait is present on the device. Recognizing the safety hazards to swimmers, boaters and water skiers which are created by floating metal cans and glass jugs, it is unlawful to use metal cans or glass jugs as floats. This shall not be construed to prohibit the use of plastic jugs, cork, styrofoam, or similar materials as floats.

History Note: Authority G.S. 113-134; 113-272; 113-292; Eff. February 1, 1976;

*Amended Eff. July 1, 1993; May 1, 1992; July 1, 1989;
January 1, 1982;
Temporary Amendment Eff. July 1, 2002;
Amended Eff. June 1, 2005; August 1, 2002.*

15A NCAC 10C .0209 TRANSPORTATION OF LIVE FISH

(a) Fish Transport: It shall be unlawful for any person, firm, or corporation to transport live freshwater nongame fishes, or live game fishes in excess of the possession limit, or fish eggs without having in possession a permit obtained from the North Carolina Wildlife Resources Commission.

(b) Fish Stocking: It shall be unlawful for any person, firm, or corporation to stock any life stage of any species of fish in the inland fishing waters of this State without having first procured a stocking permit from the North Carolina Wildlife Resources Commission.

(c) Permits for stocking fish shall be issued as follows:

- (1) Application for a stocking permit shall be made on a form provided by the Commission. The applicant shall specify the purpose for the stocking, species to be stocked, the source of the stock, the number of individual specimens to be released, and the location where release is desired.
- (2) Before issuing a stocking permit, the Executive Director shall review the application and determine, based on principles of wildlife management and biological science, that the proposed stocking will not:
 - (A) threaten the introduction of epizootic disease or
 - (B) create a danger to or an imbalance in the environment inimical to the conservation of wildlife resources.
- (3) Based on the determination made in Subparagraph (2):
 - (A) If the Executive Director determines that either or both conditions cannot be met under any circumstances, the application shall be denied.
 - (B) If the Executive Director determines that both conditions may be met only by the introduction of fewer than the number requested, a permit only for the number that may be safely released shall be issued.
 - (C) If the Executive Director determines that the number requested may be safely released, he shall issue the permit.
- (4) Any stocking permit issued by the Commission may impose the following conditions or restrictions:
 - (A) Location where the permitted number of fish may be stocked.
 - (B) Certification that fish are free of certifiable diseases by the vendor or a

laboratory qualified to make such determination.

- (C) Documentation of the date, time and location of the release.
 - (D) Access by the Commission to the property where fish introductions occur to assess impacts of the introduction.
 - (E) All conditions required shall be included in writing on the permit.
- (5) Based on the criteria in Subparagraph (2), no permit shall be issued to stock any of the following species in the areas indicated:

SPECIES	LOCATION
Salmonids except brown, brook, and rainbow trout	Statewide
Flathead catfish	Statewide

(d) For purposes of this Rule, stocking is the introduction or attempted introduction of one or more individuals of a particular species of live fish into public waters for any purpose other than:

- (1) As bait affixed to a hook and line, or
- (2) A release incidental to "catch and release" fishing in an area within the same body of water where the fish was caught, or within an adjacent body of water not separated from that body by any natural or manmade obstruction to the passage of that species.

(e) The release of more than the daily creel limit, or if there is no established creel limit for the species, more than five individuals of the species, shall constitute prima facie evidence of an intentional release.

*History Note: Authority G.S. 113-134; 113-135; 113-274; 113-292;
Eff. February 1, 1976;
Amended Eff. June 1, 2005.*

15A NCAC 10C .0211 POSSESSION OF CERTAIN FISHES

It is unlawful to transport, purchase, possess, or sell any live individuals of piranha, "walking catfish" (*Clarias batrachus*), snakehead fish (from the Family Channidae, formerly Ophiocephalidae), black carp (*Mylopharyngodon piceus*), rudd (*Scardinius erythrophthalmus*), round goby (*Neogobius melanostomus*), tubenose goby (*Proterorhinus marmoratus*), ruffe (*Gymnocephalus cernuus*), Japanese mysterysnail (*Cipangopaludina japonica*), Chinese mysterysnail (*Cipangopaludina chinensis malleata*), red-rim melania (*Melanoides tuberculatus*), virile crayfish (*Orconectes (Gremicambarus) virilis*), rusty crayfish (*Orconectes (Procericambarus) rusticus*), white amur or "grass carp" (*Ctenopharyngodon idella*), swamp or "rice" eel (*Monopterus albus*), or red shiner (*Cyprinella lutrensis*) or to stock any of them in the public or private waters of North Carolina, except that the triploid grass carp certified to be sterile by genetic testing at a federal, state, or university laboratory may be bought, possessed and stocked locally for control of aquatic vegetation under a permit issued by the Executive Director.

*History Note: Authority G.S. 113-134; 113-292;
 Eff. February 1, 1976;
 Amended Eff. September 1, 1984;
 Temporary Amendment Eff. July 1, 2001;
 Amended Eff. July 18, 2002;
 Temporary Amendment Eff. September 1, 2002;
 Amended Eff. June 1, 2005; August 1, 2004.*

**15A NCAC 10C .0301 INLAND GAME FISHES
 DESIGNATED**

The following fishes are classified and designated as inland game fishes:

- (1) mountain trout, all species including but not limited to rainbow, brown and brook trout;
- (2) muskellunge, chain (jack) and redbfin pickerel;
- (3) yellow perch, when found in inland waters, walleye and sauger;
- (4) black bass, including largemouth, smallmouth, spotted and redeye bass;
- (5) black and white crappie;
- (6) sunfish, including bluegill (bream), redbreast (robin), redear (shellcracker), pumpkinseed, warmouth, rock bass, (redeye), flier, Roanoke bass, and all other species of the sunfish family (Centrarchidae) not specifically listed in this Rule;
- (7) spotted sea trout (speckled trout), when found in inland fishing waters;
- (8) flounder, when found in inland fishing waters;
- (9) red drum (channel bass, red fish, puppy drum), when found in inland fishing waters;
- (10) striped bass, white bass, white perch and Morone hybrids (striped bass-white bass), when found in inland fishing waters;
- (11) American and hickory shad, when found in inland fishing waters;
- (12) kokanee salmon.

*History Note: Authority G.S. 113-134; 113-129;
 Eff. February 1, 1976;
 Amended Eff. June 1, 2005; June 1, 2004; July 1, 1996;
 July 1, 1990; July 1, 1983; January 1, 1981; January 1, 1980.*

**15A NCAC 10C .0401 MANNER OF TAKING
 NONGAME FISHES: PURCHASE AND SALE**

(a) Except as permitted by the rules in this Section, it shall be unlawful to take nongame fishes from the inland fishing waters of North Carolina in any manner other than with hook and line or grabbling. Nongame fishes may be taken by hook and line or grabbling at any time without restriction as to size limits or creel limits, with the following exceptions:

- (1) Blue crabs shall have a minimum carapace width of five inches (point to point):
- (2) No person shall take or possess during one day more than 25 herring (alewife and blueback in aggregate) that are greater than 6 inches in length from the inland fishing waters of coastal rivers and their tributaries up to the first impoundment dam of the main course on

the rivers. First impoundment dams are: Roanoke Rapids Dam on Roanoke River, Rocky Mount Mill Dam on Tar River, Milburnie Dam on Neuse River, Buckhorn Dam on Cape Fear River, Lake Waccamaw Dam on Waccamaw River and Blewett Falls Dam on Pee-Dee River.

- (3) Grass carp shall not be taken or possessed on Lake James, Lake Norman and Mountain Island, Gaston and Roanoke Rapids reservoirs, except that two fish per day may be taken by bow and arrow.
- (4) No trotlines or set-hooks shall be used in the impounded waters located on the Sandhills Game Land or in designated public mountain trout waters.
- (5) In Lake Waccamaw, trotlines or set-hooks may be used only from October 1 through April 30.

(b) The season for taking nongame fishes by other hook and line methods in designated public mountain trout waters shall be the same as the trout fishing season.

(c) Nongame fishes, except alewife and blueback herring (greater than six inches in length) and bowfin, taken by hook and line, grabbling or by licensed special devices may be sold. Alewife and blueback herring less than 6 inches in length may be sold except in those waters specified in Paragraph (d) of Rule .0402 of this Section, where their possession is prohibited. Eels less than six inches in length may not be taken from inland waters for any purpose.

(d) Freshwater mussels, including the Asiatic clam (*Corbicula fluminea*), may only be taken from impounded waters, except mussels shall not be taken in Lake Waccamaw and in University Lake in Orange County. It shall be unlawful to possess more than 200 freshwater mussels.

(e) It shall be unlawful to use boats powered by gasoline engines on impoundments located on the Barnhill Public Fishing Area.

(f) In the posted waters listed below it shall be unlawful to take channel, white or blue catfish (forked tail catfish) by means other than hook and line; the daily creel limit for forked tail catfish is six fish in aggregate:

- Cedarrock Pond, Alamance County
- Lake Julian, Buncombe County
- Lake Tomahawk, Buncombe County
- Frank Liske Park Pond, Cabarrus County
- Rabbit Shuffle Pond, Caswell County
- Lake Rim, Cumberland County
- Etheridge Pond on the Barnhill Public Fishing Area, Edgecombe County
- Indian Lake, Edgecombe County
- Newbold Pond on the Barnhill Public Fishing Area, Edgecombe County
- C.G. Hill Memorial Park Pond, Forsyth County
- Kernersville Lake, Forsyth County
- Winston Pond, Forsyth County
- Bur-Mil Park Ponds, Guilford County
- Hagan-Stone Park Ponds, Guilford County
- Oka T. Hester Pond, Guilford County

San-Lee Park Ponds, Lee County
 Kinston Neuseway Park Pond, Lenoir County
 Freedom Park Pond, Mecklenburg County
 Hornet's Nest Pond, Mecklenburg County
 McAlpine Lake, Mecklenburg County
 Park Road Pond, Mecklenburg County
 Reedy Creek Park Ponds, Mecklenburg County
 Squirrel Park Pond, Mecklenburg County
 Lake Luke Marion, Moore County
 Anderson Community Park, Orange County
 Lake Michael, Orange County
 River Park North Pond, Pitt County
 Ellerbe Community Lake, Richmond County
 Hamlet City Lake, Richmond County
 Indian Camp Lake, Richmond County
 Salisbury Community Lake, Rowan County
 Big Elkin Creek, Surry County
 Apex Community Lake, Wake County
 Bass Lake, Wake County
 Bond Park Lake, Wake County
 Lake Crabtree, Wake County
 Shelley Lake, Wake County
 Simpkins Pond, Wake County
 Lake Toisnot, Wilson County
 Harris Lake County Park Ponds, Wake County

- (4) the head waters and including all waters of the creek south of the state line.
 Flat Creek at NC Highway 39 Bridge - Within 50 yards on either side of the NC Highway 39 Bridge.
- (5) Satterwhite Point State Recreation Area.
- (b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any concrete boat launching ramp located on the reservoir.
- (c) Speed Limit in Mooring Areas. No person shall operate a vessel at greater than no-wake speed while within a designated mooring area established by or with the approval of the US Army Corps of Engineers on the waters of the reservoir.
- (d) Speed Limit. No person shall operate a vessel at greater than no-wake speed within any regulated area of the reservoir described in Paragraph (a) of this Rule.
- (e) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter a designated swimming area established by or with the approval of the US Army Corps of Engineers on the waters of the reservoir.
- (f) Placement and Maintenance of Markers. Each of the boards of Commissioners of the above-named counties is designated a suitable agency for placement and maintenance of markers implementing this Rule for regulated areas within their territorial jurisdiction in accordance with the Uniform System, subject to the approval of the US Army Corps of Engineers.

History Note: Authority G.S. 113-134; 113-272; 113-292; Eff. February 1, 1976; Amended Eff. July 1, 1994; July 1, 1993; May 1, 1992; Temporary Amendment Eff. December 1, 1994; Amended Eff. July 1, 1998; July 1, 1996; July 1, 1995; Temporary Amendment Eff. July 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. July 1, 2002; July 1, 2001; Amended Eff. August 1, 2002 (approved by RRC on 06/21/01 and 04/18/02) Temporary Amendment Eff. June 1, 2003; Amended Eff. May 1, 2004 (this amendment replaces the amendment approved by RRC on July 17, 2003); Amended Eff. June 1, 2005.

History Note: Authority G.S. 75A-3; 75A-15; Eff. February 1, 1976; Amended Eff. December 1, 1994; March 25, 1978; Temporary Amendment Eff. June 1, 1998; January 1, 1998; Amended Eff. May 1, 2005; April 1, 1999; July 1, 1998.

15A NCAC 10F .0311 GRANVILLE, VANCE AND WARREN COUNTIES

(a) Regulated Areas. This Rule applies to the following waters of John H. Kerr Reservoir in Granville, Vance and Warren Counties:

- (1) Kimball Point - Within 50 yards of the shoreline in the northernmost cove of the Kimball Point Recreation Area located at the western end of SR 1204 in Warren County.
- (2) Kerr Lake Methodist Campground - Beginning 50 yards north and ending 50 yards east of the Kerr Lake Methodist Campground.
- (3) Lower Mill Creek - Beginning at a point on the eastern side of Lower Mill Creek where it intersects the North Carolina - Virginia state line, running across the creek with said state line and then running in a southerly direction on both the east and west sides of the creek to

15A NCAC 10H .0104 QUALITY OF BIRDS RELEASED

- (a) All birds purchased or raised for release on hunting preserves shall be healthy and free from disease. Possession of unhealthy or diseased birds shall be grounds for revocation or denial of a controlled hunting preserve license.
- (b) Waterfowl shall be tested for Avian Influenza (AI) and Exotic Newcastle Disease (END) by use of serological screening methods and according to the following sample sizes:
 <100 birds - test 95% of source flock or shipment
 101-200 birds - test 44% of source flock or shipment
 201-300 birds - test 26% of source flock or shipment
 301-400 birds - test 18% of source flock or shipment
 401-500 birds - test 14% of source flock or shipment
 >500 birds - test 58 individuals from source flock or shipment.
- (c) Waterfowl that have tested positive in seriological tests shall be tested further by virus isolation/polymerase-chain-reaction (PCR) tests and identification techniques.
- (d) Cloacal swabs pooled into groups of no more than five samples for testing shall be used for virus isolation or PCR tests for AI and END.
- (e) Final virus isolation/PCR tests that are required because of positive results of serological tests shall be conducted within 10 days prior to release of birds.
- (f) The Wildlife Resources Commission shall not accept Directigen[®] test results for AI tests on captive-reared waterfowl.

(g) Test results shall not be used to accept or reject any individual bird(s) from shipments or flocks that have positive results on any assay.

(h) All test results shall be submitted directly from the testing lab to the Wildlife Resources Commission, Division of Wildlife Management.

(i) Neither permit nor license shall be issued until tests are negative for AI and END.

History Note: Authority G.S. 113-134; 113-273; Eff. February 1, 1976; Amended Eff. June 1, 2005; November 1, 1990.

15A NCAC 10H .0904 DISPOSITION OF BIRDS OR EGGS

(a) **Diseased Birds.** No game bird propagator licensed under this Section shall knowingly sell or otherwise transfer possession of any live game bird that shows evidence of any communicable disease, except that such transfer may be made to a qualified veterinarian or pathologist for examination and diagnosis. Disposition of any game bird having a communicable disease in a manner not likely to infect wild game bird populations shall be the responsibility of the licensee.

(b) Waterfowl shall be tested as follows:

- (1) Waterfowl shall be tested for Avian Influenza (AI) and Exotic Newcastle Disease (END) by use of serological screening methods and according to the following sample sizes:
 <100 birds - test 95% of source flock or shipment
 101-200 birds - test 44% of source flock or shipment
 201-300 birds - test 26% of source flock or shipment
 301-400 birds - test 18% of source flock or shipment
 401-500 birds - test 14% of source flock or shipment
 >500 birds - test 58 individuals from source flock or shipment.
- (2) Waterfowl that have tested positive in seriological tests shall be tested further by virus isolation/polymerase-chain-reaction (PCR) tests and identification techniques.
- (3) Cloacal swabs pooled into groups of no more than five samples for testing shall be used for virus isolation or PCR tests for AI and END.
- (4) Final virus isolation/PCR tests that are required because of positive results of serological tests shall be conducted within 10 days prior to release of birds.
- (5) The Wildlife Resources Commission shall not accept Directigen[®] test results for AI tests on captive-reared waterfowl.
- (6) Test results shall not be used to accept or reject any individual bird(s) from shipments or flocks that have positive results on any assay.
- (7) All test results shall be submitted directly from the testing lab to the Wildlife Resources

Commission, Division of Wildlife Management.

(8) Neither permit nor license shall be issued until tests are negative for AI and END.

(c) **Sale of Live Birds or Eggs.** Subject to the limitations set forth in Paragraph (b) of Rule .0901 of this Section, any healthy game birds which are authorized to be propagated under this Section, or the eggs thereof, may be sold or transferred alive by any licensed game bird propagator to any other licensed game bird propagator. Licensed game bird propagators may also sell or transfer healthy live game birds to licensed controlled shooting preserve operators or to any person who holds a valid state license or permit to possess the same. Upon any such sale or transfer, a receipt or other written evidence of the transaction shall be prepared in duplicate showing the date, the names and license or permit numbers of both parties, and the species and quantity of the game birds or eggs transferred. A copy of such receipt or writing shall be retained by each of the parties as a part of his records as provided by Rule .0906 of this Section. Any live migratory waterfowl sold or transferred to any person for use in training retrievers or conducting retriever trials must be marked by one of the methods provided by 50 C.F.R. 21.13. Each pheasant sold or transferred for such purposes shall be banded prior to the transfer with a metal leg band which is imprinted with the number of the propagator's license.

(d) **Sale of Dead Game Birds as Food.** Subject to the limitations and conditions indicated in Paragraph (b) of Rule .0901 of this Section and to any applicable laws and regulations relating to pure foods, public health and advertising, game birds produced by game bird propagators licensed under this Section may be killed at any time in any manner, except by shooting during the closed season on the species concerned, and sold for food purposes as provided by the following Subparagraphs:

- (1) **Sale Direct to Consumer.** Unprocessed dead game birds may be sold directly to a consumer when accompanied by a receipt showing the name of the consumer, the name and license number of the propagator, and the quantity and species of the game birds sold. A copy of such receipt shall be retained by the propagator as part of his records. No such bird shall be resold by any such consumer.
- (2) **Sale To or Through a Processor.** Game birds may be sold to any commercial food processor who holds a permit to possess them or delivered to such a processor for processing and packaging prior to sale. In either case, the transfer shall be evidenced by a duplicate receipt identifying the processor by name and permit number and the propagator by name and license number, and indicating the number and species of birds transferred. A copy of such receipt shall be retained by each of the parties as part of his records. The processed carcasses of the birds shall be enclosed in a wrapper or container on the outside of which is indicated the number and species of birds contained, the license number of the propagator, and the fact that such birds were

domestically raised. When so packaged, such processed game birds may be sold at wholesale or at retail through ordinary channels of commerce. This Paragraph shall not apply to dead quail marketed for food purposes under the regulations of the North Carolina Department of Agriculture.

- (3) The eggs of propagated game birds may not be sold for food purposes.

History Note: Authority G.S. 113-134; 113-273; 50 C.F.R., Part 21.13; Eff. January 1, 1981; Amended Eff. June 1, 2005.

15A NCAC 10J .0102 GENERAL REGULATIONS REGARDING USE OF CONSERVATION AREAS

(a) Trespass. Entry on areas posted as Wildlife Conservation Areas for purposes other than wildlife observation, hunting, trapping or fishing shall be as authorized by the landowner and there shall be no removal of any plants or parts thereof, or live or dead nongame wildlife species or parts thereof, or other materials, without the written authorization of the landowner: Restrictions. On those areas designated and posted as Colonial Waterbird Nesting Areas, entry is prohibited during the period of April 1 through August 31 of each year, except by written permission of the landowner. Entry into Colonial Waterbird Nesting Areas during the period of September 1 through March 31 will be as authorized by the landowner.

(b) Littering. No person shall deposit any litter, trash, garbage, or other refuse at any place on any wildlife conservation area except in receptacles provided for disposal of such refuse. No garbage dumps or sanitary landfills shall be established on any wildlife conservation area by any person, firm, corporation, county or municipality, except as permitted by the landowner.

(c) Possession of Hunting Devices. It is unlawful to possess a firearm or bow and arrow on a designated wildlife conservation area at any time except during the open hunting seasons or hunting days for game birds or game animals thereon unless such device is cased or not immediately available for use, provided that such devices may be possessed in designated camping areas for defense of persons and property; and provided further that .22 caliber pistols with barrels not greater than seven and one-half inches in length and shooting only short, long, or long rifle ammunition may be carried as side arms on designated wildlife conservation areas at any time other than by hunters during the special bow and arrow and muzzle-loading firearms deer hunting seasons. This Rule shall not prevent possession or use of bow and arrow as a licensed special fishing device in those waters where such use is authorized. During the closed firearms seasons on big game (deer, bear, boar, wild turkey), no person shall possess a shotgun shell larger than No. 4 shot or any rifle or pistol larger than a .22 caliber rimfire while on a designated wildlife conservation area except that shotgun shells containing any size steel or non-toxic shot may be used while waterfowl hunting. No person shall hunt with or have in possession any shotgun shell containing lead or toxic shot while hunting waterfowl on any area designated as a wildlife

conservation area, except shotgun shells containing lead buckshot may be used while deer hunting.

(d) License Requirements:

(1) Hunting and Trapping:

(A) Requirement. Except as provided in Paragraph (d)(1)(B) of this Rule, any person entering upon any designated wildlife conservation area for the purpose of hunting or trapping shall have in his possession a game lands use license in addition to the appropriate hunting or trapping licenses.

(B) Exception. A person under 16 years of age may hunt on designated wildlife conservation areas on the license of his parent or legal guardian.

(2) Trout Fishing. Any person 16 years of age or over, including an individual fishing with natural bait in the county of his residence, entering a designated wildlife conservation area for the purpose of fishing in designated public mountain trout waters located thereon must have in his possession a regular fishing license and special trout license. The resident and nonresident sportsman's licenses and short-term comprehensive fishing licenses include trout fishing privileges on designated wildlife conservation areas.

(e) Training Dogs. Dogs shall not be trained on designated wildlife conservation areas except during open hunting seasons for game animals or game birds thereon. Dogs may not be allowed to enter any wildlife conservation area designated and posted as a colonial waterbird nesting area during the period of April 1 through August 31.

(f) Trapping. Subject to the restrictions contained in 15 NCAC 10B .0110, .0302, and .0303, trapping of furbearing animals is permitted on any area designated and posted as a wildlife conservation area during the applicable open seasons, except that trapping is prohibited:

- (1) on the Nona Pitt Hinson Cohen Wildlife Conservation Area in Richmond County;
- (2) in posted "safety zones" located on any Wildlife Conservation Area.

(g) Use of Weapons. No person shall hunt or discharge a firearm or bow and arrow from a vehicle, or within 200 yards of any building or designated camping areas, or within, into, or across a posted "safety zone" on any designated wildlife conservation area. No person shall hunt with or discharge a firearm within, into, or across a posted "restricted zone" on any designated wildlife conservation area.

(h) Vehicular Traffic. No person shall drive a motorized vehicle on a road, trail or area posted against vehicular traffic or other than on roads maintained for vehicular use on any designated wildlife conservation area.

(i) Camping. No person shall camp on any designated wildlife conservation area except on an area designated by the landowner for camping. On the coastal islands designated wildlife conservation areas, camping shall be allowed except on those

areas designated and posted as Colonial Waterbird Nesting Areas.

(j) Swimming. No person shall swim in the waters located on designated wildlife conservation areas, except that a person may swim in waters adjacent to coastal island wildlife conservation areas.

(k) Motorboats. No person shall operate any vessel powered by an internal combustion engine on the waters located on designated wildlife conservation areas.

History Note: Authority G.S. 113-134; 113-264; 113-270.3; 113-291.2; 113-291.5; 113-305; 113-306; Eff. February 1, 1990; Amended Eff. June 1, 2005.

15A NCAC 18A .2609 REFRIGERATION: THAWING: AND PREPARATION OF FOOD

(a) All potentially hazardous foods requiring refrigeration shall be kept at or below 45° F (7° C), except when being prepared or served. An air temperature thermometer accurate to 3° F (1.5°C) shall be provided in all refrigerators.

(b) Refrigeration and freezer capacity shall be sufficient to maintain required temperatures on all potentially hazardous foods.

(c) Potentially hazardous foods shall be thawed:

- (1) in refrigerated units at a temperature not to exceed 45° F (7° C);
- (2) 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;
- (3) as a part of the conventional cooking process; or
- (4) in a microwave oven only when the food will be immediately transferred to conventional cooking equipment as part of a continuous cooking process or when the entire, uninterrupted cooking process takes place in the microwave oven.

(d) Employees preparing food shall have used antibacterial soap, dips or hand sanitizers immediately prior to food preparation or shall use clean, plastic disposable gloves or sanitized utensils during food preparation. This requirement is in addition to all handwashing requirements in Section .2600 of these Rules. Food shall be prepared with the least possible manual contact, with utensils and on preparation surfaces that have been cleaned and rinsed prior to use. Preparation surfaces which come in contact with potentially hazardous foods shall be sanitized as provided in Rule .2618(c) of this Section. Raw fruits and raw vegetables shall be washed with potable water to remove soil and other contaminants before being cooked or served.

(e) 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:

- (1) poultry, poultry stuffings, stuffed meats, and stuffings containing meat shall be cooked to heat all parts of the food to at least 165° F

(74°C) with no interruption of the cooking process, and

- (2) pork and any food containing pork shall be cooked to heat all parts of the food to at least 150° F (66° C), and
- (3) ground beef and foods containing ground beef shall be cooked to an internal temperature of at least 155° F (68° C), and
- (4) roast beef shall be cooked to an internal temperature of at least 130° F (54° C), and
- (5) beef steak shall be cooked to a temperature of 130° F (54° C) unless otherwise ordered by the immediate consumer.

(f) Liquid eggs, or uncooked frozen eggs, dry eggs and egg products shall be used only for cooking and baking purposes. This Paragraph does not apply to pasteurized products.

(g) Potentially hazardous foods that have been cooked and then refrigerated shall be reheated to 165° F (74° C) or higher throughout before being served or before being placed in a hot food storage facility except that, food in intact packages from processing plants that are regulated by the food regulatory agency that has jurisdiction over the plants may initially be reheated to 140° F (60° C). Reheating time shall not exceed two hours.

(h) All potentially hazardous foods shall be stored at temperatures of 140° F (60° C) or above; or 45° F (7° C) or below except during necessary periods of preparation and serving. However, roast beef, as described in Subparagraph (e)(4) of this Rule shall be stored at a temperature of at least 130° F (54° C) or above; or 45° F (7° C) or below.

(i) Time only, rather than the temperature requirements set forth in Paragraph (h) of this Rule, may be used as the public health control for a working supply of potentially hazardous food before cooking, or for ready-to-eat potentially hazardous food that is displayed or held for service for immediate consumption if:

- (1) the food is marked or otherwise identified to indicate the time that is four hours past the point in time when the food is removed from temperature control;
- (2) the food is cooked and served, served if ready-to-eat, or discarded, within four hours from the point in time when the food is removed from required temperature control;
- (3) food in unmarked containers or packages or marked to exceed the four hour limit in Subparagraph (1) of this Paragraph, is discarded; and
- (4) written procedures approved by the Department, as being in accordance with these Rules, are maintained in the establishment for the handling of food from the time of completion of the cooking process or when the food is otherwise removed from required temperature control.

These procedures shall be made available to the Department upon request.

(j) Time only, rather than temperature requirements as set forth in Paragraph (h) of this Rule, may be used as the public health

control for a working supply of potentially hazardous food before cooking, or for ready-to-eat potentially hazardous food that is displayed or held for customer take-out, if:

- (1) the food is marked or otherwise identified to indicate the time that is two hours past the point in time when the food is removed from temperature control;
- (2) the food is cooked and served, served if ready-to-eat, or discarded, within two hours from the point in time when the food is removed from required temperature control;
- (3) food in unmarked containers or packages or marked to exceed the two hour limit in Subparagraph (1) of this Paragraph, is discarded; and
- (4) written procedures approved by the Department, as being in accordance with these Rules, are maintained in the establishment for the handling of food from the time of completion of the cooking process or when the food was otherwise removed from required temperature control.

These procedures shall be made available to the Department upon request.

(k) An establishment wishing to move foods controlled under Paragraphs (i) and (j) of this Rule for immediate consumption on the premises, shall have their written procedures for the handling of the food from the time of completion of the cooking process or when the food was otherwise removed from required temperature control, approved by the Department, as being in accordance with these Rules, and shall maintain those approved procedures in the establishment.

(l) In a food establishment that serves a highly susceptible population, time only, rather than temperature, may not be used as the public health control for raw eggs.

(m) All potentially hazardous food that is transported must be maintained at temperatures as noted in Paragraph (h) of this Rule.

(n) A metal stem-type thermometer accurate to 2°F (1° C) shall be available to check food temperatures.

History Note: Authority G.S. 130A-248; Eff. May 5, 1980;

Amended Eff. May 1, 2005; October 1, 2004; August 1, 1998; October 1, 1993; May 1, 1991; October 1, 1990.

TITLE 18 – SECRETARY OF STATE

**18 NCAC 06 .1205 LIMITED OFFERINGS
PURSUANT TO G.S. 78A-17(9)**

(a) Any issuer relying upon the exemption provided by G.S. 78A-17(9) in connection with an offering of a security made in reliance upon Rule 505 of Regulation D promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, 17 C.F.R. 230.505 (1982) (and as subsequently amended) shall comply with the provisions of Rules .1206, .1207 and .1208 of this Section; provided that such compliance shall not be required if the security is offered and

sold only to persons who will be actively engaged, on a regular basis, in the management of the issuer's business; and provided further, that compliance with provisions of Paragraphs (a), (b), and (c) of Rule .1208 of this Section shall not be required, except in the case of the offer and sale of a viatical settlement contract, if the security is offered to not more than five individuals who reside in this State.

(b) Any issuer relying upon the exemption provided by G.S. 78A-17(9) in connection with an offering of a direct participation program security made solely in reliance upon an exemption from registration contained in Section 4(2) or Section 3(a)(11) of the Securities Act of 1933 as amended, or made solely in reliance upon Rule 504 of Regulation D promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, 17 C.F.R. 230.504 (1982), (and as subsequently amended), or any person relying upon the exemption provided by G.S. 78A-17(9) in connection with an offering of a viatical settlement contract, shall comply with the following conditions and limitations:

- (1) No commission, discount, finder's fee or other similar remuneration or compensation shall be paid, directly or indirectly, to any person for soliciting any prospective purchaser of the security sold to a resident of this State unless such person is either registered pursuant to G.S. 78A-36 or exempt from registration thereunder or the issuer reasonably believes that such person is so registered or exempt therefrom.
- (2) In all offers or sales of direct participation program securities, the provisions of Rule .1313 of this Chapter regarding registered offerings of direct participation program securities shall be applicable; provided that such compliance shall not be required with respect to offers or sales to individuals who will be actively engaged, on a regular basis, in the management of the issuer's business. In all sales of viatical settlement contracts, the provisions of Rule .1320 shall be applicable.
- (3) Any prospectus or disclosure document used in offering the securities in this state shall disclose the legend(s) as required by the provisions of Rule .1316 of this Chapter.
- (4) Not less than 10 business days prior to any sale of the securities to a resident of this State which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration from, a purchaser, the issuer shall file with the administrator, or cause to be so filed:
 - (A) A statement signed by the issuer and acknowledged before a notary public or other similar officer:
 - (i) identifying the issuer (including name, form of organization, address and telephone number);

- (ii) identifying the person(s) who will be selling the securities in this State (and in the case of such persons other than the issuer and its officers, partners and employees, describing their relationship with the issuer in connection with the transaction and the basis of their compliance with or exemption from the requirements of G.S. 78A-36) and describing any commissions, discounts, fees or other remuneration or compensation to be paid to such persons;
- (iii) containing a summary of the proposed offering including:
 - (I) a description of the securities to be sold;
 - (II) the name(s) of all general partners of an issuer which is a partnership and, with respect to a corporate issuer or any corporate general partner(s) of any issuer which is a partnership, the date and place of incorporation and the names of the directors and executive officers of such corporation(s);
 - (III) the anticipated aggregate dollar amount of the offering;
 - (IV) the anticipated required minimum investment, if any, by each purchaser of the securities to be offered;
 - (V) a brief description of the issuer's business and the anticipated use of the proceeds of the offering; and
 - (VI) a list of the states in which the securities
- (iv) are proposed to be sold; containing an undertaking to furnish to the administrator, upon written request, evidence of compliance with Subparagraphs (1), (2), and (3) of this Paragraph (b);
- (v) in the case of a direct participation program security, containing an undertaking to furnish to the administrator, upon written request, a copy of any written document or materials used or proposed to be used in connection with the offer and sale of the securities; and
- (vi) in the case of a viatical settlement contract, the filing shall include a copy of all written documents or materials, including advertising, used or proposed to be used in connection with the offer and sale of the securities.
- (B) A consent to service of process naming the North Carolina Secretary of State as service agent using the Uniform Consent to Service of Process (Form U-2) signed by the issuer and acknowledged before a notary public or other similar officer; and accompanied by a properly executed Corporate Resolution (Form U-2A), if applicable;
- (C) A non-refundable filing fee as established by G.S. 78A-17(9), payable to the North Carolina Secretary of State.
- (5) In the case of offers of viatical settlement contracts, the persons offering the security shall deliver to the offeree written materials complying with G.S. 78A-13. Additionally, any materials used in the offering of the security shall comply with G.S. 78A-14 and shall provide each offeree written notice of his or her rights under G.S. 78A-56 and under Rule .1501 of this Chapter.
- (6) Except in the case of the offer or sale of a viatical settlement contract, compliance with the provisions of Subparagraph (4) of this Paragraph (b) shall not be required if the security is offered to:
 - (A) not more than five individuals who reside in this State, excluding individuals described in

- Subparagraph (6)(B) of this Paragraph (b); and
- (B) individuals who will be actively engaged, on a regular basis, in the management of the issuer's business.

(c) Neither the issuer nor any person acting on the issuer's behalf shall offer, offer to sell, offer for sale or sell the securities claimed to be exempt under G.S. 78A-17(9) by any means or any form of general solicitation or general advertising.

History Note: Authority G.S. 78A-13; 78A-17(9); 78A-49(a); Eff. January 1, 1984; Temporary Rule Eff. October 1, 1983, for a period of 120 days to expire on January 29, 1984; Amended Eff. October 1, 1988; Temporary Amendment Eff. October 1, 1997; Amended Eff. August 1, 1998; Temporary Amendment Eff. November 1, 2002; April 1, 2002; Amended Eff. May 1, 2005; August 1, 2004; April 1, 2003.

18 NCAC 06 .1313 REGISTRATION OF DIRECT PARTICIPATION PROGRAM SECURITIES

(a) As a condition to the registration of direct participation program securities, the issuer or dealer(s) effecting sales of such securities pursuant to such registration shall:

- (1) deliver to each offeree of the security in this State prior to any sale of the security to such offeree, a written statement of the investor suitability standards which each offeree must meet in order to purchase the security. The statement may be contained in any offering circular, prospectus or other written document delivered to the offeree; and
- (2) determine, prior to the sale of the security to each person in this State, that the person meets the investor suitability standards applicable to the security. For purposes of this determination, the issuer or dealer(s) shall be entitled to rely conclusively upon a written statement or questionnaire signed by the person and received in good faith and without knowledge that the information stated therein is inaccurate.

(b) The minimum investor suitability standards which shall be imposed for registered offerings of direct participation program securities are as follows:

- (1) The investor shall either have a minimum net worth of two hundred twenty-five thousand dollars (\$225,000) or a minimum net worth of sixty thousand dollars (\$60,000) and had during the last tax year or estimates that the investor will have during the current tax year, taxable income of at least sixty thousand dollars (\$60,000) without regard to the investment in the security.
- (2) Net worth shall be determined exclusive of principal residence, mortgage thereon, home furnishings and automobiles. In the case of sales to fiduciary accounts, the investor

suitability standards shall be met by the fiduciary or the fiduciary account or by the donor who directly or indirectly supplies the funds to purchase the securities.

(c) The administrator will permit the substitution of lower suitability standards if such lower standards are consistent with the standards outlined in the NASAA policy statement for that specific type of program. (See CCH NASAA Reports for such policy statements.)

(d) The administrator may modify or waive, upon the showing of good cause, the requirements of Paragraphs (a), (b) and (c) of this Rule, in whole or in part, with respect to a particular security, offering or transaction or the administrator may require higher investor suitability standards with respect to a particular security offering or transaction where necessary for the protection of investors. For purposes of this Rule, "good cause" means a substantial reason related to the investor protection goals intended to be served by the investor suitability requirements of Paragraphs (a), (b), or (c) of this Rule, determined with respect to the relative investment experience, financial sophistication, and financial substance of the offerees; the amounts of the proposed individual investments in the proposed offering; the business history and financial substance of the issuer of the securities; and the relative risk of loss presented by the particular business activity of the issuer.

History Note: Authority G.S. 78A-49(a); Eff. April 1, 1981; Amended Eff. May 1, 2005; October 1, 1988; January 1, 1984.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

CHAPTER 52 - BOARD OF PODIATRY EXAMINERS

21 NCAC 52 .0205 PRACTICE ORIENTATION

The board shall require each applicant, who has otherwise successfully completed their requirements to practice in the state, to attend a practice- and ethics-orientation prior to receiving his/her license. Should an applicant be unable to attend the required orientation in person, then the board shall require an applicant to spend up to one week as a trial period to better equip them to practice podiatry in North Carolina in the office of and under the direction of a podiatrist practicing in North Carolina. Such orientation shall take place only in those offices approved by the board and assignment of an orientation office in which to work shall be considered as a portion of the clinical examination in podiatry. The license shall not be issued until the orientation requirement has been fulfilled.

History Note: Authority G.S. 90-202.4(g); 90-202.6(a)(b); Eff. February 1, 1976; Amended Eff. May 1, 2005; December 1, 1988.

TITLE 23 – DEPARTMENT OF COMMUNITY COLLEGES

23 NCAC 02C .0210 LOCAL COLLEGE PERSONNEL POLICIES

(a) Each local board of trustees shall adopt, publish, and implement personnel policies, consistent with all applicable statutes, rules, and regulations, addressing the following issues:

- (1) Adverse weather;
- (2) Annual leave (vacation);
- (3) Drug and alcohol use;
- (4) Civil leave;
- (5) Communicable disease;
- (6) Compensatory leave;
- (7) Definitions of the employment categories and benefits for each:
 - (A) Full-time permanent,
 - (B) Part-time permanent,
 - (C) Full-time temporary, and
 - (D) Part-time temporary;
- (8) Disciplinary action addressing suspension and dismissal;
- (9) Educational leave (reference 23 NCAC 02D .0103);
- (10) Employee evaluation process;
- (11) Employee grievance procedures;
- (12) Employee personnel file;
- (13) Hiring procedures (describing procedures used for employment of both full- and part-time employees);
- (14) Leave transfer;
- (15) Leave without pay;
- (16) Longevity pay plan (reference 23 NCAC 02D .0109);
- (17) Military leave (reference 23 NCAC 02D .0104);
- (18) Nepotism (reference 23 NCAC 02C .0204);
- (19) Non-reappointment;
- (20) Other employee benefits;
- (21) Political activities of employees (reference 23 NCAC 02C .0208);
- (22) Professional development;
- (23) Reduction in force;
- (24) Salary determination methods for full- and part-time employees that address at least the following:
 - (A) Provisions and criteria for salary determination,
 - (B) Requirements for annual salary review, and
 - (C) Establishment of salary formulas, ranges, or schedules;
- (25) Sexual harassment;
- (26) Tuition exemption (reference 23 NCAC 02D .0202);
- (27) Sick leave consistent with provisions of the State Retirement system;
- (28) Secondary Employment that addresses conflict with the employee's primary job responsibilities and institutional resources (the local board of trustees shall approve or disapprove any secondary employment of the

president; the president or any member of the college's senior administration designated by the president shall approve or disapprove secondary employment of all full-time employees); and

- (29) Shared leave consistent with provisions of the Office of State Personnel (reference 25 NCAC 01E .1301 through 25 NCAC 01E .1307).

(b) Each local board of trustees shall submit copies of these policies, including amendments, to the NC Community College System President's office upon adoption.

History Note: Authority G.S. 115D-5; 115D-20; 115D-25.3; Eff. September 1, 1993; Amended Eff. May 1, 2005; January 1, 1996.

23 NCAC 03A .0101 DEFINITIONS AND APPLICATION FOR INITIAL LICENSE

(a) The following terms shall have the following meaning in this subchapter unless the context of a specific rule requires a different interpretation.

- (1) "Proprietary school" means any business school, trade school, technical school, or correspondence school which:
 - (A) offers postsecondary education or training for profit or for a tuition charge or offers classes for the purpose of teaching, for profit or for a tuition charge, any program of study or teaching one or more of the courses or subjects needed to train and educate an individual for employment; and,
 - (B) has any physical presence within the State of North Carolina; and,
 - (C) is privately owned and operated by an owner, partnership or corporation.
- (2) "Classes or schools" as stated in G.S. 115D-88(4a) means classes or schools, which are offered by the seller of the equipment or the seller's agent.
- (3) "Equipment" as stated in G.S. 115D-88 includes software.
- (4) "Classes or schools" conducted by employers for their own employees are exempt. Employers may contract with third part agencies to provide training for their employees. Schools or classes conducted by third party agencies for an employer to train his employees are exempt.
- (5) "Users" as specified in G.S. 115D-88 (4a) means employees or agents of purchasers.
- (6) "Five or fewer students" as stated in G.S. 115D-88 (4b) means total number of students at the time of maximum enrollment during any term.
- (7) "Remote sites" means approved instructional environments in the same county that do not have any administrative staff or administrative

functions such as recruiting, accounting and record keeping taking place.

(b) Application for an Initial License:

- (1) Any person or persons operating a proprietary school with an enrollment of more than five persons in a school in the State of North Carolina shall obtain a license from the North Carolina State Board of Community Colleges except as exempt by G.S. 115D-88.
- (2) A preliminary application shall be submitted setting forth the proposed location of the school, the qualifications of the Chief Administrator of the school, a description of the facilities available, courses to be offered, and financial resources available to equip and maintain the school. Upon approval of the preliminary application, a final application may be submitted. This application shall be verified and accompanied by the following:
 - (A) A certified check or money order in the amount of two thousand five hundred dollars (\$2,500) made payable to the North Carolina State Treasurer;
 - (B) A guaranty bond or alternative to a guaranty bond as set forth in G.S. 115D-95. Except as otherwise provided herein, the bond amount for a proprietary school shall be at least equal to the maximum amount of prepaid tuition held at any time during the fiscal year. During the initial year of operation, the bond amount shall be based on the projected maximum amount of prepaid tuition that will be held at any time during that year. In any event, the minimum surety bond shall be ten thousand dollars (\$10,000);
 - (C) A copy of the school's catalog or bulletin. The catalog shall include a statement addressing each item listed in G.S. 115D-90(b)(7);
 - (D) A financial statement showing capital investment, assets and liabilities, and the proposed operating budget which demonstrates financial stability or a financial statement and an accompanying opinion of the school's financial stability by either an accountant, using generally accepted accounting principles, or a lending institution;
 - (E) A detail of ownership; (This must show stock distribution if the school is a corporation, or partnership agreement if the school will be operated as a partnership.)

- (F) Information on all administrative and instructor personnel who will be active in the operation of the school, either in full- or part-time capacity; (This information must be submitted on forms provided for this purpose.)
 - (G) Enrollment application or student contract form;
 - (H) School floor plan showing doors, windows, halls, and seating arrangement; also offices, rest rooms, and storage space; the size of each room and seating capacity shall be clearly marked for each classroom; lighting showing kind and intensity shall be indicated for each room; the type of heating and cooling system used for the space occupied shall be stated;
 - (I) Photostatic copies of inspection reports or letters from proper officials to show that the building is safe and sanitary and meets all local city, county, municipal, state, and federal regulations such as fire, building, and sanitation codes;
 - (J) If building is not owned by the school, a photostatic copy of the lease held by the school for the space occupied.
- (3) A person or persons purchasing a proprietary school already operating as a licensed school shall comply with all of the requirements for securing an initial license. A license is not transferable to a new owner. All application forms and other data shall be submitted in full. Such terms as "previously submitted" when referring to a former owner's file are not acceptable. If a proprietary school offers classes in more than one county, the school's operations in each such county constitutes a separate school requiring a separate license. Classes conducted by the school in separate locations shall be reported and approved prior to advertising and commencement of classes.
 - (4) Remote sites shall not have any administrative staff or any administrative functions such as recruiting, accounting or record keeping. Each remote site shall be subject to an initial remote site fee of one thousand dollars (\$1,000) and an annual remote site renewal fee of seven hundred and fifty dollars (\$750.00) to be paid by a certified check or money order made payable to the North Carolina State Treasurer. Each remote site shall have an initial site visit and a visit during each annual audit.
 - (5) Classes conducted at remote sites by licensed schools shall be approved prior to advertising and commencement of classes. Any course

- offered at a remote site shall be a part of an approved program of study for that licensed school.
- (6) Changes in application information presented for licensure or relicensure relating to mission, programs, location or stock distribution require prior approval and licensure amendment by the State Board of Community Colleges.
- (A) Program additions require curriculum reviews and program or course approvals prior to initiation. A certified check or money order in the amount of two hundred dollars (\$200.00) made payable to the North Carolina State Treasurer shall accompany each additional program approval request.
- (B) Single course additions or revisions may be individually approved when schools submit a request for license amendment. Course additions or revisions requiring curriculum review, instructor evaluation, and equipment site assessment are subject to the curriculum review fee of two hundred dollars (\$200.00) to be paid by a certified check or money order made payable to the North Carolina State Treasurer.
- (C) School relocations require site visits and approvals prior to use. A certified check or money order in the amount of four hundred dollars (\$400.00) made payable to the North Carolina State Treasurer shall accompany each site relocation approval request.
- (D) Other site assessment visits, such as for program additions and revisions, shall require a certified check or money order made payable to the North Carolina State Treasurer in the amount of two hundred dollars (\$200.00).

History Note: Authority G.S. 115D-88; 115D-89; 115D-90; 115D-91; 115D-92; Eff. September 1, 1993; Amended Eff. Pending consultation per G.S.12-3.1; December 1, 2004.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday May 19, 2005, 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 Monday, May 16, 2005 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

June 16, 2005	July 21, 2005
August 18, 2005	September 15, 2005
October 20, 2005	November 17, 2005
December 15, 2005	

LIST OF APPROVED PERMANENT RULES

May 19, 2005 Meeting

BUILDING COMMISSION

Definitions	01	NCAC	30D	.0103
Pre-Selection	01	NCAC	30D	.0302

MEDICAL CARE COMMISSION

Classification of Medical Facilities	10A	NCAC	13B	.3103
Application of Physical Plant Requirements	10A	NCAC	13F	.0301
Construction	10A	NCAC	13F	.0302
Location	10A	NCAC	13F	.0303
Plans and Specifications	10A	NCAC	13F	.0304
Physical Environment	10A	NCAC	13F	.0305
Housekeeping and Furnishings	10A	NCAC	13F	.0306
Fire Alarm System	10A	NCAC	13F	.0307
Plan for Evacuation	10A	NCAC	13F	.0309
Electrical Outlets	10A	NCAC	13F	.0310
Other Requirements	10A	NCAC	13F	.0311
Building Code and Sanitation	10A	NCAC	13F	.0312
Qualifications of Medication Staff	10A	NCAC	13F	.0403
Qualifications of Activity	10A	NCAC	13F	.0404
Food Service Orientation	10A	NCAC	13F	.0509
Resident Contract Information on Home and Resident Register	10A	NCAC	13F	.0704
Activities Program	10A	NCAC	13F	.0905
Respite Care	10A	NCAC	13F	.0907

Resident Rights	10A NCAC 13F .0909
Resident Records	10A NCAC 13F .1201
Record of Staff Qualifications	10A NCAC 13F .1210
Written Policies and Procedures	10A NCAC 13F .1211
Use of Physical Restraints and Alternatives	10A NCAC 13F .1501
The License	10A NCAC 13G .0202
Qualifications of Medication Staff	10A NCAC 13G .0403
Qualifications of Activity Coordinator	10A NCAC 13G .0404
Food Service Orientation	10A NCAC 13G .0509
Resident Register	10A NCAC 13G .0703
Resident Contract and Information on Home	10A NCAC 13G .0704
Activities Program	10A NCAC 13G .0905
Respite Care	10A NCAC 13G .0907
Resident Rights	10A NCAC 13G .0909
Resident Records	10A NCAC 13G .1201
Written Policies and Procedures	10A NCAC 13G .1211
Record of Staff Qualifications	10A NCAC 13G .1212
Use of Physical Restraints and Alternatives	10A NCAC 13G .1301

MANUFACTURED HOUSING BOARD

Address	11 NCAC 08 .0902
Rule-Making and Hearing Procedures	11 NCAC 08 .0903

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

Definitions	12 NCAC 09A .0103
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COASTAL RESOURCES COMMISSION

Division of Coastal Management	15A NCAC 07A .0101
Nomination and Designation Procedures	15A NCAC 07H .0503
Application Process	15A NCAC 07I .0302
Who is Entitled to a Contested Case	15A NCAC 07J .0301
Petition for Contested Case	15A NCAC 07J .0302
Project Maintenance Major Development Dredge and Fill	15A NCAC 07J .0407
Procedure for Requesting Declaratory Rulings	15A NCAC 07J .0602
Variance Petitions	15A NCAC 07J .0701

WILDLIFE RESOURCES COMMISSION

Hunting on Gamelands	15A NCAC 10D .0103
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COSMETIC ART EXAMINERS, BOARD OF

Live Model/Mannequin Performance Requirement	21 NCAC 14J .0207
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REAL ESTATE COMMISSION

Proof of Licensure	21 NCAC 58A .0101
Agency Agreements and Disclosure	21 NCAC 58A .0104

RULES REVIEW COMMISSION

Delivery of Instruments	21	NCAC	58A	.0106
Handling and Accounting of Funds	21	NCAC	58A	.0107
Brokerage Fees and Compensation	21	NCAC	58A	.0109
Broker-In-Charge	21	NCAC	58A	.0110
Business Entities	21	NCAC	58A	.0502
Active and Inactive License Status	21	NCAC	58A	.0504
Salesperson to be Supervised by Broker	21	NCAC	58A	.0506
Continuing Education Requirement	21	NCAC	58A	.1702
Affiliation with Resident Broker	21	NCAC	58A	.1807
Additional Course Offerings	21	NCAC	58C	.0205
Facilities and Equipment	21	NCAC	58C	.0207
Application and Criteria for Original Approval	21	NCAC	58C	.0603
Instructor Performance	21	NCAC	58C	.0604
Expiration Renewal and Reinstatement of Approval	21	NCAC	58C	.0607
Denial or Withdrawal of Approval	21	NCAC	58C	.0608
Elective Course Component	21	NCAC	58E	.0302
Distance Education Courses	21	NCAC	58E	.0310
Course Completion Reporting	21	NCAC	58E	.0406
Per Student Fee	21	NCAC	58E	.0407

RESPIRATORY CARE BOARD

Inactive Status	21	NCAC	61	.0305
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STATE PERSONNEL COMMISSION

Mentoring Program Administration	25	NCAC	01K	.0801
Mentoring Program Purpose	25	NCAC	01K	.0802
Mentoring Program Curriculum	25	NCAC	01K	.0803

**LIST OF APPROVED TEMPORARY RULES
May 19, 2005 Meeting**

COMMISSION FOR HEALTH SERVICES

Covered Medications	10A	NCAC	39A	.1002
Applications Process	10A	NCAC	39A	.1005
Program Operation	10A	NCAC	39A	.1006

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>ABC COMMISSION</u>				
ABC Commission v. Pantry, Inc. T/A Pantry 355	03 ABC 1094	Gray	09/01/04	
ABC Commission v. Richard Martin Falls, Jr., T/A Falls Quick Stop	04 ABC 0341	Mann	07/16/04	
ABC Commission v. Nichos, Inc., T/A Mexican Store	04 ABC 0626	Gray	10/15/04	
ABC Commission v. Red Lion Manestream, Inc., T/A Red Lion Manestream	04 ABC 0695	Wade	07/20/04	
ABC Commission v. Fat Dragon, Inc. T/A Akumi	04 ABC 0868	Lassiter	02/10/05	
ABC Commission v. KOL, Inc, T/A Wards Grocery	04 ABC 0872	Wade	09/21/04	
ABC Commission v. Carlos Salas, T/A Boom Boom Room Night Club	04 ABC 0938	Chess	10/19/04	
Alcoholic Beverage Control v. Faal Group International, LLC T/A Crown Central	04 ABC 1308	Elkins	03/24/05	
Sports Dimensions, INC d/b/a Club Deep Oros v. ABC Commission	04 ABC 2225	Gray	03/22/05	
<u>VICTIMS COMPENSATION</u>				
Lonnie Jones v. Dept. Crime Control & Public Safety, Victims Compensation	03 CPS 2320	Conner	07/23/04	
Angelique M. Jones on behalf of a juvenile victim, her son, Jaquial Jones v. Victims Compensation Commission	03 CPS 2353	Conner	07/12/04	
Jean Stevens on Behalf of Amber Nichole Sewell v. Victim and Justice Services	04 CPS 0399	Chess	09/16/04	
Krista Chmiel v. Crime Victims Compensation Commission Case #CV-65-04-0020899	04 CPS 0992	Gray	09/31/04	
Christopher C. Searcy v. Crime Victims Compensation Commission	04 CPS 1305	Gray	01/21/05	
Jason Israel Chandler v. Dept. Crime Control & Public Safety, Victim Compensation Services	04 CPS 1368	Lassiter	01/10/05	
Regina Rose Hargrave v. Dept. Crime Control & Public Safety, Victim Compensation Services	04 CPS 1500	Lassiter	01/10/05	
Isaac Cornell Mitchell v. Victim and Justice Services	04 CPS 1529	Gray	01/13/05	
Scott Harshfield v. Crime Victims Compensation Commission	04 CPS 1559	Gray	03/14/05	
Belinda D. Clegg v. Crime Victims Compensation Commission	04 CPS 1637	Mann	02/07/05	
John Selden Clem v. State Highway Patrol, Trooper C.J. Owens	04 CPS 1705	Chess	11/17/04	
Pamela E. Patterson v. Crime Victims Compensation Commission	04 CPS 1915	Gray	04/28/05	
Ricky Nelson Allen v. Dept. Crime Control & Public Safety	04 CPS 1916	Lassiter	01/05/05	
Bennett Lee Sullivan v. Johnston County Sheriff's Dept.	04 CPS 2041	Wade	01/06/05	
Harold E Shaw v. Office of Administrative Hearings	04 CPS 2113	Conner	04/14/05	

CONTESTED CASE DECISIONS

Delphine Holder v. Crime Control & Public Safety, Victim Compensation Services Division	04 CPS 2135	Chess	01/05/05
Daniel A. Young, Sr v. Crime Victims Compensation Commission	05 CPS 0023	Wade	02/21/05
Walter Clark v. Crime Control & Public Safety Victim Comp. Services Division	05 CPS 0048	Gray	05/10/05
William F. Crain v. Victims Compensation Commission	05 CPS 0077	Gray	04/18/05
Christine Watts v. OAH	05 CPS 0128	Chess	03/17/05
Brenda Cox-Thomas v. Div. of Victim Compensation Services	05 CPS 0158	Morrison	04/20/05
Richard H Jones v. OAH – Administrative Law Judge	05 CPS 0225	Lassiter	04/13/05

DEPARTMENT OF AGRICULTURE

NC Spring Water Assoc, Inc., Wiley Fogleman (President) v. DOA, David McLeod and Table Rock Spring Water Co.	04 DAG 0110	Gray	07/21/04
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DEPARTMENT OF ADMINISTRATION

Larry Yancey v. GACPD, DOA	04 DOA 0896	Morrison	07/28/04
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HEALTH AND HUMAN SERVICES

Bejeer Smiles Child Care Learning Center, Inc. v. DHHS, Div of Child Development	98 DHR 0235	Gray	09/16/04
Margaret Bollo v. DHHS, Broughton Hospital	03 DHR 0444	Gray	07/21/04
Walter Ray Nelson, Jr., Karen Marie Nelson v. DHHS	03 DHR 0884	Lassiter	05/18/04
Winter McCotter v. DHHS, Div. of Facility Services, Healthcare Personnel Registry Section	03 DHR 0905	Gray	10/20/04
Blaine Ryan Walsh-Child, Bonnie L. Walsh-Mother v. DHHS, Div. of Medical Assistance	03 DHR 1113	Gray	10/15/04
Olufemi Augustine Ohome v. DHHS, Div. of Facility Services	03 DHR 1062	Lassiter	05/24/04
Karen A. Anders v. DHHS, Div of Facility Services	03 DHR 1217	Gray	09/20/04
Charles Crawford Cox v. DHHS	03 DHR 1546	Lassiter	07/07/04
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
Tomeeka K. Blount v. DHHS, Caswell Center	03 DHR 1728	Elkins	10/15/04
Lativia L. Gibbs v. DHHS, Div. of Child Development	03 DHR 1746	Smith	07/23/04
Rebecca Stephens Short v. DHHS, Div of Facility Services	03 DHR 1806	Conner	06/11/04
Jacqueline Haltiwanger v. DHHS, Div of Facility Services	03 DHR 1818	Conner	09/24/04
Loretta Kaye Dulakis v. DHHS, Div. of Facility Services	03 DHR 1848	Wade	08/20/04
Willie S. Neely v. DHHS, Division of Facility Services	03 DHR 2151	Gray	02/17/05
Pamela Narron (Legal Guardian for) Benjamin Chad Pierce v. DHHS, Div Of Mental Health – DD-SA	03 DHR 2377	Conner	07/19/04
Tony Worley v. DHHS, Div of Facility Services	03 DHR 2427	Mann	12/07/04
Mooreville Hospital Management Assoc, Inc d/b/a Lake Norman Reg. 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	03 DHR 2404	Conner	06/08/04
Louvenia Jones, Sheryl Willie – General Power of Attorney v. DHHS, Div of Child Development	03 DHR 2445	Gray	06/15/04
Antonia Marie Collins v. DHHS, Div of Facility Services	03 DHR 2450	Mann	09/15/04
John Michael Thompson v. DHHS, DFS	04 DHR 0046	Lassiter	07/27/04
Donna R. Gardner v. Health Care Personnel Registry, DHHS, Div of Facility Services	04 DHR 0048	Gray	09/17/04
Johnny Rouse v. DHHS, Div of Facility Services	04 DHR 0107	Wade	10/07/04
Alisa Hodges Yarborough v. DHHS, DFS	04 DHR 0176	Elkins	07/19/04
Brenda Rena Hairston v. DHHS	04 DHR 0183	Wade	02/04/05
Chinedu Eucharia Akamelu v. DHHS, Division of Facility Services	04 DHR 0185	Elkins	11/23/04
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
Mary P. Daniels v. DHHS	04 DHR 0232	Gray	08/09/04
Evelyn Deloris Johnson v. DHHS	04 DHR 0261	Elkins	02/10/05
Terry T. Nixon v. DHHS, Division of Facility Services	04 DHR 0287	Lassiter	01/05/05
Paulette Simato v. DHHS, Div of Facility Services	04 DHR 0302	Conner	09/22/04
Eula P. Street v. DHHS, DFS	04 DHR 0332	Elkins	07/14/04
Donnell Williams v. Harnet County DSS	04 DHR 0334	Conner	06/28/04
Terry William Waddell v. Medicaid/NC Health Choice	04 DHR 0335	Mann	06/04/04
Peter Young v. DHHS	04 DHR 0372	Conner	10/08/04
Paula Una Simon v. DHHS	04 DHR 0386	Chess	09/10/04
Nathan E. Lang vs DHHS	04 DHR 0439	Conner	06/23/04
Johnny Street v. DHHS	04 DHR 0441	Wade	10/19/04
Phyllis S. Weaver v. DHHS	04 DHR 0457	Conner	07/19/04
Beverly Manago v. DHHS, Division of Facility Services	04 DHR 0473	Chess	11/30/04
Bervin D. Pearson Sr. v. DHHS, Broughton Hospital	04 DHR 0476	Morrison	09/09/04
Ralm, Inc v. DHHS, DFS, Mental Health Licensure	04 DHR 0482	Lassiter	02/15/05
Tracy M. Anderson v. DHHS, Div. of Facility Services	04 DHR 0501	Conner	09/14/04
Bio-Medical Applications of NC, Inc., v. DHHS, Div. of Facility Services, S CON , Section, Health Systems Management, Inc, (Lessor) and Clayton Dialysis Center., Inc. (Lessee)	04 DHR 0516	Elkins	12/17/04
Ray J. Bobbitt v. Nash County Dept. of Social Services	04 DHR 0529	Elkins	07/13/04

CONTESTED CASE DECISIONS

Shirley Hines v. Black Mountain Center	04 DHR 0532	Conner	04/26/05
Ralm, Inc v. DHHS, DFS, Mental Health Licensure and Certification	04 DHR 0540	Lassiter	02/17/05
Connie Watt Redice v. DHHS	04 DHR 0546	Lassiter	06/29/04
Edrica Mekoyo v. DHHS, Div. of Facility Services	04 DHR 0560	Gray	09/17/04
Shirly Thaggard v. DHHS, Div. of Facility Services	04 DHR 0588	Morrison	11/05/04
Maggie E. Clinding v. DHHS, Div. of Facility Services	04 DHR 0590	Conner	11/08/04
Judith Marie Carson v. DHHS, Broughton Hospital	04 DHR 0594	Gray	10/08/04
Francho Peoples v. DHHS, Division of Medical Assistance	04 DHR 0596	Elkins	11/23/04
Emelie Kashangura v. DHHS, DFS	04 DHR 0602	Elkins	07/14/04
The Braxton Home, Alfred F. Braxton v. DHHS, Division of Facility Services	04 DHR 0633	Wade	02/01/05
Rush Street Food Mart, Ghassan Dahir v. DHHS, WIC, Div. of Public Health	04 DHR 0640	Elkins	09/24/04
Zack's Food Mart, Nidal Dahir v. DHHS, WIC, Div of Public Health	04 DHR 0641	Elkins	09/24/04
Sabrina Betts v. NC Health Personnel Registry	04 DHR 0644	Lassiter	06/02/04
Velma J. Thomas, Thomas Child Care v. Div of Child Development	04 DHR 0645	Conner	12/03/04
Amy Hensley v. DHHS	04 DHR 0696	Elkins	09/01/04
Deloris T. Johnson v. DHHS, DFS	04 DHR 0701	Wade	05/03/05
Christy Robinson v. DHHS	04 DHR 0704	Elkins	02/14/05
Tanisha Mitchell v. DHHS, Div. of Facility Services	04 DHR 0787	Mann	06/23/04
Rudolph Lofton v. Medicaid Program	04 DHR 0788	Wade	11/23/04
Stacey Curtis v. Dorothea Dix Hospital	04 DHR 0791	Lassiter	09/01/04
Michelle Cross v. DHHS	04 DHR 0811	Morrison	11/24/04
Tracy B Lovett, Lovett House Inc. v. DMH/DD/SAS Accountability Team Marvin Sanders/Jim Jarrard	04 DHR 0812	Wade	04/07/05
Progressive Child Care, Inc. Drake Groves/Director v. Div of Child Development c/o Forsyth County Department of Social Services	04 DHR 0844	Mann	09/22/04
Tanya H. Dey v. Medicaid	04 DHR 0864	Elkins	11/10/04
Judy W. Dickson v. DHHS, Div. of Facility Services	04 DHR 0865	Elkins	10/11/04
Fox's Tot, Inc., Connie Fox v. DHHS	04 DHR 0881	Elkins	07/20/04
Oyetoun M Oladipo v. Health Care Personnel Registry, DHHS	04 DHR 0887	Morrison	09/23/04
Ralph Robinson, Jr., Neuse Center for MH/DD/SAS	04 DHR 0897	Gray	01/31/05
Lisa Robinson v. Neuse Center for MH/DD/SAS	04 DHR 0898	Gray	01/31/05
Triad Imaging, Inc v. DHHS, DFS, CON Section and Diagnostic Radiology & Imaging, LLC	04 DHR 0908	Gray	02/17/05
Linda Brown v. DHHS, Div. of Medical Assistance	04 DHR 0919	Gray	01/19/05
K.E.C., Jr., by parent or guardian, E.D.C v. Division of Mental Health, Developmental Disabilities, and Substance Abuse Services	04 DHR 0967	Mann	12/10/04
Kids Kingdon Christian Learning Center, Inc., v. Div. of Child Development, Regulatory Services Section	04 DHR 0974	Conner	08/10/04
Winfred Keene v. Health Care Personnel Registry Section	04 DHR 0976	Lassiter	10/18/04
Susan L Morris d/b/a Magnolia Place v. OAH	04 DHR 1059	Conner	04/14/05
James Phillip Chavis, Jr., DHHS, Div. of Medical Assistance	04 DHR 1071	Wade	02/04/05
Sandra Elaine Patrick v. DHHS, Div of Facility Services	04 DHR 1073	Conner	10/01/04
Roger Penland, Jr v. DHHS, Division of Facility Services	04 DHR 1096	Gray	11/29/04
New Beginnings Childcare v. Div. of Child Dev. & Lee Co. DSS	04 DHR 1112	Lassiter	08/18/04
Roberta Bell v. DHHS, Div of Medical Assistance	04 DHR 1134	Wade	09/15/04
Phyllis Bryant Duren v. DHHS, DFS	04 DHR 1135	Conner	03/04/05
Manley Yates & Cynthia Yates, Ham Grocery, Inc. v. DHHS, WIC	04 DHR 1136	Elkins	09/14/04
Grace A. Wright v. Wake County Human Services Program Integrity – Dedi H. Bateman	04 DHR 1152	Mann	09/23/04
Sandy Reichard v. Satana T. Deberry, DHHS	04 DHR 1162	Wade	02/17/05
Michael J. Shelton, Pinnacle Homes #2 v. DHHS, Div. of Medical Assistance	04 DHR 1166	Gray	09/03/04
Charleese K. Garrison, as Mother of Jasmine C. Garrison v. DHHS, Div of Medical Assistance	04 DHR 1168	Gray	02/15/05
Wade Assisted Living, Inc., T/A Laurie Edwards	04 DHR 1174	Wade	11/08/04
Janet K. Faison v. DHHS, Div. of Facility Services	04 DHR 1181	Wade	02/01/05
Cynthia R. Hill, DHHS, Division of Facility Services	04 DHR 1183	Wade	02/01/05
Charlynn Keough v. Cherokee Co. DSS, BeBe McClure S.H., by his parent/guardian D.H. v. DHHS	04 DHR 1225	Wade	01/24/05
Alicia Colon v. DHHS, Division of Facility Services	04 DHR 1250	Creech	11/30/04
Monica Dockery v. DHHS	04 DHR 1280	Mann	11/16/04
Monica Dockery v. DHHS	04 DHR 1281	Wade	12/02/04
Julia Matheson v. DHHS, Div. of Facility Services	04 DHR 1301	Wade	10/19/04
Faye Rice, CEO Rice & Rice Co., Inc v. Marvin Sanders DHHS, Div of MH Dev. Disabilities	04 DHR 1303	Wade	01/24/05
Renee Farrow v. OAH	04 DHR 1307	Gray	03/14/05
Martha Abare v. DHHS, Div. of Facility Services	04 DHR 1310	Wade	11/01/04
Lakresha McIver v. Health Care Registry	04 DHR 1330	Elkins	11/10/04
Vonzella Malone v. DHHS, Division of Facility Services	04 DHR 1331	Gray	11/23/04
Saint's Assisted Independent Living, Inc v. DHHS, Div. of Facility Services	04 DHR 1357	Conner	04/21/05
Renita M. Walton v. DHHS, Div of Facility Services	04 DHR 1359	Wade	10/14/04
Elizabeth D. Hedgepeth v. Dept. of Health Services	04 DHR 1364	Elkins	11/10/04
Cydra Pajiete Seegers v. DHHS, Div. of Facility Services	04 DHR 1366	Mann	11/09/04
Ghazaelle Abdel-Kader v. DHHS, WIC, Division of Public Health	04 DHR 1373	Gray	12/15/04
Adib Abdullah v. DHHS	04 DHR 1380	Gray	10/22/04
Madeleine C. Pacheco v. DHHS, Div. of Facility Services	04 DHR 1381	Wade	10/14/04
Bio-Medical Applications of NC, Inc., DHHS, Div. of Facility Services, Div. of Medical Facilities Planning Section, Total Renal Care of NC, LLC and Renal Systems Management, LLC and Garner Dialysis Center, Inc	04 DHR 1384	Elkins	02/04/05
Sona Ekoko Mukwelle v. Health Care Personnel Registry Sec. (Nurse Aid I)	04 DHR 1394	Conner	04/26/05
Craven Regional Medical Authority d/b/a Craven Regional Medical Center	04 DHR 1428	Chess	01/21/05

CONTESTED CASE DECISIONS

Robert Earl King Jr. v. DHHS	04 DHR 1430	Lassiter	03/07/05
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STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 0190

COUNTY OF WAKE

ANN TROCHUM,
Petitioner,

v.

NORTH CAROLINA STATE UNIVERSITY CAMPUS
POLICE DEPARTMENT

DECISION

THIS MATTER came on for hearing before the undersigned Augustus B. Elkins II, Administrative Law Judge, on August 10-11, 2004, October 20-22, 2004, and December 1-2, 2004 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Caitlyn T. Fulghum, Esq.
The Fulghum Law Firm, P.L.L.C.
100 East Parrish Street, Suite 300
Durham, NC 27701

For Respondent: Katherine C. Galvin, Esq.
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
114 West Edenton Street
Raleigh, NC 27699-9001

EXHIBITS

Admitted for Petitioner:

- Exhibits one (1) through twenty-one (21);
- Exhibits twenty-three (23) through twenty-eight (28);
- Exhibits thirty-one (31) through thirty-eight (38);
- Exhibit thirty-nine (39) with the exclusion of handwritten notes except for the following notations: "49175", "13.08%" and "director Ba.";
- Exhibits forty (40) through fifty-three.two (53.2);
- Exhibit fifty-three.three (53.3) with the exclusion of handwritten notes;
- Exhibits fifty-five (55) through fifty-six (56) (with the exclusion of Ex 56.1, which was not admitted);
- Exhibits fifty-seven (57) through sixty-two (62);
- Exhibits sixty-nine (69) through eighty-one (81);
- Exhibits eighty-three (83) through ninety-five (95).

Admitted for Respondent:

- Exhibits one (1) through ten (10);
- Exhibit twelve (12);
- Exhibit thirteen (13) (with exclusion of handwritten notes on the document);
- Exhibits fourteen (14) through nineteen (19);
- Exhibit twenty-one (21);
- Exhibit twenty-one.one (21.1);
- Exhibit twenty-four (24) through twenty-six (26);
- Exhibit twenty-six.one (26.1) (mistakenly misnumbered as Respondent's Exhibit 26, but discussed off the record and re-numbered 26.1);
- Exhibit twenty-seven (27).

WITNESSES

Called by Petitioner:

1. Petitioner Ann Trochum
2. David Norris
3. Rhonda Sutton
4. William Davis
5. Perce Guthrie
6. Robert Guy

Called by Respondent:

1. Chief Thomas Younce
2. Assistant Director, Lt. Col. John Dailey
3. Lt. Richard Potts
4. Galen Jones
5. Alison Henderson

ISSUES

Has Respondent engaged in unlawful State employment practices constituting discriminatory gender based disparate treatment and retaliation for opposition to the disparate treatment?

Did Respondent's alleged act of retaliation, i.e., a transfer, result in a wrongful discharge where the termination was constructive in violation of North Carolina law and public policy?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearings, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner Ann Trochum is a former employee of Respondent NCSU Campus Police Department. She had been employed by the State of North Carolina for approximately 28 years at the time of this action. She was employed by the State Bureau of Investigation (SBI), by Respondent NCSU Campus Police, and is currently employed by the North Carolina State Capital Police. Ms. Trochum was employed by the NCSU Campus Police Department (Department) from March 30, 2000 to March 30, 2004. At the time she resigned her employment with the Department, Ms. Trochum was earning a base salary of \$41,100 with a shift premium of 10%. Ms. Trochum began working with the State Capital Police on April 1, 2004.

2. Petitioner became a sworn law enforcement officer in December of 1999. She was hired by Respondent as a Patrol Officer on March 30, 2000. Prior to becoming a sworn law enforcement officer, Ms. Trochum worked for the State Bureau of Investigations for 24 years. At the SBI, Ms. Trochum was not a sworn officer. During her employment with the SBI, Ms. Trochum became a supervisor of a seven-person clerical unit. Ms. Trochum did not supervise sworn officers.

3. Ms. Trochum began her career as a sworn officer with the Garner Police Department, but left that position before completing her training. Ms. Trochum began working at the NCSU Police Department in March 2000. In May of 2001, Petitioner was promoted to the rank of Sergeant by an external Assessment Center. Upon her promotion, Petitioner became the only female Sergeant out of nine Sergeants in the Campus Police Department. She remained the only female Sergeant at the time of her separation from employment in 2004.

4. Thomas Younce is the Chief of the NCSU Campus Police Department, a position he has held for approximately five years. North Carolina State University is a constituent university of the University of North Carolina and a state agency. N.C. Const., Art. IX, § 8; N.C.G.S. § 114-6.

5. After obtaining an undergraduate degree from Auburn University, where he was an ROTC officer, Chief Younce began his career in law enforcement as a military police officer in the United States Air Force. As a military police officer stationed in Washington D.C., Chief Younce was one of two officers in charge of Presidential security details. Chief Younce was a sworn agent with the North Carolina State Bureau of Investigations, the Chief of Police for Fuquay-Varina, and the Chief of Police for Wilson.

After retiring as Wilson's Chief of Police, Chief Younce took a position as a consultant with the United States Department of Justice in Haiti. Chief Younce was next hired by East Carolina University, where he served as the Chief of the ECU Campus Police Department.

6. Chief Younce has held positions in several civic and professional organizations. Chief Younce is the past President of two chapters of the International Rotary Club, the Fuquay-Varina and Wilson chapters. As the President of the Wilson Rotary Club, Chief Younce was the first President to broaden that organization's membership to include women and African-Americans. He is also a Paul Hearst fellow, a former member of the Governor's Crime Commission, and a member of the International Association of Chiefs of Police. Chief Younce is the incoming Chair of the North Carolina Police Chief's Association.

7. As the Chief of the NCSU Police Department, Chief Younce's responsibilities include: "management of the budget; all hiring, promotion, and dismissal; development of policies and procedures; approving those policies and procedures; assignment of personnel within the department to different shifts; planning for the events on campus; planning for the direction of the department; assisting the officers, or having the officers assist me in developing goals that we'd like to accomplish during the year."

8. John Dailey is the Deputy Director of the NCSU Campus Police Department. In addition to Deputy Director, John Dailey is also referred to as Assistant Chief Dailey, Assistant Director Dailey, A.D. Dailey and Lt. Colonel Dailey. Assistant Chief Dailey was hired at NCSU in May of 2001. Prior to coming to NCSU, Assistant Chief Dailey was employed by the Duke University Campus Police Department from August 1993 until May 2001. Assistant Chief Dailey was an officer in the United States Army for six years prior to becoming employed at Duke University, and before that was a ROTC officer in college.

9. Chief Younce and Assistant Chief Dailey were both hired after Petitioner was already employed. Upon observing Petitioner's job performance, both Chief Younce and Assistant Chief Dailey formed a favorable impression of her.

10. After her promotion to Sergeant, pursuant to Chief Younce's request to new sergeants to submit their assignment preferences, Ms. Trochum notified the Department that she would like to be assigned either to the position of Career Development Officer or to the Investigation Unit. Sergeants could be assigned to Patrol, or to "specialty" positions in the Campus Police Department. There were four specialty areas: Investigations, Special Events, Career Development, and Crime Prevention/Media Relations. Chief Younce's regular practice was to ask for his employees' input before changing their assignments, and he would normally take into account each person's preferences in determining assignments.

11. Chief Younce informed the Sergeants that there was an opening in Career Development, and Petitioner sent him an e-mail expressing her interest in the Career Development position. She outlined her qualifications for the position, including her prior experience assisting the Career Development Officer with recruiting female officers. Subsequently, an opening became available in Investigations, and Petitioner requested that she be considered for the Investigations assignment as her first choice. Chief Younce assigned Petitioner to the Investigations Division as a Detective-Sergeant. He felt that it was important to have a woman in Investigations, to handle sexual assault investigations.

12. The Department assigned Ms. Trochum to the Investigations Unit and she remained in that assignment until February 2004. All of her annual performance evaluations were positive. Her performance ratings were "good," "very good," or "outstanding" in all categories, with overall ratings of "good" and "very good."

13. Petitioner received numerous commendations and letters of appreciation for her service. (Petitioner's Ex. 9, 10, 11, 12, 13, 14, 15, 16, 17, 21.) In August of 2000, Petitioner was commended for "excellent performance" and was nominated for "employee of the month." (Petitioner's Ex. 9, 10.) She was commended for her investigative work several times in 2003. (Petitioner's Ex. 13, 14, 15.)

14. In August of 2003, Chief Younce recommended Petitioner for service on the Council on the Status of Women, noting that "She is an outstanding member of our department." (Petitioner's Ex. 16.) Chief Younce again expressed his approval of Petitioner's work in September of 2003. (Petitioner's Ex. 17.) He gave Petitioner a Certificate of Commendation for outstanding service in December of 2003. (Petitioner's Ex. 21).

15. In 2003, the NCSU Police Department participated as a pilot program in developing a new pay scale system known as "Career Banding. The career banding project provided a mechanism for awarding pay increases to Department employees by establishing set criteria for career advancement. (Respondent's Ex. 2, NCSU General Order 100-8, Career Development Program) Prior to Career Banding, there had been four job classifications within the police department: Police Officer I, II, III, and IV. Officers who did not hold any rank were classified as "Police Officer I," Sergeants were "Police Officer II," Lieutenants were "Police Officer III," and Captains were "Police Officer IV." Under the old classification and compensation system, there were a limited number of positions within each higher ranking classification and in order for an officer to advance, one of the positions would have to be

vacated by an officer retiring or dying. In comparison, with career banding, there are requirements and guidelines for each position that provide officers a detailed advancement framework and vacancies are not required in order to advance. (Respondent's Ex. 2, Career Development Program)

16. The Career Banding Plan established three "bands" for police department employees: the "Police Officer Band," the "Supervisor Band," and the "Director Band." (Petitioner's Ex. 24, 31.) Each band was divided into three levels: the "Contributing Level," the "Journey Level," and the "Advanced Level."

17. Under Career Banding, the officers who did not hold any rank were placed in the "Police Officer Band." (Petitioner's Ex. 38) Sergeants, Lieutenants, and Captains were assigned to the Supervisor Band. (Petitioner's Ex. 24).

18. Sergeants were placed at the contributing level; Lieutenants at the journey level; and Captains were at the advanced level. The term "Sergeant" became the working title for the contributing level of the Supervisor band. All of the Sergeants were slotted in the "Supervisor Band" at the contributing level based on their rank.

19. Chief Younce created a committee comprised of officers from every rank to assist in the development of the career banding program. Chief Younce asked for volunteers and Ms. Trochum volunteered and was chosen to be on the Career Banding Committee. This committee developed the competencies for each position within the department. (Petitioner's Ex. 26.) "Competencies" are defined by the Career Banding Plan as the "knowledge, skills, and work behaviors that contribute to success in the job and to the organization's mission and goals." (Petitioner's Ex. 24, 25.) Once the competencies were written, the Career Banding Committee determined which level of the "Police Officer Band" each officer would be assigned to, i.e., "Contributing," "Journey," or "Advanced."

20. The Department's career banding program had to be developed in accordance with requirements and guidelines set down by the Office of State Personnel and the NCSU Human Resources Department. (Respondent's Ex. 2) Representatives from NCSU's Human Resources Department were also members of the Career Banding Committee. On the career banding project, Assistant Chief John Dailey was the main liaison between the Department, NCSU Human Resources and the Career Banding Committee.

21. Under the career banding project, different competencies, i.e., knowledge, job skills, responsibilities, and tasks associated with job performance, are aligned with each classification level within each band. (Respondent's Ex 3, Competencies for Positions at NC State University Campus Police Department) The Career Banding Committee identified and drafted the competencies.

22. Not all of the police officers had actually performed every competency for their position. For example, brand new officers who were straight out of Basic Law Enforcement Training had not yet performed all the competencies for their positions. Chief Younce testified that day-shift officers did not have the opportunity to arrest drunk drivers, which was a required competency, because drunk driving most often occurs at night. However, no police officer was slotted below the "contributing" level of the Police Officer band. The committee relied instead upon training records and job performance to determine whether each officer had the ability to perform the required competencies.

23. A market rate of pay was established by Human Resources for each level of each band. (Petitioner's Ex. 31) The market rate for the contributing level of the Police Officer band was set at \$31,950. All of the officers in the Police Officer Band received a pay raise to at least \$31,950. (Petitioner's Ex. 40.) Chief Younce wanted every officer, even the brand new ones, to receive the contributing rate of pay, regardless of whether they had actually demonstrated the required competencies. The NCSU Law Enforcement Career Banding Plan dictated that the Department must follow the guidelines and apply the following pay factors when making compensation decisions under the career banding program:

"Campus police would apply pay factors as listed below. To ensure available funds are distributed fairly and equitably, salaries will be determined in compliance with State Personnel Career Banding Salary Administration Policy. Pay factor evaluation will occur with each action as defined in the policy. New hire, promotion, reassignment, demotion, gra[de] band transfer.

Pay factors:

- Marketing dynamics/Journey market rate guidelines/Market reference rate guidelines.
- Availability of funding.
- Competencies.
- Interim and annual reviews.
- Minimum qualifications for the classification.

- Related education and experience.
- Duties and responsibilities.
- Training, certification, and licenses.
- Internal pay alignment (equity).
- Current salary and total compensation.”

(Respondent’s Exhibit 1)

24. Every officer in the department was required to fill out and submit a career banding development plan which provided information regarding the officers’ training, education and other relevant experience. To evaluate and make recommendations regarding the slotting of the police officers in the police officer band, the Career Banding Committee reviewed the officers’ career banding development plans. In making the decisions regarding market adjustment pay raises, Chief Younce relied upon and applied the market ranges established by OSP and NCSU Human Resources and is set forth in Respondent’s Exhibit 10.

25. Lieutenant Richard Potts was on the Career Banding Committee with Petitioner. At the beginning of the Career Banding project, Potts was a police officer. He was promoted in 2003 to Lieutenant, and became Petitioner’s supervisor in Investigations. When it came to deciding which officers would be slotted above the contributing level, Lt. Potts was very vocal in sharing his personal feelings about particular officers. Lt. Potts had been an officer himself and had not at that time supervised any of the officers on patrol. As a result of Lt. Potts’s opinions, at least one officer was slotted below the level that Petitioner thought was appropriate. Lt. Potts told Petitioner on several occasions during the Career Banding process that she would be demoted.

26. Chief Younce testified that he wanted supervisors to be able to provide counseling in the future and to take command of supervising a unit of anywhere from six to eight to ten officers. In order to accomplish the Department’s goal of having sergeants classified and functioning as supervisors, the Office of State Personnel (OSP) required that the Department write specific competencies that a police supervisor had to demonstrate. Those supervisor competencies had to be submitted to OSP before the Department received approval to put sergeants into the supervisory band.

27. The Career Banding Committee did not review or make any recommendations regarding the classification of officers in the Police Supervisor Band, i.e., Sergeants and higher ranking officers. Assistant Chief Dailey had been instructed by Chief Younce that nobody was to lose rank as a result of Career Banding. The Department made the decision that, as a result of career banding, no officer would lose existing rank or be demoted, even if an officer lacked some of the competencies associated with his or her classification. The committee did not have any involvement in that decision. The career banding program was implemented so that all sergeants were placed in the contributing level of the supervisory band, all existing lieutenants were placed in the journey level of the supervisory band and captains were in the advanced level of the supervisory band.

28. The market rate for the contributing level of the Supervisor band (Sergeant) was set at \$41,100 per year. (Petitioner’s Ex. 31) Any officer classified within the supervisory band had to be paid at least the minimum for that band which was \$32,100.

29. On August 6, 2003, Assistant Chief Dailey made recommendations to Chief Younce regarding the amount of pay each Sergeant should receive. (Petitioner’s Ex. 94) Assistant Chief Dailey recommended that every Sergeant, with the exception of Petitioner, receive a pay raise to \$41,100. (Petitioner’s Ex. 31) Assistant Chief Dailey recommended that Petitioner’s salary be \$36,990. Dailey determined the amount of Petitioner’s pay by subtracting 10% from the pay he gave to the other Sergeants. No other officer in the department was singled out for less pay than the market rate of the contributing level for their band.

30. Prior to Career Banding, Petitioner’s salary had been \$34,879. (Petitioner’s Ex. 37) Two other Sergeants, Sgt. Peebles and Sgt. Dudley, had earned less money than Petitioner. (Petitioner’s Ex. 37.) Both Sgt. Peebles and Sgt. Dudley received raises to \$41,100. (Petitioner’s Ex. 40.) All of the male Sergeants received salary increases ranging from 8% to 18.4%, while Petitioner’s raise was 6.1%.

31. On September 9, 2003, the Campus Police Department issued a General Order restructuring the Investigations division. (Petitioner’s Ex. 30.1) The Commission on Accreditation for Law Enforcement Agencies requires that criminal investigation divisions be organized in such a way as to allow patrol officers to be transferred into the investigation division “without regard for rank and/or titles.” Respondent’s Ex 21, Standard 42.2.5, Commentary. The General Order stated that Investigations would consist of one Lieutenant (David 1), one Sergeant (David 2), two Senior or Master Officers (David 3 and 4), one Patrol Officer in Training (David 5), and any other officers who may be temporarily assigned. (Petitioner’s Ex. 30.1.) Although the General Order had an effective date of September 9, 2003, the Department did not actually change the existing staffing of the criminal investigation unit on that date. Staffing changes were not put into place until January 2004.

32. Petitioner was one of two Sergeants in Investigations at that time. Sgt. Ed Farmer was “David 2”, and Petitioner was “David 3.” It appeared to Petitioner that Sgt. Farmer was being assigned as the “Sergeant” in Investigations, while Petitioner was being demoted to an “Officer.” Petitioner had not yet been informed of her new pay. (Petitioner’s Ex. 34.)

33. On September 17, 2003, Respondent printed spreadsheets reflecting the new salaries under Career Banding. (Petitioner’s Ex. 39-40.) These documents showed that Petitioner’s new salary would be \$36,990, while all of the male Sergeants would receive \$41,100. (Petitioner’s Ex. 39-40) Petitioner’s classification was changed from the “Police Supervisor band” to the “Police Officer band” on the spreadsheet. (Petitioner’s Ex. 40) Chief Younce testified that this change was made because the computer payroll software system would not allow the salary of \$36,990 to be entered for someone in the Supervisor band. Major Allen also had incorrect information listed on the PeopleSoft and payroll documents. The inaccuracy regarding Petitioner and her misclassification in the payroll software was corrected.

34. Between October 16 and November 4, 2003, all of the Sergeants except Petitioner received letters informing them that their salary was raised to \$41,100. (Petitioner’s Ex. 31) Petitioner was told on November 4, 2003, by letter dated October 16, 2003, that her salary would be \$36,990. (Petitioner’s Ex. 34) All market adjustment pay raises, regardless of when an officer was notified of his or her raise, were made retroactive to July 1, 2003. Chief Younce delivered this letter to Petitioner personally. Petitioner told Chief Younce that \$36,990 was not even Sergeant’s pay. Chief Younce responded that Petitioner should feel free to tell him if she had some competencies that he had overlooked. Chief Younce did not tell Petitioner at that time that she lacked any competency to be a Sergeant. He did not tell Petitioner that she needed to develop any additional competencies.

35. On November 4, 2003, Petitioner called NCSU Human Resources and left a voice mail message for Deborah Wright. Petitioner explained in her message that she had received her pay letter, and that she had not received Sergeant’s pay. Petitioner had asked Chief Younce if he minded her contacting Wright and he said that she should do that.

36. On November 5, 2003, Kathy Lambert, the Assistant Director for Compensation in Human Resources, sent an e-mail to Assistant Chief Dailey asking for an explanation as to why Petitioner was paid below the minimum for her band. (Petitioner’s Ex. 57) This was the first notice that Dailey had received indicating that Petitioner was dissatisfied with her pay. Dailey responded that Petitioner did not have the competency as demonstrated by having an intermediate law enforcement certificate as all the other Sergeants did. (Petitioner’s Ex. 57) He did not say anything about Petitioner’s ability to function as a supervisor.

37. In fact, not all of the other Sergeants had Intermediate Law Enforcement Certificates. Sgt. Ed Farmer and Sgt. Jeff Sutton did not have Intermediate Law Enforcement Certificates on November 5, 2003.

38. An Intermediate Law Enforcement Certificate is issued by the North Carolina Department of Justice Education and Training Standards Division. Qualification for the Intermediate Certificate is based on a combination of educational credits, law enforcement training hours, and years of service. Applicants are credited with one point for each semester hour of college and one point for completing twenty hours of law enforcement training. (Petitioner’s Ex. 42) An officer with a college degree does not need as many training points to obtain the certificate compared to an officer without a degree.

39. Because Petitioner did not have a college degree, she was required to have 48 points and four years of service to get an Intermediate Certificate. Petitioner, Chief Younce, and Assistant Chief Dailey believed that Petitioner would have four years of service in December of 2003. Petitioner also believed that she had completed sufficient training hours, combined with her college credits, to earn 48 points. However, Chief Younce, Assistant Chief Dailey, and Lt. Potts testified that they did not believe that Petitioner’s training would qualify her for an Intermediate Law Enforcement Certificate.

40. Assistant Chief Dailey testified that he added up Petitioner’s training hours and educational points prior to making his pay recommendations, and concluded that she had 25 or 26 out of the 48 points required for an Intermediate Certificate. He testified that he had prepared a worksheet on the training hours for the Sergeants who did not yet have Intermediate Certificates, but he had thrown it away. Dailey testified that he relied on reports submitted by each Sergeant to determine the number of training hours and education credits they had completed. Petitioner had reported completing a total of 27 credit hours of college. (Respondent’s Ex. 7) One hour of college credit is equivalent to one point, regardless of whether the type of course.

41. When Assistant Chief Dailey added up Petitioner’s points, he excluded six credit hours that Petitioner had completed at the Raleigh School of Data Processing. In addition to the Raleigh School of Data Processing, Petitioner reported eighteen credit hours at Wake Tech, and three credit hours at Wesleyan College. (Respondent’s Ex. 7.) Without counting the Raleigh School of Data Processing credits, Petitioner had 21 points toward her Intermediate Certificate, based on her educational credits.

42. In addition to her educational credits, Petitioner reported numerous law enforcement training classes and supervisory classes she had taken through State Personnel. (Respondent’s Ex. 7.) Petitioner had been a supervisor at the SBI for nine years.

Assistant Chief Dailey gave detailed testimony about which of Petitioner's training classes he believed he would have counted in determining whether she would qualify for an Intermediate Certificate. Counting the classes that Dailey testified that he would have counted, Petitioner had completed 386 hours of training. The training counted on the stand included the police law institute, the field sobriety test training, the criminal investigations and the crime prevention trainings. State Personnel Office management training was not counted. Daily did not count Petitioner's supervisory training toward getting her Intermediate Certificate because it was taken before she became a police officer. Based on the Training Standards Commission's formula (twenty training hours equals one point), Petitioner had earned 19.3 points for her training hours that he did count. Adding Petitioner's 19.3 training points to her 21 credit hours of college, yields a total of 40.3 points. This is inconsistent with Dailey's testimony that he believed Petitioner had only 25 or 26 points toward her Intermediate Certificate. Given that he did not have his work sheet; Dailey had no explanation for the inconsistency.

43. Assistant Chief Dailey testified that he believed that the other Sergeants had met the requirements to qualify for an Intermediate Certificate. Because Sgt. Farmer had an associate's degree, he needed only 16 training points to earn the Intermediate Certificate. Based on Dailey's calculations, Sgt. Farmer had 21.22 points for his training hours.

44. Lt. Richard Potts testified. He started at NCSU Campus Police in July 2001. In May 2003 he was promoted to lieutenant and became chief of the detective bureau. He was Petitioner's supervisor. Lieutenant Potts stated that he believed that Petitioner did not have the training necessary to get an Intermediate Law Enforcement Certificate.

45. On one occasion, Lt. Potts came into Petitioner's office and began arguing with her about her credits for the Intermediate Law Enforcement Certificate and whether she would qualify for the Certificate. Lt. Potts told Petitioner, "You're nothing but a goddamn secretary. You need to start packing your stuff because you're getting out of here. . . . You're going to Patrol." (T. pp. 538, 540, 2094-95) Officer William Davis heard Lt. Potts make this statement. Lt. Potts sounded angry when he said this. Prior to the hearing in this case, Petitioner had never told Officer Davis that Lt. Potts had referred to her as a "goddamn secretary." Petitioner was not aware that Officer Davis had heard Lt. Potts make the statement until the day before the hearing in this matter.

46. Lt. Potts made other comments relating to the issues in this case which Petitioner recorded in her personal calendar. (Petitioner's Ex. 23.) On June 10, 2003, he told her that she was going to be demoted from Sergeant. On September 3, 2003, he told her that she was the joke of the department. On September 9, 2003, he told her again that she was going to be demoted. On one occasion, Petitioner and Lt. Potts had a disagreement about the way that a rape investigation should be handled. Petitioner became upset about Potts's instructions. Lt. Potts said, "What's the matter, little girl? Are you going to cry?" Then Lt. Potts punched a file cabinet as he was leaving the Petitioner's office.

47. Having heard the week before other sergeants and lieutenants discussing their letters and salaries, on November 4, 2003, Petitioner went to Lt. Potts and told him that everyone had gotten letters about their (career banding) money except her. Lt. Potts stated he would check on it and in a short time later came to her office and said that Chief Younce was going to give her, her letter that day.

48. On Thursday, November 6, 2003, Petitioner e-mailed Ms. Wright, asking for a response to her complaint made by phone message on or about November 4, 2003. Ms. Wright did not respond to Petitioner's e-mail. Petitioner was concerned about time frames for filing a complaint. Petitioner called Ms. Wright, and was told that Ms. Wright would return Petitioner's call. Ms. Wright did not return Petitioner's call.

49. On or around Tuesday, November 11, 2003, Petitioner went to Ms. Wright's office in person, and asked to see Ms. Wright. Petitioner was told that Ms. Wright was not in. Petitioner spoke with Ms. Wright's assistant, Daphne McMichael. In Petitioner's presence, Ms. McMichael called Ms. Wright and informed her that Sergeant Trochum wanted to speak with her. Ms. McMichael told Petitioner that Ms. Wright would not be able to see her, but would get back in touch with Petitioner.

50. After leaving Human Resources, Petitioner went to Lt. Potts and told him that she was not getting a response from Human Resources regarding her concerns. Lt. Potts told Petitioner to talk to Chief Younce. Lt. Potts informed her that he had nothing to do with her pay decision and could not provide her any information. Petitioner e-mailed Chief Younce to request a meeting with him. She met with him later that day, November 11, 2003. Chief Younce told Petitioner that the two reasons she did not receive Sergeant's pay were that she did not have an Intermediate Law Enforcement Certificate, and that she was not supervising anyone. When Petitioner asked the Chief about her supervision at the SBI, he replied that she had to be currently supervising someone in the department. Chief Younce advised Ms. Trochum that the Department would be willing to re-consider her salary adjustment and invited Ms. Trochum to "feel free" to submit additional documentation that demonstrated any competencies that she believed the Department may have overlooked. Petitioner told the Chief that she was 18 months from retirement. Chief Younce asked her if she would be willing to go on patrol to get the money. Petitioner stated she was not sure she wanted to go back to patrol.

51. Two other Sergeants, Sgt. Ed Farmer and Sgt. Jeff Sutton, did not have Intermediate Law Enforcement Certificates at that time, and three other Sergeants, Sgt. Ed Farmer, Sgt. Jon Barnwell, and Sgt. William Peebles, were not supervising anyone at that time. Sergeant Farmer was a Detective in Investigations, the same as Petitioner. Sergeant Barnwell was in Crime Prevention/Media Relations. Sergeant Peebles was in Career Development. Sgt Peebles had worked for Chief Younce as a patrol shift supervisor when both officers were employed by East Carolina University. Additionally, there was one lieutenant, Lt. Pulley, who did not supervise anyone. Lt. Pulley was the Special Events Coordinator.

52. On November 12, 2003, Assistant Chief Dailey filled out a "Career Banding Salary Decision/Adjustment Documentation" form stating that Petitioner's new salary was \$36,990. (Petitioner's Ex. 58.) He stated that the justification for the adjustment was that Petitioner "has not demonstrated competency of police skills through receipt of an Intermediate Law Enforcement Certification as required by plan." (Petitioner's Ex. 58) Although the final decision about Petitioner's pay was made prior to October 16, 2003, Assistant Chief Dailey did not fill out the required pay documentation form until November 12, after he was contacted by Human Resources about Petitioner's pay. Dailey did not indicate that there was any issue with Petitioner's ability to function as a supervisor and said nothing about her lacking competencies to work as a Patrol Sergeant.

53. Petitioner continued to e-mail Human Resources, asking Ms. McMichael whether she had any information about her complaint. On Monday, November 17, 2003, Petitioner spoke with Deborah Wright. Ms. Wright told Petitioner that she would get back in touch with her. Kathy Lambert was continuing to exchange phone calls and e-mails with Assistant Chief Dailey. (Petitioner's Ex. 59.) On November 20, 2003, Dailey left a message for Ms. Lambert indicating that he was pretty sure that Sergeant Farmer had completed all of the necessary classes to receive his certification but was going to check on it. (Petitioner's Ex. 59;

54. The Career Banding Plan states that pay adjustments may be disputed for the following reasons: (1) the amount of salary adjustment is different from expected based on application of the pay factors, (2) no salary adjustment has been granted when application of pay factors would support an adjustment, or (3) assignment within band is different than expected. (Petitioner's Ex. 24) The Career Banding Plan does not state that an employee may grieve his or her salary on the basis of gender discrimination. Petitioner had received a "Performance Pay Dispute" form with her Career Banding materials and had been instructed that the form should be used for disputing pay issues related to Career Banding.

55. There is a fifteen-day deadline for filing a Performance Pay Dispute. (Petitioner's Ex 36) According to Petitioner's calculation, her deadline for filing was Friday, November 21, 2003. Petitioner told Ms. McMichael that she was concerned about missing her deadline, and Ms. McMichael recommended that Petitioner contact Allison Henderson, an Employee Relations Specialist in Human Resources, responsible for handling grievances.

56. Petitioner called Ms. Henderson and told Ms. Henderson that she was not satisfied with the explanation that Chief Younce had given her about her pay. She told Ms. Henderson that she was not sure the Performance Pay Dispute form was the correct form to use, as the issue was with pay, not performance. Ms. Henderson told Petitioner that the Performance Pay Dispute form was the correct form to use for a Career Banding pay issue. Ms. Henderson also set up an appointment to meet with Petitioner on Monday, November 24, 2003. Petitioner filed a Performance Pay Dispute on Friday, November 21, 2003.

57. The Performance Pay Dispute form does not contain any questions about discrimination or any boxes to check that indicate that the pay dispute is based on discrimination. Petitioner indicated on her Performance Pay Dispute form that her reason for the dispute was that she was "Not given starting pay for Sergeant in new career banding project as other 8 positions in the department." (Petitioner's Ex. 36.)

58. On Monday, November 24, 2003, Petitioner met with Ms. Henderson and Galen Jones, Assistant Director of Employee Relations, in Human Resources. Ms. Jones is responsible for managing the university's unlawful workplace grievance process, including complaints related to discrimination. Petitioner told Ms. Jones and Ms. Henderson that she had received less pay than all the other Sergeants, and she listed the names of the other Sergeants. Ms. Jones testified that it was "pretty easy to see, once she listed them out, you know, names such as Jeff and William and, you know, they were all men, other than her." (T. p. 1847.) Petitioner told Ms. Jones and Ms. Henderson that the police department was looking after the guys, and they're not looking after her. Petitioner testified that she told them, "[t]he only difference in the other eight sergeants and myself is I wear a skirt." (T. pp. 411, 2127.) Ms. Jones testified that when she pressed Petitioner about what she was saying, she did not bring the words "gender discrimination" forward. Petitioner testified to the contrary. She stated that Ms. Jones asked Petitioner, "What are you saying, Ann? Are you saying that it's discrimination?" And Petitioner responded, "Yes, I am." (T. pp. 411, 2128)

59. Ms. Jones was concerned, based on Petitioner's complaint, that gender discrimination might be an issue. She testified that the main reason she was investigating was to determine whether there were gender issues involved.

60. Petitioner told Ms. Henderson and Ms. Jones that she was concerned that the Performance Pay Dispute form was not the correct form to use. Ms. Jones told Petitioner that she would let Petitioner know if she needed to fill out another form, but that Petitioner had started the process by filing her Performance Pay Dispute on time. Ms. Jones and Ms. Henderson asked Petitioner if they could talk to the Police Department and try to work out the problem. Petitioner gave them permission to do so.

61. On November 25, 2003, Assistant Chief Dailey revised his explanation for Petitioner's pay adjustment, saying that the Career Banding Committee had "considered whether an officer had the certification or was eligible to receive the certification when making their assessments." (Petitioner's Ex. 60) Dailey stated that Petitioner could "bring her case back to the Chief once she has her certification." (Petitioner's Ex. 60, 77)

62. Ms. Jones brought up the issue of gender discrimination with Assistant Chief Dailey and Chief Younce. She told Assistant Chief Dailey and Chief Younce that Petitioner's pay might be perceived as gender discrimination. Ms. Jones questioned Chief Younce and Assistant Chief Dailey about why the one female Sergeant was the only person who was not moved into the contributing level. She asked them why Petitioner was not at the same level as everyone else when she had a very good performance rating. She noted that Petitioner had no corrective actions or "letters of understanding" in her file, while others in the police department did.

63. On December 1, 2003, Ms. Lambert sent an email to Ms. Wright, Ms. Henderson, and Ms. Jones, indicating that the other Sergeants who did not have Intermediate Law Enforcement Certificates were put in the Supervisory band because they were expected to receive their certificates, while Dailey believed that Petitioner would not. (Petitioner's Ex. 60) Dailey told Ms. Lambert that the Intermediate Certificate was preferred, not required. (Petitioner's Ex. 60)

64. Neither Chief Younce nor Assistant Chief Dailey had told Petitioner that she needed to obtain an Intermediate Law Enforcement Certificate in order to receive \$41,100 pay. At that point, Chief Younce had not told either of the other two Sergeants who lacked Intermediate Law Enforcement Certificates that they needed to get their certificates in order to receive or to keep their \$41,100 pay.

65. On December 4, 2003, Petitioner saw Dr. Rhonda Sutton, NCSU Assistant Vice Provost and Director of Harassment Prevention and Equity Programs in the Office for Equal Opportunity, at a meeting of the Council on Women, and told Dr. Sutton about her complaint. Petitioner told Dr. Sutton that she had not received the same pay as all the male Sergeants, and that she felt she was being discriminated against. Based on her conversation with Petitioner, Dr. Sutton understood that Petitioner believed she was experiencing gender discrimination. Dr. Sutton filled out an "OEO Intake Form" with regard to Petitioner's complaint, stating that Petitioner felt she was being discriminated against because of her gender. (Petitioner's Ex. 83)

66. Dr. Sutton called Ms. Wright in Human Resources and discussed with Ms. Wright the concerns that Petitioner had raised with Dr. Sutton. (Petitioner's Ex. 84.1) She told Ms. Wright that Petitioner had talked to her about the salary banding project, and that it seemed odd that all of the male sergeants got an increase while the one female did not. Ms. Wright told Dr. Sutton that Petitioner's working title was Sergeant, but that Petitioner was technically a detective. She also told Dr. Sutton, erroneously, that Petitioner's annual performance rating was a "3" when it was in fact a "4." (Petitioner's Ex. 4)

67. On December 5, 2003, Galen Jones called Dr. Sutton. Ms. Jones put Dr. Sutton on speaker phone with Deborah Wright and Allison Henderson, both in the room with Ms. Jones. Ms. Jones questioned Dr. Sutton about why she had called Ms. Wright, how well she knew Petitioner, and why she was involved. Ms. Jones was aware that Dr. Sutton's office conducted investigations of discrimination issues. Dr. Sutton testified that Ms. Jones appeared to be unhappy with the fact that she, Dr. Sutton, had called Ms. Wright. Dr. Sutton had the impression from her conversation that Ms. Jones felt she (Dr. Sutton) was stepping on her (Ms. Jones) toes.

68. Dr. Sutton communicated the substance of her conversation with Petitioner to Ms. Jones, Ms. Henderson, and Ms. Wright. She explained that Petitioner had said she was the only female Sergeant, and that all the male Sergeants were being paid more. Dr. Sutton told Ms. Jones, Ms. Henderson, and Ms. Wright that all eight of the male Sergeants were paid more than the only female Sergeant. Ms. Jones told Dr. Sutton that she was aware of Petitioner's situation, and would be in contact with Petitioner. When questioned by the Undersigned, Dr. Sutton believed that Ms. Jones, Ms. Henderson, and/or Ms. Wright would be handling the gender discrimination aspect of Petitioner's complaint. Dr. Sutton's boss, JoAnn Woodard, instructed Dr. Sutton that Human Resources was handling Petitioner's complaint. The Human Resources Office is responsible for handling discrimination claims made by State Personnel Act employees.

69. On Monday, December 8, 2003, Ms. Henderson and Ms. Jones called Petitioner to a meeting in Human Resources. They told Petitioner that they had heard from Dr. Rhonda Sutton in the OEO Office, and they knew that Petitioner had been talking to Dr. Sutton. Petitioner felt that Ms. Jones was "disappointed" that Petitioner had spoken with Dr. Sutton. Ms. Henderson and Ms.

Jones told Petitioner that the Police Department had informed them that the issue really was time in grade. Petitioner's time in grade was identical to that of one of the male Sergeants, Sgt. Jay Dudley, who had graduated from BLET with Petitioner.

70. On December 9, 2003, Petitioner told Dr. Sutton that Assistant Chief Dailey and the campus police appeared to be changing their reasoning for her lower pay. First the issue was that Petitioner did not have her Intermediate Certificate, and more recently it was that she did not have enough years of experience. Dr. Sutton asked Petitioner if she wanted Dr. Sutton to contact Assistant Chief Dailey directly. Petitioner asked Dr. Sutton not to do so, because Petitioner believed things had reached a point where they were not so great, and she didn't want anything else to happen.

71. On December 15, 2003, Lieutenant Potts went into Petitioner's office and told her that Chief Younce and Assistant Chief Dailey wanted to meet with her. Petitioner went to the Chief's office and met with Chief Younce and Assistant Chief Dailey. Chief Younce told Petitioner that they wanted to talk with her about the pay issue and asked what it would take to make her happy. Petitioner said that she would be happy if they had never done their actions to her because she felt she had become the talk of the department. Assistant Chief Dailey said they meant what would make her happy money wise. Petitioner replied that she wanted the same pay as the guys got and wanted it retroactive to July 1 as everyone else had. Chief Younce knew that Petitioner was the only female Sergeant, and that she was referring to all the Sergeants other than herself when she said she wanted to get paid the same as the guys.

72. In December 2003, Assistant Chief Dailey asked Sgt. Peebles to research the supervisory experience of the Sergeants in the department. Assistant Chief Dailey and Chief Younce were aware that Petitioner had been a supervisor at the SBI for nine years. Petitioner had taken more than 200 hours of supervisory training classes, including Introduction to Supervision, Supervision for Managers, Situational Leadership, Team Building, Ethical and Legal Responsibilities Regarding Records, Work Performance Plan and Appraisal Training, How to Handle Difficult People, FARR Executive Workshop, and Generation X: the Next Employee.

73. Sgt. Barnwell had not yet attended the NCSU Supervisory Series class. Sgt. Farmer had taken First Line Supervision and had reported taking a two-hour class on Harassment in the Workplace, and a two-hour class on Worker's Comp. Sgt. Head had not taken any of the supervisory classes.

74. Assistant Chief Dailey and Chief Younce told Kathy Lambert that Petitioner did not possess the competencies of a supervisor, and did not function as a supervisor. Chief Younce stated that competencies were things that someone is able to do or capable of doing. He agreed that the specialty sergeants, who are not on patrol, do not regularly perform some of the competencies listed in their job descriptions. Competency may be demonstrated by completion of training.

75. After completing its investigation, Human Resources recommended that the Campus Police Department adjust Petitioner's salary to the same level as the male Sergeants. The recommendation was not made on the basis of a finding of gender discrimination but rather, Ms. Jones told Chief Younce, "there certainly could be a claim filed just because it looks as if . . . the only female sergeant hasn't gotten the same amount of money as the other sergeants." (T.p p. 1377, 1882.) Ms. Jones stated she considered the risk of future litigation and the possible costs that would be associated with such litigation because "every business has to take into account the risk of litigation, and right or wrong, what it [may] cost." (T.p p. 1883)

76. Chief Younce did not think it was right to raise Petitioner's salary to \$41,100. He did not think it was fair to the department or the process. Nevertheless, he agreed to comply with Human Resources' recommendation. Assistant Chief Dailey believed that a lower salary for Petitioner was the right decision and that the recommendation by Human Resources was wrong. He did not believe it was the right thing to do but was the "easy thing." (T.p p. 1652-53)

77. On January 6, 2004, Petitioner was given an interim evaluation by Lt. Potts. (Petitioner's Ex. 46.) Lt. Potts wrote that Petitioner needed improvement in six out of eight areas. (Petitioner's Ex. 46.) Petitioner had never received a "needs improvement" on any evaluation during her employment with Respondent. (Petitioner's Ex. 1-4.) Lt. Potts testified that his comments on Petitioner's interim evaluation were intended to help her improve in specific areas where he saw a need for improvement.

78. One of the areas in which Lt. Potts indicated that Petitioner needed improvement was on her "POPAT" score. (Petitioner's Ex. 46.) The POPAT (Police Officer Physical Abilities Test) is a physical test that consists of doing push-ups, sit-ups, running a certain distance, dragging a dummy, and other physical activities. The Career Banding Plan, which was implemented on September 19, 2003, requires that all sworn law enforcement officers be physically fit and in compliance with the POPAT standards set by the NCSU campus police department.

79. In October of 2003, every member of the police department took the POPAT. There was no departmental time limit for completing the POPAT at that time. However, Chief Younce planned to implement a time limit in the spring of 2004, and he wanted all of the officers to have an opportunity to practice the POPAT so that they would know what was going to be expected. Petitioner successfully completed the POPAT, while a significant number of officers in the department, including Sgt. Farmer, were unable to complete the required number of push-ups and sit-ups to finish the test.

80. Lt. Potts also wrote on Petitioner's evaluation that Petitioner had done half as many investigations as Sgt. Farmer. (Petitioner's Ex. 46.) Lt. Potts relied on a document while testifying (Respondent's Ex. 26) that he knew did not accurately reflect the total number of investigations performed by Sgt. Farmer and Sgt. Trochum. Sgt. Farmer had opened and completed 28 investigations, and Petitioner had opened and completed 11. (Respondent's Ex. 26.) However, in addition to the investigations reflected on Respondent's Ex. 26, Lt. Potts had personally assigned 31 investigations to Petitioner and 24 to Sgt. Farmer. In order to determine the total number of investigations performed by Sgt. Farmer and Petitioner, the number of cases assigned by Lt. Potts would have to be added to the number of cases opened by each Sergeant on their own. Adding those two numbers together yields a total of 42 investigations for Petitioner, and 52 investigations for Farmer. Lt. Potts admitted that 42 was not half of 52. Petitioner felt that this evaluation was not an accurate reflection of her performance and was motivated by retaliation. (Petitioner's Ex. 84). She did not express this belief to Lt. Potts.

81. On January 7, 2004, Chief Younce sent Petitioner a letter informing her that her pay was being adjusted to \$41,100 contingent on her approval for an Intermediate Certificate. His letter stated should she not get approval for her Intermediate Certificate upon first eligibility that her salary would be reduced to \$36,990. (Respondent's Ex. 11.) He stated that this standard was consistent for all Sergeants eligible for the Supervisory Band.

82. Ms. Jones in Human Resources worked with Chief Younce in drafting this letter. Ms. Jones instructed Chief Younce that if he was going to make Petitioner's pay contingent on receiving the Intermediate Certificate, he should do the same for the other two male Sergeants who did not yet have their certificates. Neither of those two Sergeants had been informed when they received their pay raise letters in November that the raise was contingent on approval for an Intermediate Law Enforcement Certificate. Accordingly, Chief Younce wrote them e-mails on January 7, 2003 telling them that they needed to obtain Intermediate Law Enforcement Certificates.

83. The letter to Petitioner went on to declare that Petitioner had not "demonstrated the competencies necessary to be identified as a Police Sergeant." (Respondent's Ex. 11) Petitioner had been with the department for almost four years, and had been a Sergeant for more than two years. Prior to Petitioner's pay complaint, Chief Younce had not expressed any concerns about her performance.

84. On January 12, 2004, Allison Henderson at NCSU Human resources wrote Petitioner stating, that per email message from Petitioner on January 9 stating she (Petitioner) was satisfied with her pay resolution, Ms. Henderson was closing Petitioner's performance pay dispute effective January 9, 2004. (Respondent's Ex. 12)

85. By order of the Director, signed by Captain J.W. Goodrow and issued on January 9, 2004 with an effective date of January 17, 2004, Petitioner along with approximately five other individuals were reassigned. Petitioner's effective date of reassignment was February 2, 2004. Assistant Chief Dailey and Lt. Potts informed Petitioner on January 12, 2004, that she was being removed from her position as a Detective in Investigations and reassigned to C-Squad as a Patrol Sergeant on night-shift. Petitioner did not tell Chief Younce, Assistant Chief Dailey or Lt. Potts that she did not want to be reassigned to Patrol at that January 12th meeting.

86. In December of 2003, Assistant Chief Dailey had sent a short two sentence e-mail to the Sergeants indicating that there was "the possibility of making some assignment changes," stating that Sgt. Peebles had requested to go to the line. Dailey stated, "if any of you are interested in a change, let me know." (Petitioner's Ex. 48)

87. Petitioner was not interested in a change and did not request any re-assignment. Sgt. Farmer said that he was stressed out from having been the interim supervisor in Investigations and wanted an assignment where he wasn't under that much pressure. Sgt. Dudley said that he would like to go somewhere to further his career. Sgt. Sutton said that he would go wherever he was needed.

88. Assistant Chief Dailey and Captain Goodrow made recommendations to Chief Younce about transferring several officers, including Petitioner. Lt. Potts was Petitioner's direct supervisor at the time, and had some involvement in making the decision to transfer Petitioner. Assistant Chief Dailey testified that he trusted Potts's opinion and listened to what Potts said.

89. A day-shift Patrol position was vacant because one Sergeant had left. Assistant Chief Dailey and Captain Goodrow recommended transferring Sgt. Peebles from Career Development to day-shift Patrol, as he had requested. The transfer of Sgt. Peebles to day-shift Patrol created an opening in Career Development. Chief Younce was aware that Petitioner had been interested in the Career Development position previously and that she had worked with the prior recruiting officer. She had experience and had demonstrated competencies in the Career Development area. Lt. Pulley was transferred from Special Events to Career Development. (Petitioner's Ex. 50)

90. The transfer of Lt. Pulley to Career Development created an opening in Special Events. Sgt. Farmer was transferred out of Investigations, as he had requested, into Special Events. The Department was awarded a federal grant funding a crime mapping project that the Department believed Sgt. Farmer was qualified to carry out. The transfer of Sgt. Farmer to Special Events left only one Sergeant, Petitioner, in Investigations. Under the General Order that had been issued in September 2003, the structure of Investigations was going to include one Sergeant who would supervise the Investigators. Instead of leaving Petitioner in Investigations, where she would have functioned as a supervisor, it was recommended that Petitioner be transferred to C-Squad on night-shift Patrol. Though not hearing directly from Petitioner, Assistant Chief Dailey testified that others had told him that Petitioner would quit if she were moved to Patrol.

91. It is the Department's preference and usual practice to consult with its officers and to take their desires into consideration when making assignments. The Department does not have to honor the consultations and preferences based on the Department's institutional needs. Assistant Chief Dailey testified that there needs to be an opening or someone willing to move in order to make changes to an officer's assignment. There was already a Sergeant on C-Squad, Sgt. Sutton, so there was no opening on Patrol. In order to create an opening for Petitioner to be moved on C-Squad, Sgt. Sutton was moved to D-Squad, which is also a night-shift Patrol squad. Since there was also a Sergeant on D-Squad, Sgt. Dudley had to be moved as well. Sgt. Dudley was transferred to Investigations. Chief Younce testified that: "moving J. Dudley from patrol shift to investigation was an effort to get that particular person investigative experience and investigative supervisory experience." (Tr. 1312-13) Sgt. Barnwell was the Chair of the University's Staff Senate and those responsibilities led the Department to decide that Sgt. Barnwell remain in his current position in crime prevention and media relations.

92. Chief Younce gave his approval to the recommendations for reassignment without making any changes. Chief Younce has the discretion to exercise his independent judgment to make personnel assignments in any way he concludes best fits the needs of the Department. Chief Younce relied on the supervisors underneath him and expected those supervisors to rely on the employees underneath them in making decisions. He expected that Assistant Chief Dailey would rely on the Lieutenants underneath him for information about their employees. Lieutenant Potts was Petitioner's direct supervisor at the time the pay decisions were made. Petitioner testified that, based on her history with Lt. Potts, she was afraid to tell Assistant Chief Dailey and Lt. Potts that she did not want to go to Patrol for fear of being fired for insubordination.

93. Petitioner contacted Dr. Rhonda Sutton in the OEO office and complained about her transfer to Patrol. Petitioner told Dr. Sutton that she felt the transfer was like a demotion. (In accordance with the University's definitions and procedures Petitioner's reassignment was technically not a demotion.) She told Dr. Sutton that she felt like the transfer was retaliation for going to Human Resources. She reported being very upset about the transfer to night shift. Dr. Sutton was concerned that the transfer might have been retaliatory. She talked with Petitioner about her options of the EEOC or the Office of Administrative Hearings.

94. Petitioner was placed on Patrol without any additional supervisory training. Assistant Chief Dailey testified that he had no reason to think that Petitioner would not do fine as a Patrol Sergeant. Petitioner supervised six police officers on the night-shift squad and had no difficulty supervising these officers. The lieutenant on this patrol supervises and writes the performance appraisals for only one person, the sergeant. The sergeant supervises and writes the performance appraisal for all other officers on this night Patrol. Assistant Chief Dailey stated he thought it was alright with OSP for one person, the lieutenant to supervise only one person, the sergeant. Several weeks after Petitioner was moved to Patrol, her Lieutenant was out of work for one week. Petitioner was the only supervisor on the squad during that week. Petitioner performed her job as a supervisor to Chief Younce's satisfaction. Assistant Chief Dailey also thought she did a good job on Patrol.

95. Lt. Ellis, Petitioner's supervisor on night-shift, told Petitioner that he had been instructed to document everything that Petitioner did. (Petitioner's Ex. 85-93) This caused Petitioner to feel as though the department was looking for a reason to terminate her. Captain Goodrow initiated the policy of using Daily Observation Reports to evaluate new shift supervisors in early February 2004. The Department intended it to be applied to all new sergeants. The Department's reasoning for reassignment to Patrol Squad C was its looking to that reassignment as an opportunity to demonstrate the competencies of effectively managing and directing general patrol duties and traffic management responsibilities as well as the 11 or so other career banding plan responsibilities that comprise competency as a sergeant.

96. On February 17, 2004, Chief Younce received a letter from the Training and Standards Commission denying Petitioner's application for an Intermediate Certificate. Chief Younce drafted a letter to Petitioner informing her that her pay would be reduced to \$36,990. Petitioner asked Chief Younce for some time to resolve the problem with Training and Standards, and Chief Younce agreed.

97. Petitioner became severely depressed as a result of the police department's various actions relating first to her pay issue and then, more importantly, to her transfer. Petitioner went to see her family doctor, and was referred to a psychologist, Dr. David Norris, whom she first saw on February 23, 2004.

98. Dr. Norris has been a licensed psychologist since 1984. He has a Ph.D. in psychology from North Carolina State University, a Master's in Divinity from Southeastern Baptist Theological Seminary, and a B.A. in Chemistry from the University of North Carolina at Chapel Hill. (Petitioner's Ex. 53.2) Dr. Norris regularly diagnoses and treats patients for affective disorders, anxiety disorders, and conflict resolution issues, including conditions such as depression, anxiety, obsessive compulsive disorders, and personality disorders. Dr. Norris was tendered and accepted as an expert witness, with no objection from Respondent.

99. When Dr. Norris first saw Petitioner, she was suffering from a "reactive depression," technically referred to as "major depressive disorder, single episode, moderate . . . DSM-IV 279.22." (T. pp. 344, 365) Dr. Norris described Petitioner's condition as "an acute depressive reaction to a life-changing situation," similar to an acute grief reaction. (T. p. 344-45) Reactive depression is different than chronic depression. Reactive depression is caused by a life situation, while chronic depression is an ongoing problem which comes in episodes throughout a person's life. Petitioner's reactive depression was caused by being transferred from her regular "plain clothes" job to a night-shift patrol position.

100. When Petitioner felt rejected by authority figures, she had a strong reaction to it, and it was very stressful to her. Petitioner had been repeatedly told, and also felt, that others in the department had lost respect for her. She had heard other officers joking about her, saying that she thought she was a sergeant, but that the Chief had brought her down. One Lieutenant asked her why she was still wearing her stripes. Moreover, as a result of the interim evaluation by Lt. Potts, Petitioner was afraid that she would receive below good on her annual evaluation in May, which would mean she would lose her Career Banding money.

101. Petitioner was not sleeping well, had lost about fifteen pounds or more, her affect was low, and she was very thin. Dr. Norris contacted Petitioner's family physician and recommended that she begin taking anti-depressant medication. He also recommended that she not be alone, that she stay with family members even when she was off work, that she and her husband spend a lot of time together, and that she get as much exercise as she could tolerate. Further, Dr. Norris began cognitive therapy with Petitioner, initially once per week.

102. Petitioner's depression did not improve, even though she was taking medication and following Dr. Norris recommendations. Ultimately, Dr. Norris recommended that Petitioner change jobs. Dr. Norris testified that "[i]t was pretty obvious that if she continued to go in [to work at NCSU], she would continue to have trouble pulling out of her depression." (T. p. 348.) Had Petitioner remained in her job, she could have become so depressed that she would have required hospitalization. It appeared that Petitioner ran the risk of developing further health problems due to lowered immunity from lack of good diet and lack of sleep.

103. Prior to resigning her employment with Respondent, Petitioner applied for a job with State Capital Police. Major Mitchell, from State Capital Police, came to the NCSU Campus Police department to conduct a background check on Petitioner. She met with Chief Younce in his office, and told him that Petitioner had applied for a position with State Capital Police. This meeting occurred before Petitioner told Chief Younce that she was resigning.

104. When Chief Younce has heard on other occasions that one of his officers has applied for a position with another department, he has asked them why. Chief Younce never asked Petitioner why she was thinking of leaving. He did not ask her whether there was anything he could do to persuade her to stay. He was not required to do either.

105. On March 13, 2004 Petitioner gave Chief Younce notice of her resignation, effective April 1, 2004. (Respondent's Ex. 23) The first time that Chief Younce learned that Petitioner was experiencing medical problems was when he received her letter of resignation. Chief Younce testified that he would have "evaluate[d] whether we could move her to another position, whether it would be appropriate to the department." (Tr. 1042-43)

106. After changing jobs, Petitioner showed a great improvement in her affect and mood. She reported that she was sleeping well, and she began to gain weight within several weeks after leaving Respondent's employment.

107. Chief Younce, Assistant Chief Dailey, and Lt. Potts ultimately incorrectly assessed Petitioner's qualifications for the Intermediate Certificate. Petitioner applied for the certification on January 28, 2004. The Training Standards Commission told

Petitioner that in order for a portion of her prior education hours to be considered, she had to enroll in an accredited college that would accept the hours she had taken. Petitioner received the Intermediate Certificate on April 22, 2004 based on the training hours she had completed prior to July of 2003. (Petitioner's Ex. 44) She did not have to take any additional training or complete any additional educational hours to receive her certificate.

108. Chief Younce's reasons for transferring Petitioner to Patrol were so she could get supervisory experience, and so she could bring her investigative experience to Patrol. Assistant Chief Dailey testified that for the Department's cross-training purposes and in order for it to be able to rely upon an officer to assume responsibility to act as a patrol shift supervisor, taking a supervising class does not substitute for the experience of actually acting as a patrol shift supervisor. In addition to a supervisor's knowledge of policies and ability to motivate and evaluate officers, Assistant Chief Dailey stated the Department needed to see a supervisor demonstrate the ability to make tactical decisions that come up every day under the normal pressures of a patrol shift.

109. Sgt. Farmer's prior supervisory experience consisted of having been the interim supervisor of Investigations for approximately five months in 2003. He had not been a Sergeant on Patrol and had never supervised a squad. He had been a supervisor on Centennial Campus coordinating security for academic and research offices and private residences. Both Petitioner and Sgt. Farmer had responsibility for supervising patrol officers when they were "on call" and had to respond to an investigation. In 2003, Sergeant Farmer was relieved of his on-call duties, and the hours were divided only between Petitioner and Lt. Potts. As such, Petitioner worked more on-call hours than Sergeant Farmer. None of Petitioner's supervisors ever expressed any dissatisfaction with the way Petitioner performed her on-call duties. Sgt. Farmer was not transferred to Patrol to get supervisory experience. He stayed in a specialty position in Special Events.

110. Sgt. Barnwell's prior supervisory experience included having been the interim supervisor of telecommunications. The telecommunicators are civilian employees. Sgt. Barnwell had not been a Sergeant on Patrol and had not supervised a squad. Assistant Chief Dailey testified that Barnwell had demonstrated competence as a law enforcement supervisor by working at football games where he supervised sworn officers and was responsible for maintaining crowd control and player and coach safety. Some of the football games were nationally televised. Evidence showed that Dailey did not say anything about working at football games when he was asked at his deposition whether Sgt. Barnwell had ever supervised police officers. Assistant Chief Dailey said at his deposition that Barnwell had not ever supervised police officers to his knowledge. Other than working at football games, Sgt. Barnwell had no experience supervising police officers in a law enforcement capacity.

111. Petitioner also worked at football games where she supervised other police officers. Though evidence showed that Sgt. Barnwell had a higher level of supervision, there was no material difference between the supervisory skills demonstrated by Petitioner and those by Sgt. Barnwell at the football games. None of Petitioner's supervisors ever expressed any dissatisfaction with the way she performed her duties at football games.

112. Sgt. Barnwell was not transferred to Patrol to get supervisory experience. He stayed in his specialty position in Crime Prevention/Media Relations. Sergeant Barnwell was still in that position as of the date of this hearing. He is still not supervising any police officers.

113. Chief Younce testified that he needed someone with investigative experience on Patrol. Sgt. Farmer had investigative experience. He had specifically requested to get out of Investigations, and he had no prior experience supervising a patrol squad. Sgt. Farmer was not transferred to Patrol.

114. After Petitioner resigned, Respondent posted an advertisement for the Sergeant position. (Petitioner's Ex. 55.) The job posting stated that an Intermediate Law Enforcement Certificate was preferred, not required, for the position. The minimum salary for the posted position was \$41,100, not the \$32,100 minimum of the supervisor band. Assistant Chief Dailey testified that Human Resources posted the job, not the Campus Police. Assistant Chief Dailey did not believe it was in the draft sent to Human Resources by the Department. He thought the language stating preferred might be a typographical error. Chief Younce and Assistant Chief Daily stated the Department was going to hire people that had an intermediate certificate that had three years of law enforcement experience and by those requirements, would meet the market rate of \$41,100.

115. Petitioner had a change of pay when she was transferred to night-shift Patrol based on her 2003 experience. As a Patrol Sergeant, Petitioner earned a 10% shift premium on her regular hours. She did not earn on-call pay, extra time pay, or overtime pay as part of regular job duties. A comparison presented by Petitioner and found to be credible of the monthly pay Petitioner earned or would have earned in 2004 on Patrol compared with Investigations based on 2003 numbers shows Petitioner earned or would have earned \$475.76 less per month on Patrol than in Investigations.

	<u>Patrol</u>	<u>Investigations</u>
Regular Monthly Pay:	\$3,425.00	\$3,425.00

CONTESTED CASE DECISIONS

Overtime:	0	216.37
On-Call:	0	242.55
Extra Time:	0	351.73
Shift Premium	342.00	7.11
Total	\$3,767.00	\$4,242.76

116. The above numbers can not be absolute since a completed year in her Patrol position may have provided other opportunities for income. Patrol officers have an ability to earn supplemental pay by working special events. The Department generally has special events on the weekends as well as other events that take place during the day. These special events may present an opportunity to earn supplemental income. Further, a night shift officer may pick up overtime hours due to court appearances.

117. Petitioner currently works with the North Carolina State Capital Police. She is eligible for State retirement in July 2005. Petitioner's monthly salary at State Capitol Police is \$2,401.83. Reinstatement is not viable in this case because Respondent has hired a replacement for Petitioner and Petitioner has obtained alternate employment.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Pursuant to State and Federal law, the Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case as defined in prior orders.

2. The Petitioner was a career state employee, as defined in N.C. Gen. Stat. §126-1, *et seq.*, and is subject to the State Personnel Act.

3. In accordance with the Orders of the Undersigned, this matter proceeded to hearing regarding Petitioner's allegations of discrimination in the workplace based on gender based disparate treatment and retaliation including transfer for opposition to the alleged discriminatory disparate treatment. The Undersigned, in a separate ruling, found that remedies were available, if such flows from an unlawful discriminatory transfer leading to a constructive termination. Respondent was placed on adequate notice to defend such assertions.

4. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

5. No department or agency of the State shall discriminate against an employee with respect to compensation, or the terms and conditions of employment, on the basis of sex. N.C. Gen. Stat. § 126-16. In accordance with N.C. Gen. Stat. § 126-17, no State department or agency shall retaliate against an employee for protesting alleged violations of N.C. Gen. Stat. §126-16.

6. North Carolina courts "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *North Carolina Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. The impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions. *Reno v. Bossier Parish School Bd*, 520 U.S. 471, 117 S.Ct. 1491 (1997)

7. In analyzing cases of discrimination under the State Personnel Act, the North Carolina Supreme Court has adopted the burden shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

8. A *prima facie* case of sex discrimination is established when an employee shows: (1) she is a member of a protected class; (2) she was performing satisfactorily; (3) she suffered an adverse employment action; and (4) a similarly situated employee received favorable treatment. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). Under the *McDonnell Douglas* framework, a *prima facie* case of sex discrimination in pay is established when an employee shows: (1) she is a member of a protected class, and (2) the job she occupied was similar to higher paying jobs occupied by males. *Brinkley-Obu v. Hughes Training*, 36 F.3d 336, 343 (4th Cir. 1994).

9. A *prima facie* case of retaliation is established when an employee shows: (1) the employee engaged in protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543 (4th Cir. 2003); *King v. Rumsfeld*, 328 F.3d 145, 150-51 (4th Cir. 2003).

10. As in other civil rights contexts, to show protected activity, the Petitioner in a retaliation case need "only ... prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring." *Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1503 (11th Cir.1990); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), (stating that a Title VII oppositional retaliation claimant need not show that the underlying claim of discrimination was in fact meritorious in order to prevail). Many courts thus see the inquiry as whether one in good faith subjectively believed that the Respondent had engaged in a discriminatory practice and whether the belief was objectively reasonable in light of the facts. *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, (11th Cir.2002); *Peters v. Jenney*, 327 F.3d 307, (4th Cir. 2003).

11. After a *prima facie* showing is made, a presumption arises that the State unlawfully discriminated or retaliated against the employee. To rebut the presumption of discrimination or retaliation, the employer must produce a legitimate, non-discriminatory reason for its actions. Thereafter, the employee may prevail by showing that the proffered reason was not the true reason for the employment decision, but is merely a pretext for discrimination or retaliation. *Enoch v. Alamance County Dep't of Soc. Servs.*, 164 N.C. App. 233, 595 S.E.2d 744, (2004); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993).

12. Oppositional activities are not protected unless they are proportionate and reasonable under the circumstances. Courts must balance the purpose of protecting opposition to discrimination against Congress's "manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Laughlin v. Metropolitan Washington Airports Auth.*, 149 F.3d 253, (4th Cir.1998) (addressing Title VII retaliation)

13. To qualify as protected activity, an employee need not engage in the formal process of adjudicating a discrimination claim. Protected activity encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities. *Laughlin v. Metropolitan Washington Airports Auth.*, 149 F.3d 253 (4th Cir. 1998)

14. Petitioner established a *prima facie* case of sex discrimination with regard to her pay: she is a member of a protected class (female), and the job she occupied was similar to higher paying jobs occupied by males (Sgt. Sutton and Sgt. Farmer).

15. Petitioner established a *prima facie* case of sex discrimination with regard to transfer to Patrol: she is a member of a protected class (female); she was performing satisfactorily (undisputed); she suffered an adverse employment action (being transferred to night-shift Patrol); and similarly situated male employees (Sgt. Farmer and Sgt. Barnwell) received more favorable treatment (staying in specialty positions).

16. Petitioner established a *prima facie* case of retaliation with regard to her transfer to Patrol: she engaged in protected activity (complaining to her supervisors, to Human Resources, and to the Office of Equal Opportunity about possible gender discrimination in her pay); she suffered an adverse employment action (being transferred to night-shift Patrol); and a causal connection exists between the protected activity and the adverse action (proximity in time, statements by supervisor).

17. A verbal complaint to one's supervisor or to Human Resources is sufficient to constitute protected activity. *See Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543 (4th Cir. 2003) (holding that an employee's complaint to her supervisor was protected activity under Title VII). Petitioner's verbal complaint to Ms. Henderson and Ms. Jones, to the effect that she was the only female Sergeant in the department and was being paid less than all the male Sergeants and that the department was "looking after the guys, and they're not looking after me," constitutes protected activity. A reasonable person would understand from these statements that Petitioner was protesting alleged discrimination on the basis of sex. Further, the Human Resources staff was in fact concerned about the activity and investigated possible discrimination.

18. Petitioner's verbal complaint to Chief Younce and Assistant Chief Dailey, to the effect that she wanted to get paid the same amount as "all the guys," constitutes protected activity. A reasonable person would understand from these statements, and the fact that Petitioner was the only female Sergeant, that Petitioner was protesting alleged discrimination on the basis of sex.

19. Petitioner's verbal complaint to Dr. Rhonda Sutton in the Office of Equal Opportunity, to the effect that she was being paid less than all the male Sergeants and that she had complained about it to Human Resources, constitutes protected activity. A reasonable person would understand from these statements, and Dr. Sutton did in fact understand, that Petitioner was protesting alleged discrimination on the basis of sex. Her concerns were relayed by her to Human Resources.

20. Petitioner's filing of a Performance Pay Dispute, in the context of her conversations with Human Resources, constitutes protected activity. Petitioner's participation in the OEO process initiated by Dr. Sutton constitutes protected activity. The OEO form stated that Petitioner felt she was being discriminated against because of her gender and documented a protest of alleged discrimination on the basis of sex.

21. It is unlawful for a state agency to transfer an employee in retaliation for opposition to alleged discrimination. N.C. Gen. Stat. § 126-36(a).

22. An undesirable reassignment is an adverse employment action for which an employer may be liable when such action is taken for an unlawful reason. *See Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257 (1998). Petitioner's transfer from her day-shift job as a Detective in Investigations to a night-shift position on Patrol constitutes an adverse employment action. Other male sergeants asking for a transfer or expressing no preference were accommodated as was the Respondent's usual practice. Petitioner was not. Petitioner did not wish to transfer and did not request one. In order to transfer Petitioner, questionable transfers of other male employees, primarily sergeants were enacted in order to make an opening on the evening Patrol shift for her to be transferred into.

23. Even when an employer has the right to assign employees as it chooses, it may not assign employees to more onerous shifts against their will in retaliation for protected activity. *RGC (USA) Mineral Sands, Inc. v. National Labor Relations Bd.*, 281 F.3d 442, 450 (4th Cir. 2002) (holding that employer unlawfully retaliated against union workers by reassigning them to night shifts); *National Labor Relations Bd. v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1049 (4th Cir. 1997) (holding that employer's transfer of employee to night shift was a "constructive discharge" because employer knew that employee could not work night shift).

24. While Contested Case Hearings based on lack of "just cause" under N.C. Gen. Stat. § 126-35 are limited to the specific employment actions of dismissal, demotion, or suspension, *Winbush v. Winston-Salem State University*, 598 S.E. 2d 619, (2004), no such limitation applies to Contested Cases based on unlawful discrimination or retaliation. It is unlawful for a State employer to discriminate against an employee on the basis of gender, or to retaliate against an employee for making a complaint of sex discrimination, with regard to any term, condition, location, or other privilege of employment. *See* N.C. Gen. Stat. §§ 126-16, 126-17, 126-84, 126-85. Whether Petitioner's re-assignment to Patrol constituted a transfer as Petitioner contends, a change in job duties as Respondent contends, or a change in the hours and location of Petitioner's employment, the re-assignment is unlawful if it was based upon Petitioner's sex and her complaint about sex discrimination.

25. Close proximity in time can give rise to a sufficient inference of causation to satisfy the *prima facie* requirement. *King v. Rumsfeld*, 328 F.3d 145, 151 (2003) (holding that a two month and two week time frame between employer's notice of EEO complaint and plaintiff's termination satisfied *prima facie* causation requirement). A temporal connection alone may be sufficient to show retaliation. *Lauer v. Schewel Furniture Co., Inc.*, No. 03-1043, 2004 WL 24971 *5 (4th Cir. 2004). There was a causal connection between Petitioner's protected activity and the adverse employment action.

26. The decision to transfer Petitioner to Patrol was made two months after Chief Younce, Assistant Chief Dailey, and Lt. Potts became aware of Petitioner's complaint to Human Resources, and two days after Chief Younce complied with Human Resource's recommendation to raise Petitioner's pay. The transfer occurred after Petitioner was given an interim evaluation by Lt. Potts where Lt. Potts wrote that Petitioner needed improvement in six out of eight areas. Petitioner had never received a "needs improvement" on any evaluation during her employment with Respondent. Petitioner has shown a causal connection between her protected activity and the adverse employment action to satisfy her *prima facie* requirement.

27. Since Petitioner satisfied her burden of establishing a *prima facie* case, the burden shifts to Respondent to articulate a legitimate nondiscriminatory reason for its actions.

28. Respondent has articulated several reasons for paying Petitioner less than her male co-workers at varying times. First, Respondent said that Petitioner didn't have an Intermediate Law Enforcement Certificate. Then Respondent modified that to Petitioner wasn't eligible for the Intermediate Law Enforcement Certificate. Later Respondent articulated that Petitioner wasn't functioning as a supervisor; then, it was that she lacked experience as a supervisor. Respondent, lastly specified that Petitioner lacked experience as a law enforcement supervisor.

29. An employer's changing or inconsistent reasons for an adverse employment action constitute convincing evidence of discrimination. *Lauer*, 2004 WL 24971 *330 (citing *Alvarado v. Board of Trs. of Montgomery Comm. Coll.*, 928 F.2d 118, 122-23 (4th Cir. 1991)).

30. Ultimately, Respondent settled on the following two reasons: (1) that Petitioner lacked the qualifications for the Intermediate Certificate, and (2) that she lacked experience as a police supervisor. Having articulated these reasons, Respondent has

set forth legitimate nondiscriminatory reasons for pay disparity and the transfer of the Petitioner to Patrol. Respondent has satisfied its burden of articulating a legitimate nondiscriminatory reason for its action.

31. Once the employer articulates its alleged legitimate nondiscriminatory reason for the adverse employment action and the analysis and burden of proof shifts to the Petitioner. The employee may prevail by showing that the employer's reason is "'unworthy of credence' and therefore a 'cover-up' for discrimination." *Lauer*, 2004 WL 24971 *329-30 (citing *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089).

32. After the *prima facie* case has been rebutted by the assertion of a legitimate nondiscriminatory reason, the trier of fact may still consider the evidence establishing the *prima facie* case and inferences properly drawn there from in determining whether the employer's explanation is pretextual. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, (2000).

33. Direct evidence is not required to prove a discriminatory motive. Circumstantial evidence is probative of intentional discrimination. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, (2003).

34. In deciding whether an employer has vicarious liability in a case, the Court turns to agency law principles, for Title VII defines the term "employer" to include "agents." A master is subject to liability for the torts of his servants committed while acting in the scope of their employment. A supervisor, however, acting out of gender-based animus may be actuated by personal motives unrelated and even antithetical to the employer's objectives. However, scope of employment is not the only basis for employer liability under agency principles. An employer is subject to liability for the torts of its employees acting outside the scope of their employment when the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998)

35. Petitioner's evidence of gender-related comments by Lieutenant Potts may be used to establish that sex was a motivating factor in the decision to transfer Petitioner to Patrol, since Assistant Chief Dailey relied on information from Lt. Potts. See *Watkins v. Hospitality Group Management*, 2004 U.S. Dist. LEXIS 4037, at 2 (M.D. NC, 2004) (holding that *Hill's* limit on liability based upon subordinates with no supervisory power did not preclude finding liability on the basis of a general manager's discriminatory animus). Comments Lt. Potts told Petitioner such as, "You're nothing but a goddamn secretary. You need to start packing your stuff because you're getting out of here. . . . You're going to Patrol," and "What's the matter, little girl? Are you going to cry," followed by Lt. Potts punching a file cabinet as he was leaving the Petitioner's office; are compelling comments and actions by Lt. Potts (an agent of Respondent) in regards to this analysis.

36. Equally compelling to this case was Lt. Potts testimony regarding the work done by Petitioner as compared to Sgt. Farmer. Lt. Potts wrote on Petitioner's evaluation that Petitioner had done half as many investigations as Sgt. Farmer. Lt. Potts put forth a document, while testifying to the Undersigned that cited cases individually opened, which testimony he knew did not accurately reflect the total number of investigations performed by Sgt. Farmer and Sgt. Trochum. In his direct testimony he failed to include investigations that he had personally assigned to Petitioner and to Sgt. Farmer.

37. Respondent's reason, that Petitioner lacked the qualifications to obtain an Intermediate Law Enforcement Certificate, has been shown not to be persuasive, since Petitioner ultimately obtained the Certificate based on the training and education she had already completed at the time of the pay decision. Further, two other individuals (both male) did not have the certificate and the same or similar guess work applied but to their favor. Moreover, even if it was believed that Petitioner lacked the qualifications for an Intermediate Certificate, statements to Human Resources, indicating that the Intermediate Certificate was preferred, not required, and lack of certainty nine months after the pay decision about whether the Intermediate Certificate was required, or had been required of Petitioner's replacement, is persuasive evidence to show that the lack of qualifications for an Intermediate Certificate was not the reason for pay disparity.

38. Respondent's other reason, that Petitioner lacked experience as a law enforcement supervisor, has been shown not to be persuasive. Petitioner's experience as a law enforcement supervisor was equal to or greater than Sgt. Barnwell's and Sgt. Farmer's, both of whom received higher pay. Further, disregard for Petitioner's supervisory experience and skills at the North Carolina State Bureau of Investigation as well as the supervisory training received by Petitioner through the North Carolina Office of State Personnel, reflect Lt. Potts declarations to Petitioner that, "You're nothing but a goddamn secretary." Further as a demonstration of personal physical fitness and supervisory leadership in being physically fit, Petitioner successfully completed the POPAT, while a significant number of officers in the department, including Sgt. Farmer, were unable to complete the required number of push-ups and sit-ups to finish the test.

39. Even an otherwise legitimate job requirement cannot justify an employer's decision when it is applied in a discriminatory manner. See *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543 (4th Cir. 2003). (holding that the employer's

refusal to hire the plaintiff as a nurse was not based on the fact that she had not yet obtained her nursing license, because other people were interviewed before they formally received their licenses).

40. The evidence presented has shown that the Respondent's asserted reasons for paying Petitioner less than her male co-workers do not overbear those reasons as set forth by Petitioner.

41. With regard to Petitioner's transfer to Patrol, Respondent has asserted two reasons: (1) that Petitioner needed to develop supervisory competencies, and (2) that Respondent needed a Sergeant with investigative experience on Patrol.

42. The evidence has shown that Respondent's first reason, that she needed to develop supervisory competencies, is not prevailing. Petitioner had the competency to perform the job duties required of a Sergeant. She had demonstrated these competencies through completion of over 200 hours of supervisory training, nine years of supervisory experience at the SBI, four years of successful job performance at campus police, and supervising police officers when she was on-call and working special events like football games.

43. Petitioner's demonstrated supervisory competencies were equal to or greater than two male Sergeants, Sgt. Farmer and Sgt. Barnwell, who had not complained of gender discrimination and pay disparity. Sgt. Farmer and Sgt. Barnwell had not supervised on Patrol, had less supervisory experience than Petitioner, and had less supervisory training than Petitioner. Neither Sgt. Farmer nor Sgt. Barnwell was required to go to Patrol to develop supervisory competencies.

44. The evidence has shown that Respondent's second reason, that they needed a Sergeant with investigative experience on Patrol, is not a compelling reason for its actions. Sgt. Farmer had investigative experience, he had asked to leave Investigations, and it was Respondent's usual practice to consider what officers wanted in making assignments. Respondent knew that Petitioner did not want to go to Patrol and had not asked for a change of assignments, and that Sergeant Farmer wanted to leave Investigations. It would have been the Department's usual practice to move Sgt. Farmer, not Petitioner to Patrol.

45. Additionally, once Sgt. Farmer was transferred to Special Events, all of the vacant positions were filled. Respondent would not normally move someone unless there was a vacancy or someone else wanted to move. Since there was no vacancy, and no one wanted to move off of night-shift Patrol, it would not have been Respondent's usual practice to move someone from Investigations to Patrol.

46. All the testimony and evidence presented, including but not limited to the words and actions of the agent(s) of the Respondent, reveal that Petitioner has carried her burden of proof discomfiting Respondent's proffered reasons for its employment decision and Petitioner prevails in the analysis regarding Respondent's asserted reasons for its actions as pretext for gender based discriminatory pay disparity and retaliation. **The evidence taken in its entirety shows that Respondent's reasons for its transfer of the Petitioner are not legitimate, nonretaliatory reasons.**

47. Petitioner's pay was reduced when she was transferred to Patrol from Investigations.

48. Respondent has asserted that Respondent's actions are of no consequence and/or without remedy, in that, Petitioner was ultimately paid the same amount as her male counterparts and she resigned her position with Respondent. Respondent asserts that Petitioner's petition cites the transfer (and demotion) and discrimination claims but does not assert wrongful termination, thereby leaving the Office of Administrative Hearings without jurisdiction over the ramifications of Respondent's actions; they being the resignation of Petitioner, which is asserted by the Petitioner as a constructive discharge. Alternatively, Respondent asserts that the Office of Administrative Hearings and the State Personnel Commission do not have jurisdiction over Petitioner's constructive discharge claim because resignations do not constitute actionable grounds for a petition for a contested case hearing. Further, Respondent asserts that the Office of Administrative Hearings and the State Personnel Commission do not have jurisdiction over Petitioner's constructive discharge claim because she failed to properly preserve such a claim by satisfying the statutory jurisdictional requirements placed on such allegations.

49. The above assertion was advanced by Respondent at the beginning of this contested case and Respondent's motion to dismiss was denied. Respondent experienced no prejudice in the preparation or presentation of its case which was ably advanced by Respondent's counsel.

50. North Carolina recognizes the claim of wrongful discharge in violation of public policy where termination is constructive. As cited in *Whitt v. Harris Teeter, Inc*, 165 N.C.App. 32, 598 S.E.2d 151 (N.C.App.2004), an employee who resigns is normally not regarded as having been discharged, and thus would have no right of action for abusive discharge. *Whitt* goes on to state that, "the law is not entirely blind, however. It is able, in most instances, to discard form for substance, to reject sham for reality. It therefore recognizes the

concept of constructive discharge; in a proper case, it will overlook the fact that a termination was formally effected by a resignation if the record shows that the resignation was indeed an involuntary one, coerced by the employer.”

51. To the extent that a formal pleading was not asserted by Petitioner, amendment was allowed and Respondent was put on notice that the Petitioner sought redress from a resignation that was not an involuntary one but one flowing from the impact of a retaliatory transfer which was pled. "Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure in order that decisions be had on the merits and not avoided on the basis of mere technicalities." [Phillips v. Phillips, 46 N.C.App. 558, 265 S.E.2d 441, \(1980\)](#) (citing [N.C. Gen.Stat. § 1A-1, 15](#); [Mangum v. Surlles, 281 N.C. 91, 187 S.E.2d 697 \(1972\)](#)); see also [Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 \(1986\)](#).

52. As Plaintiff in the case of *McDevitt v. Stacy*, 148 N.C.App. 448, 559 S.E.2d 201 (N.C.App.2002), the Respondent in this case "has advanced no suggestion of additional witnesses (it) might have called, further cross-examination (it) would have conducted, supplementary exhibits (it) would have introduced, or how amendment otherwise prejudiced" the Respondent in putting forth its case. The entire record of this case shows that constructive discharge was an issue at this hearing and amendment was proper under the Rules of Civil Procedure followed by the Office of Administrative Hearings.

53. A constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable in an effort to force the employee to quit. *Whitt v. Harris Teeter, Inc.*, 165 N.C.App. 32, 598 S.E.2d 151 (N.C.App.2004). Under the theory of constructive discharge, "an employee's reasonable decision to resign because of unendurable working conditions" is treated as a termination. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S. Ct. 2342 (2004). If a reasonable person would have felt compelled to resign under the circumstances, the resignation is a constructive discharge. A constructive discharge is actionable as a "termination" under Chapter 126. *Campbell v. N.C. Department of Transp.*, 155 N.C. App. 652, 660-61 575 S.E. 2d 54 (2003).

54. A transfer to night-shift is sufficient to constitute a constructive discharge. *National Labor Relations Bd. v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1049 (4th Cir. 1997) A change in working hours, which results in a reduction in pay and severe depression for the employee, is also sufficient to constitute a constructive discharge. *Whitt*.

55. Like the employer in *Grand Canyon*, and in *Whitt*, the evidence shows that Respondent had reason to know that Petitioner would quit if she were transferred to night shift. In accordance with all the evidence, again including but not limited to the words and actions of the agent(s) of the employer and the shifting of employees to create a vacancy for Petitioner to move into, the transfer of Petitioner was a purposeful act to drive the Petitioner to quit.

56. Like the plaintiff in *Whitt*, Petitioner became clinically depressed as a result of and as an impact to the discrimination and retaliation that she had experienced. Petitioner was losing sleep and losing weight, and her condition was not improving with medical treatment and counseling. She was putting herself at risk, mentally and physically, by continuing to work in that environment. Her psychologist advised her to seek other employment in order to preserve her health.

57. In judging whether a resignation is truly involuntary, the courts have applied an objective standard. The test is not whether the particular employee felt it necessary to resign, but whether a reasonable person in the employee's shoes would have felt compelled to resign. *Beye v. Bureau of Nat. Affairs*, 59 Md.App. 642, 477 A.2d 1197 (Md.App.,1984) citing [Alicea Rosado v. Garcia Santiago, supra, 562 F.2d 114, 119](#); [Bourque v. Powell Electrical Mfg. Co., supra, 617 F.2d 61](#); [Vaughn v. Pool Offshore Co., etc., 683 F.2d 922 \(5th Cir.1982\)](#); [Jacobs v. Martin Sweets Co., Inc., 550 F.2d 364 \(6th Cir.\)](#), cert. denied 431 U.S. 917, 97 S.Ct. 2180, 53 L.Ed.2d 227 (1977); [Held v. Gulf Oil Co., 684 F.2d 427 \(6th Cir.1982\)](#); [Rimedio v. Revlon, Inc., 528 F.Supp. 1380 \(S.D.Ohio 1982\)](#).

58. Under the reasonable man standards articulated by the courts, a reasonable person would have felt compelled to resign under the circumstances set forth by the evidence in this case. Petitioner's resignation did not reflect an unwillingness to work (indeed, she immediately obtained other employment with the North Carolina State Capitol Police), but she could not continue to work in an environment that was hazardous to her mental and physical health. Petitioner's resignation was a constructive discharge.

59. State Personnel Commission rules provide the Commission with various legal and equitable powers and remedies when discrimination and/or retaliation have been found.

60. 25 N.C.A.C. 1B.0434 provides: *In those cases in which the State Personnel Commission finds an act of discrimination or unlawful workplace harassment prohibited by G.S. 126-16, G.S. 126-36 or G.S. 126-36.1, the Commission may order reinstatement, back pay, transfer, promotion or other appropriate remedy. The Commission shall also have the authority in such cases to order other corrective remedies to ensure that the same or similar discriminatory acts do not recur.*

61. Back pay is reduced by any interim earnings. 25 N.C.A.C. 01B.0421. The Respondent must pay the Petitioner's retirement contribution on the total gross amount of back pay awarded. 25 N.C.A.C. 01B.0421.

62. 25 N.C.A.C. 1B.0422 provides: *Front pay is the payment of an amount to an employee above his/her regular salary, such excess amount representing the difference between the employee's salary in his/her current position and a higher salary determined to be appropriate due to a finding of discrimination. Front pay shall be paid for such period as the agency is unable to hire, promote or reinstate the employee to a position at the level ordered by the Personnel Commission.* Federal courts have held that front pay may be awarded when reinstatement is not viable because the employer has hired a replacement for the employee, there is continuing hostility between the employee and the employer, or the employee has suffered psychological injury as a result of the discrimination. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 121 S.Ct. 1946, 1947 (2001).

63. Attorney's fees may be awarded pursuant to 25 N.C.A.C. 1B.0414 and 1B.0438. Costs may be awarded pursuant to 25 N.C.A.C. 1B.0438.

64. The amount that Petitioner would have earned in Investigations minus the amounts she earned on Patrol and at State Capital Police is \$951.52 (\$475.76 times two) for the two months that she worked on Patrol prior to her resignation; and \$20,250.23 (\$1840.93 times eleven) for the eleven months (April 2003 through February 2004) that she has worked at State Capital Police since her resignation.

65. Petitioner's pay that she would have earned in Investigations minus the amounts she may reasonably be expected to earn at State Capital Police is \$7,363.72 (\$1840.93 times four) for the four months (March 2004 through June 2004) that she is expected to work at State Capital Police until her retirement.

66. Petitioner's counsel has set forth amounts and request for attorney's fees and costs which appear reasonable, but final submission to the State Commission would include additional attorney's fees and costs for time spent and costs incurred following the submission of the request which would reflect a more accurate total amount.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

There is sufficient evidence to properly and lawfully support Petitioner's claim of gender based disparate treatment and retaliation and Petitioner prevails upon her contention that Respondent engaged in unlawful State employment practices constituting discrimination and retaliation. The ramifications and impact of the above actions support Petitioner's claim of wrongful discharge in violation of State public policy and prevailing law where termination was constructive. As such, it is the decision of the Undersigned that Petitioner be awarded back pay and front pay and the return of lost benefits including making the appropriate retirement contribution, 401(k) contribution, and longevity pay based on the total gross back pay award. Further, Petitioner should be awarded reasonable attorney fees pursuant to 25 N.C.A.C. 1B.0414 as well as reasonable costs upon submission by the Petitioner's counsel of a Petition to the North Carolina State Personnel Commission for Attorney Fees with an accompanying itemized statement of the fees and costs incurred in representing the Petitioner.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and to present written arguments regarding this Decision issued by the Undersigned in accordance with N. C. Gen. Stat. § 150B-36.

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina State Personnel Commission. State Personnel Commission procedures and time frames regarding appeal to the Commission are in accordance with Appeal to Commission, Section 0.0400 *et seq.* of Title 25, Chapter 1, SubChapter B of the North Carolina Administrative Code (25 NCAC 01B .0400 *et seq.*).

IT IS SO ORDERED.

This is the 5th day of May, 2005.

Augustus B. Elkins
Administrative Law Judge