NORTH CAROLINA REGISTER

VOLUME 24 • ISSUE 07 • Pages 276 - 487

October 1, 2009

Contact List for Rulemaking Questions or Concerns

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.

Office of Administrative Hearings
Rules Division
1711 New Hope Church Road — (919) 431-3000
Raleigh, North Carolina 27609 — (919) 431-3104 FAX

contact:	Molly Masich, Codifier of Rules	molly.masich@oah.nc.gov	(919) 431-3071
	Dana Vojtko, Publications Coordinator	dana.vojtko@oah.nc.gov	(919) 431-3075
	Julie Edwards, Editorial Assistant	julie.edwards@oah.nc.gov	(919) 431-3073
	Tammara Chalmers, Editorial Assistant	tammara.chalmers@oah.nc.gov	(919) 431-3083

Rule Review and Legal Issues

Rules Review Commission
1711 New Hope Church Road — (919) 431-3000
Raleigh, North Carolina 27609 — (919) 431-3104 FAX

contact:	Joe DeLuca Jr., Commission Counsel	joe.deluca@oah.nc.gov	(919) 431-3081
	Bobby Bryan, Commission Counsel	bobby.bryan@oah.nc.gov	(919) 431-3079

Fiscal Notes & Economic Analysis

Office of State Budget and Management
116 West Jones Street — (919) 807-4700
Raleigh, North Carolina 27603-8005 — (919) 733-0640 FAX

contact:	Nathan Knuffman, Asst. Budget Officer	osbmruleanalysis@ncmail.net	(919)807-4728

Governor's Review

Eddie Speas — eddie.speas@nc.gov
Legal Counsel to the Governor — (919) 733-5811
116 West Jones Street
Raleigh, North Carolina 27603

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee
545 Legislative Office Building
300 North Salisbury Street — (919) 733-2578
Raleigh, North Carolina 27611 — (919) 715-5460 FAX

contact:	Karen Cochrane-Brown, Staff Attorney	karenc@ncleg.net
	Jeff Hudson, Staff Attorney	jeffreyh@ncleg.net

County and Municipality Government Questions or Notification

NC Association of County Commissioners
215 North Dawson Street — (919) 715-2893
Raleigh, North Carolina 27603

contact:	Jim Blackburn	jim.blackburn@ncacc.org
	Rebecca Troutman	rebecca.troutman@ncacc.org

NC League of Municipalities — (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603

contact:	Erin L. Wynia	ewynia@nclm.org

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NORTH CAROLINA REGISTER
Publication Schedule for January 2009 – December 2009

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 31st legislative day of the session beginning:	270th day from publication in the Register
23:13	01/02/09	12/08/08	01/17/09	03/03/09	03/20/09	05/01/09	05/2010	09/29/09
23:14	01/15/09	12/19/08	01/30/09	03/16/09	03/20/09	05/01/09	05/2010	10/12/09
23:15	02/02/09	01/09/09	02/17/09	04/03/09	04/20/09	06/01/09	05/2010	10/30/09
23:16	02/16/09	01/26/09	03/03/09	04/17/09	04/20/09	06/01/09	05/2010	11/13/09
23:17	03/02/09	02/09/09	03/17/09	05/01/09	05/20/09	07/01/09	05/2010	11/27/09
23:18	03/16/09	02/23/09	03/31/09	05/15/09	05/20/09	07/01/09	05/2010	12/11/09
23:19	04/01/09	03/11/09	04/16/09	06/01/09	06/22/09	08/01/09	05/2010	12/27/09
23:20	04/15/09	03/24/09	04/30/09	06/15/09	06/22/09	08/01/09	05/2010	01/10/10
23:21	05/01/09	04/09/09	05/16/09	06/30/09	07/20/09	09/01/09	05/2010	01/26/10
23:22	05/15/09	04/24/09	05/30/09	07/14/09	07/20/09	09/01/09	05/2010	02/09/10
23:23	06/01/09	05/08/09	06/16/09	07/31/09	08/20/09	10/01/09	05/2010	02/26/10
23:24	06/15/09	05/22/09	06/30/09	08/14/09	08/20/09	10/01/09	05/2010	03/12/10
24:01	07/01/09	06/10/09	07/16/09	08/31/09	09/21/09	11/01/09	05/2010	03/28/10
24:02	07/15/09	06/23/09	07/30/09	09/14/09	09/21/09	11/01/09	05/2010	04/11/10
24:03	08/03/09	07/13/09	08/18/09	10/02/09	10/20/09	12/01/09	05/2010	04/30/10
24:04	08/17/09	07/27/09	09/01/09	10/16/09	10/20/09	12/01/09	05/2010	05/14/10
24:05	09/01/09	08/11/09	09/16/09	11/02/09	11/20/09	01/01/10	05/2010	05/29/10
24:06	09/15/09	08/24/09	09/30/09	11/16/09	11/20/09	01/01/10	05/2010	06/12/10
24:07	10/01/09	09/10/09	10/16/09	11/30/09	12/21/09	02/01/10	05/2010	06/28/10
24:08	10/15/09	09/24/09	10/30/09	12/14/09	12/21/09	02/01/10	05/2010	07/12/10
24:09	11/02/09	10/12/09	11/17/09	01/02/10	01/20/10	03/01/10	05/2010	07/30/10
24:10	11/16/09	10/23/09	12/01/09	01/15/10	01/20/10	03/01/10	05/2010	08/13/10
24:11	12/01/09	11/05/09	12/16/09	02/01/10	02/22/10	04/01/10	05/2010	08/28/10
24:12	12/15/09	11/20/09	12/30/09	02/15/10	02/22/10	04/01/10	05/2010	09/11/10

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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.

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State of North Carolina

BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 22
AMENDING AND EXTENDING EXECUTIVE ORDER NO. 128,
GOVERNOR'S ADVISORY COUNCIL ON HISPANIC/LATINO AFFAIRS

By the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

Section 1 of Executive Order 128, issued by Governor Michael F. Easley on September 7, 2007, is hereby amended as follows:

Section 1. Membership Composition

The Governor's Advisory Council on Hispanic/Latino Affairs is hereby established. It shall be composed of 15 voting members who shall serve for terms of two (2) years. A member may not be appointed for more than two consecutive full terms.

In addition to the 15 appointed members, the following persons or their designees shall serve as ex-officio, non-voting members:

a. The Secretary of the Department of Commerce;
b. The Secretary of the Department of Health and Human Services;
c. The Secretary of the Department of Crime Control and Public Safety;
d. The Secretary of the Department of Juvenile Justice and Delinquency Prevention;
e. The Secretary of the Department of Correction;
f. The Secretary of the Department of Transportation;
g. The Secretary of the Department of Revenue;
h. The Governor's Policy Director; and
i. The Chairman of the Employment Security Commission.

Additionally, the Council shall invite the following persons, or their designees, to serve as ex-officio, non-voting members of the Advisory Council:

a. The Commissioner of the North Carolina Department of Agriculture and Consumer Services;
b. The Commissioner of Labor;

c. The Attorney General;
d. The Superintendent of Public Instruction; and
e. The Commissioner of Insurance.

Section 2. Duration

Except as amended herein, Executive Order 128 remains in full force and effect. Executive Order 128 is hereby extended until September 4, 2011, pursuant to N.C. Gen. Stat. § 147-16.2 or until rescinded by the Governor.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this fourth day of September in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

Beverly Eaves Perdue
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
CLHC, LLC

Pursuant to N.C.G.S. § 130A-310.34, CLHC, 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 Charlotte, Mecklenburg County, North Carolina. The Property, where the former Arrow Laundry and Cleaners, Inc.'s operated, consists of 0.46 acres and is located at 1933 East 7th Street and 1928 East 8th Street (Mecklenburg County Tax Parcels Numbers 12703133 and 12703120, respectively). Environmental contamination exists on the Property in the soil. CLHC, LLC has committed itself to redevelop the property for residential and certain commercial uses. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and CLHC, 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 Charlotte-Mecklenburg Public Library, 310 North Tryon Street, Charlotte, NC 28202 by contacting Joyce Reimann at that address, at 704-416-0152 or at jreimann@plcmc.org; or at the offices of the N.C. Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 (where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents) by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411.

Written public comments may be submitted to DENR within 30 days after the date this Notice is published in a newspaper of general circulation serving the area in which the Property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 21 days after the period for written public comments begins. Thus, if CLHC, 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 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 October 2, 2009. 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

Greenville Utilities Commission – Request for an Interbasin Transfer Certificate

NOTICE OF PUBLIC HEARING
Thursday, November 5, 2009
7:00 PM
Goess Student Center, Pitt Community College
Winterville, NC

The North Carolina Environmental Management Commission (EMC) will hold a public hearing to receive comments on the Greenville Utility Commission's (GUC) petition for an interbasin transfer (IBT) certificate. GUC has requested an IBT certificate to transfer water from the Tar River Basin to the Contentnea Creek and Neuse River basins. GUC proposes to provide finished water to the Towns of Farmville, Winterville, and Greene County, which currently rely on the Cretaceous aquifers for water supply. These communities are required by law to reduce their reliance upon this groundwater source, and therefore plan to purchase potable water from GUC. The sale, use, and disposal of this water create an interbasin transfer.

GUC is requesting a transfer of 8.3 million gallons per day (MGD) from the Tar River Basin to the Contentnea Creek River Basin to meet Farmville and Greene County's demands through the year 2030, and 4.0 MGD from the Tar River Basin to the Neuse River Basin to meet Winterville's demands through the year 2030.

The applicant anticipates that there will be no impact to water quality within the source basin as a result of the proposed transfer. This is based on the results of an impact analysis indicating that the proposed interbasin transfer from the Tar River to the Neuse River and Contentnea Creek basins will have minimal impact on the existing stream flow at Greenville. The model accounted for existing and expected future withdrawals from, and discharges to, the Tar River (greater than 100,000 gallon per day). The applicant also anticipates that this proposed transfer will not result in increased growth, or wastewater discharges, in the receiving basins. The proposed project would allow existing communities with groundwater systems to reduce their dependence on those sources while at the same time serving existing and future customers.

The public hearing will start at 7 pm Thursday, November 5th at the Craig Goess Student Center, Pitt Community College. In addition, Division of Water Resources staff will be available to answer questions from 6:30 pm to 7:00 pm at the hearing location. The public may review the draft petition and the final Environmental Assessment (EA) at the Division's web site at: http://www.ncwater.org/Permits_and_Registration/Interbasin_Transfer/Status/Greenville
The documents may also be viewed at the hearing or during normal business hours at the offices of the Division of Water Resources (512 N. Salisbury Street, Room 1106, Archdale Building, Raleigh).

The purpose of this announcement is to encourage interested parties to attend and/or provide relevant written and verbal comments. Division staff request that parties submit written copies of oral comments. Based on the number of people who wish to speak, the length of oral presentations may be limited.

If you are unable to attend, you may mail written comments to Toya Ogallo, Division of Water Resources, DENR, 1611 Mail Service Center, Raleigh, NC 27699-1611. Comments may also be submitted electronically to Toya.F.Ogallo@ncdenr.gov. Mailed and emailed comments will be given equal weight. All comments must be postmarked or emailed by December 4, 2009.

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

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

Application by: Dave Lentz
Infiltrator Systems, Inc
PO Box 768
Old Saybrook, CT 06475

For: Modification to Innovative Approval with Addition of Modified Quick 4 Chamber

DENR Contact: Ted Lyon
1-919-715-3274
Fax: 919-715-3227
ted.lyon@ncmail.net

These applications may be reviewed by contacting the applicant or at 2728 Capital Blvd., Raleigh, NC, On-Site Water Protection Section, Division of Environmental Health. Draft proposed innovative approvals and proposed final action on the application by DENR can be viewed on the On-Site Water Protection Section web site: http://www.deh.enr.state.nc.us/osww_new/new1//index.htm.

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

NOTICE OF TYPES OF DEVELOPMENT APPROVALS ISSUED BY THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES THAT ARE STATUTORILY EXTENDED UNDER THE PROVISIONS OF S.L. 2009-406

Session Law 2009-406, entitled "An Act to Extend Certain Government Approvals Affecting the Development of Real Property Within the State", was enacted by the General Assembly and signed into law by Governor Beverly E. Perdue on August 5, 2009.

The Act is known as the Permit Extension Act of 2009, and has as its purpose the prevention of the abandonment of approved projects and activities due to the present unfavorable economic conditions, by tolling the terms of certain government approvals for a finite period of time as the economy improves.

For the following types of development permits or approvals issued by the Department of Environment and Natural Resources that are current and valid at any point during the period beginning January 1, 2008 and ending December 31, 2010, please TAKE NOTICE that the normal term of development permit or approval does not run during that period and by statute, begins to run again on January 1, 2011. All other provisions of any development permit or approval are unaffected by S.L. 2009-406.

(Please further note that pursuant to an amendment of S.L. 2009-406 in a later action of the General Assembly, S.L. 2009-484, § 5.1, the holder of the development permit or approval retains the ability to voluntarily relinquish the development permit or approval, should the holder choose to do so.)

Any questions regarding this NOTICE should be directed to the specific division or section within the Department of Environment and Natural Resources that issued the development permit or approval.

TYPES OF PERMITS AND ISSUING AGENCY

TYPE OF PERMIT/APPROVAL	REFERENCE AUTHORITY	ISSUING DIVISION OR SECTION
DLR		
Erosion and Sedimentation Plan Approval	Article 4 of Chapter 113A of the General Statutes	Land Quality Section, Division of Land Resources
DWQ		
Wastewater Pump and Haul Systems (15A NCAC 02T .0200)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
Wastewater Irrigation Systems (15A NCAC 02T .0500)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section, and Construction Grant & Loans Section if funded thereby
Single Family Residence Wastewater Irrigation Systems (15A NCAC 02T .0600)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
High Rate Infiltration Systems (15A NCAC 02T .0700)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section, and Construction Grant & Loans Section if funded thereby
Other Non-Discharge Wastewater Systems (e.g., evaporation/infiltration) (15A NCAC 02T .0800)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
Reclaimed Water Systems (15A NCAC 02T .0900)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
Closed Loop Recycle Systems (15A NCAC 02T .1000)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
Land Application of Residuals (15A NCAC 02T .1100)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
Coal Combustion Products Management (15A NCAC 02T .1200)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
Soil Remediation (15A NCAC 02T .1500)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section

Groundwater Remediation Systems (15A NCAC 02T .1600)	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality/Aquifer Protection Section
State Stormwater Permits	Part I of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality / Surface Water Section
Stream Origin and Buffer Calls	Article 21 of Chapter 143 of the General Statutes	Division of Water Quality / Surface Water Section
Permits for Isolated and Other Non 404 Wetlands [*Note that Section 401 Water Quality Certifications are not included among the approvals extended by SL 2009-406, as the expiration date for a Section 401 Certification is determined by the Federal 404 Permit to which it is linked.]	Article 21 of Chapter 143 of the General Statutes	Division of Water Quality / Surface Water Section
Systemwide Collection System Permits	Part 1 of Article 21 of Chapter 143 of the General Statutes	Division of Water Quality / Water Protection Section
DEH		
Authorization to Construct a Public Water System	Article 10 of Chapter 130A of the General Statutes	Division of Environmental Health / Public Water Supply Section
Improvement Permit	Article 11 of Chapter 130A of the General Statutes	Local Health Department and Division of Environmental Health
Construction Authorization	Article 11 of Chapter 130A of the General Statutes	Local Health Department and Division of Environmental Health
Operation Permit for Type V and VI systems	Article 11 of Chapter 130A of the General Statutes	Local Health Department and Division of Environmental Health
DCM		
CAMA Minor Permits	Part 4 of Article 7 of Chapter 113A of the General Statutes	Division of Coastal Management
CAMA Major Permits	Part 4 of Article 7 of Chapter 113A of the General Statutes	Division of Coastal Management
CAMA General Permits	Part 4 of Article 7 of Chapter 113A of the General Statutes	Division of Coastal Management
DAQ		
15A NCAC 2Q.0300 Non- Title V Construction and Operation Permit	Article 21B of Chapter 143 of the General Statutes	Division of Air Quality
15A NCAC 2Q.0600 Transportation Facility Permit	Article 21B of Chapter 143 of the General Statutes	Division of Air Quality
15A NCAC 2Q.0800 Prohibitory Small Permit	Article 21B of Chapter 143 of the General Statutes	Division of Air Quality
DENR		
Detailed Environmental Statements and Findings of No Significant Impact	Article 1of Chapter 113A of the General Statutes	Environmental Review / Secretary's Office

The 2010 Low-Income Housing Tax Credit Qualified Allocation Plan
For the State of North Carolina

INTRODUCTION

The 2010 Qualified Allocation Plan (the Plan) has been developed by the North Carolina Housing Finance Agency (the Agency) as administrative agent for the North Carolina Federal Tax Reform Allocation Committee (the Committee) in compliance with Section 42 of the Internal Revenue Code of 1986, as amended (the Code). For purposes of the Plan, the term "Agency" shall mean the Agency acting on behalf of the Committee, unless otherwise provided.

The Plan was reviewed in one public hearing and met the other legal requirements prior to final adoption by the Committee. The staff of the Agency was present at the hearing to take comments and answer questions.

The Agency will only allocate low-income housing tax credits in compliance with the Plan. The Code requires that the Plan contain certain elements. These elements, and others added by the Committee, are listed below.

A. Selection criteria to be used in determining the allocation of federal low-income housing tax credits:
   Project location and site suitability.
   Market demand and local housing needs.
   Serving the lowest income tenants.
   Serving qualified tenants for the longest periods.
   Design and quality of construction.
   Financial structure and long-term viability.
   Use of federal project-based rental assistance.
   Use of mortgage subsidies.
   Experience of development team and management agent(s).
   Serving persons with disabilities and the homeless.
   Willingness to solicit referrals from public housing waiting lists.
   Tenant populations of individuals with children.
   Projects intended for eventual tenant ownership.
   Projects that are part of a Community Revitalization Plan.
   Energy efficiency.
   Historic nature of the buildings.

B. Threshold, underwriting and process requirements for project applications and tax credit awards.

C. Description of the Agency's compliance monitoring program, including procedures to notify the Internal Revenue Service of noncompliance with the requirements of the program.

In the process of administering the low-income housing tax credit and Rental Production Program (RPP), the Agency will make decisions and interpretations regarding project applications and the Plan. Unless otherwise stated, the Agency is entitled to the full discretion allowed by law in making all such decisions and interpretations. The Agency reserves the right to amend, modify, or withdraw provisions contained in the Plan that are inconsistent or in conflict with state or federal laws or regulations. In the event of a major natural disaster or disruption in the financial markets, the Agency may disregard any section of the Plan, including point scoring and evaluation criteria, that interferes with an appropriate response.

SET-ASIDES, AWARD LIMITATIONS AND COUNTY DESIGNATIONS

The Agency will determine whether applications are eligible under Section II(B) or II(C). This Section II only applies to 9% tax credit applications. Projects will be counted towards the limitations in the order awarded under the Plan (rehabilitation, higher-scoring new construction applications, and tie-breakers).

A. [reserved]

B. REHABILITATION SET-ASIDE

The Agency will award up to twenty percent (20%) of tax credits available after forward commitments to projects proposing rehabilitation of existing housing. In the event eligible requests exceed the amount available, the Agency will determine awards based on the evaluation criteria in Section IV(H)(3).

1. The following will be considered new construction under Section II(C) below:
   (a) adaptive reuse projects,
   (b) entirely vacant residential buildings,
   (c) proposals to increase and/or substantially re-configure residential units.
2. Up to $750,000 of the rehabilitation set-aside will be awarded to projects meeting one or both of the following criteria:
   (a) existing U.S. Department of Agriculture, Rural Development (RD) Section 515 financing and project-based rental assistance for at least fifty percent (50%) of the units;
   (b) allocated 9% tax credits in 1992 or earlier.

C. NEW CONSTRUCTION SET-ASIDES

The Agency will award tax credits remaining after awards described above and any under Section II(G)(2) to other new construction projects, starting with those earning the highest scoring totals within each of the following four geographic set-asides and continuing in descending score order through the last project that can be fully funded. The Agency reserves the right to revise the available credits in each set-aside.

WEST 17%		CENTRAL 24%		METRO 36%	EAST 23%	
Alexander	Jackson	Alamance	Montgomery	Buncombe	Beaufort	Johnston
Alleghany	Lincoln	Anson	Moore	Cumberland	Bertie	Jones
Ashe	Macon	Cabarrus	Orange	Durham	Bladen	Lenoir
Avery	Madison	Caswell	Person	Forsyth	Brunswick	Martin
Burke	McDowell	Chatham	Randolph	Guilford	Camden	Nash
Caldwell	Mitchell	Davidson	Richmond	Mecklenburg	Carteret	New Hanover
Catawba	Polk	Davie	Rockingham	Wake	Chowan	Northampton
Cherokee	Rutherford	Franklin	Rowan		Columbus	Onslow
Clay	Surry	Granville	Scotland		Craven	Pamlico
Cleveland	Swain	Harnett	Stanly		Currituck	Pasquotank
Gaston	Transylvania	Hoke	Stokes		Dare	Pender
Graham	Watauga	Iredell	Union		Duplin	Perquimans
Haywood	Wilkes	Lee	Vance		Edgecombe	Pitt
Henderson	Yadkin		Warren		Gates	Robeson
	Yancey				Greene	Sampson
					Halifax	Tyrrell
					Hertford	Washington
					Hyde	Wayne
						Wilson

D. NONPROFIT AND CHDO SET-ASIDES

If necessary, the Agency will adjust the awards under the Plan to ensure that the overall allocation results in

- ten percent (10%) of the state's federal tax credit ceiling being awarded to projects involving tax exempt organizations (nonprofits) and
- fifteen percent (15%) of the Agency's HOME funds being awarded to projects involving Community Housing Development Organizations certified by the Agency (CHDOs).

Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not fall into one of these categories will be awarded to the next highest ranking project(s) that do(es) until the overall allocation(s) reach(es) the necessary percentage(s). The Agency may make such adjustment(s) in any set-aside.

1. NONPROFIT SET-ASIDE

In order to qualify as a nonprofit application, the proposed project must either:

(a) not involve any for-profit Principals or

(b) comply with the material participation requirements of the Code, applicable federal regulations and Section VI(A)(2).

2. CHDO SET-ASIDE

In order to qualify as a CHDO application,

(a) the proposed project must meet the requirements of subsection (D)(1) above, 24 CFR 92.300(a)(1),

(b) as of the full application deadline, the applicant, any Principal, or any affiliate must not undertake any choice-limiting activity prior to successful completion of the U.S. Department of Housing and Urban Development (HUD) environmental clearance review, and

(c) the project and owner must comply with regulations regarding the federal CHDO set-aside.

The Agency may determine that the requirements of the federal CHDO set-aside have been or will be met without implementing subsection (D)(2).

E. PRINCIPAL AND PROJECT AWARD LIMITS; 30% BASIS BOOST

1. PRINCIPAL LIMIT

The maximum awards to any one Principal will be the lesser of:

(a) a total of $1,500,000 in tax credits, including all set-asides (the ability under Section II(G)(4) to exceed this limit to completely fund a project request no longer applies), and

(b) three projects, including no more than one per geographic set-aside.

The Agency may further limit awards based on unforeseen circumstances.

For purposes of the maximum allowed in this subsection (E)(1), the Agency may determine that a person or entity not included in an application is a Principal for the proposed project. Such determination would include consideration of relationships between the parties in previously awarded projects and other common interests. Standard fee for service contract relationships (such as accountants or attorneys) will not be considered.

2. PROJECT LIMIT

The maximum award to any one project will be $1,300,000.

3. PHR AND JV PROJECTS

Public housing redevelopment (PHR) and joint venture (JV) projects:

(a) The Agency may determine that fifty percent (50%) of the tax credits awarded to PHR or JV projects do not count against some or all of the Principals involved for the purpose of subsection (E)(1) above. This determination will be based on the Principal's role in the project(s) and overall development capacity. The allowance in this subsection (E)(3)(a) will apply to a maximum of one (1) project per Principal. In the event a Principal is involved in multiple PHR or JV projects, this exemption will apply to the one with the smallest award of 9% tax credits.

(b) PHR includes:

(i) buildings to be located on the site of former public housing,

(ii) constructing replacement public housing units, or

(iii) rehabilitation of existing public housing.

(c) JV includes projects that involve nonprofit Principal(s) with limited development experience or capacity and the Project would qualify under Section II(D)(1) (the nonprofit set-aside).

4. AGENCY-DESIGNATED BASIS BOOST

The Agency may boost the eligible basis of projects awarded in 2010 by up to thirty percent (30%) for high land costs because of being in a desirable or commercially valuable location.

Applicants requesting a boost will need to submit an appraisal by the preliminary application deadline. If the land seller is a related party or local government, the Agency may order an additional appraisal (costs to be paid by the applicant). Projects with market-rate units are ineligible for an increase under this subsection (E)(4). The Agency will make designations between preliminary and full applications.

5. DIFFICULT DEVELOPMENT AREAS

The Agency will not recognize the basis boost allowed under Section 42(d)(5)(B)(iii) of the Code for being in a HUD-designated Difficult Development Area.

F. COUNTY AWARD LIMITS AND INCOME DESIGNATIONS

1. AWARD LIMITS

No county will be awarded tax credits for new construction exceeding $2,000,000 unless doing so is necessary to meet another set-aside requirement of this Plan. No county will be awarded more than two (2) projects under the rehabilitation set-aside. The Agency may further limit awards based on unforeseen circumstances. The Agency may waive the county-based limits for revitalization efforts characterized by a high degree of committed public subsidies.

2. INCOME DESIGNATIONS

Pursuant to N.C.G.S. § 105-129.42(c) the Agency is responsible for designating each county as High, Moderate or Low Income. Five criteria were used for making this determination: (a) county median income; (b) poverty rate; (c) percent of population in rural areas; (d) regional growth patterns; (e) N.C. Department of Commerce tier (one, two or three).

Each county was considered as a whole and evaluated relative to others in the state. Based on this process, the Agency designates counties as follows:

HIGH	MODERATE		LOW		
Alamance	Alexander	Lincoln	Alleghany	Graham	Pasquotank
Buncombe	Brunswick	Moore	Anson	Greene	Pender
Cabarrus	Burke	Nash	Ashe	Halifax	Perquimans
Catawba	Carteret	Onslow	Avery	Hertford	Richmond
Chatham	Cleveland	Person	Beaufort	Hoke	Robeson
Durham	Craven	Pitt	Bertie	Hyde	Rutherford
Forsyth	Cumberland	Polk	Bladen	Jackson	Sampson
Gaston	Dare	Randolph	Caldwell	Jones	Scotland
Guilford	Davidson	Rockingham	Camden	Lenoir	Surry
Iredell	Davie	Rowan	Caswell	Macon	Swain
Johnston	Franklin	Stanly	Cherokee	Madison	Transylvania
Mecklenburg	Granville	Stokes	Chowan	Martin	Tyrrell
New Hanover	Harnett	Watauga	Clay	McDowell	Vance
Orange	Haywood	Wayne	Columbus	Mitchell	Warren
Union	Henderson	Wilson	Currituck	Montgomery	Washington
Wake	Lee	Yadkin	Duplin	Northampton	Wilkes
			Edgecombe	Pamlico	Yancey
			Gates		

G. OTHER AWARDS AND EXCEEDING LIMITATIONS

1. The Agency may award tax credits remaining from the four geographic set-asides to the next highest scoring eligible new construction application(s) statewide and/or one or more eligible rehabilitation applications. The Agency may also carry forward any amount of tax credits to the next year.

2. The Agency may award 2010 tax credits outside of the normal process to projects that: a) allow the Agency to comply with HUD regulations regarding timely commitment of funds, b) prevent the loss of state or federal investment, c) provide housing

for underserved populations or d) are part of a settlement agreement of legal action brought against a local government. The total amount of such awards(s) shall not exceed $1,000,000.

3. The Agency may also make a forward commitment of the next year's tax credits in an amount necessary to fully fund project(s) with a partial award or to any project application that was submitted in a prior year if such application meets all the minimum requirements of the Plan. In the event that credits are returned or the state receives credits from the national pool, the Agency may elect to carry such credits forward, make an award to any project application (subject only to the nonprofit set aside), or a combination of both.

4. The Agency may exceed the limitations on awards contained in Sections II(B), II(F)(1) and this Section II(G) in order to completely fund a project request.[*the following text has been moved*]

DEADLINES, APPLICATION AND FEES

A. APPLICATION AND AWARD SCHEDULE

The following schedule will apply to the 2010 application process for 9% tax credits and the first round of bond volume and 4% tax credits. The Agency will announce the application schedule for a second round of bond volume and 4% tax credits at a later time.

January 8	Deadline for submission of preliminary applications (12:00 noon)
March 1	Market analysts will mail studies to the Agency and applicants
March 12	Notification of final site scores and qualification for Agency-designated increase in eligible basis
March 22	Deadline for market-related project revisions
March 29	Deadline for the Agency and applicant to receive a hard copy of the revised market study, if applicable
May 7	Deadline for full applications (12:00 noon)
August	Notification of tax credit awards

The Agency reserves the right to change the schedule as necessary.

B. APPLICATION, ALLOCATION, MONITORING AND PENALTY FEES

1. All applicants are required to pay a nonrefundable fee of $5,470 at the submission of the preliminary application. This fee covers the cost of the market study or physical needs assessment and a $1,170 preliminary application processing fee (which will be assessed for every electronic application submitted). The Agency may charge additional fee(s) to cover the cost of direct contracting with other providers (such as appraisers).

2. All applicants are required to pay a nonrefundable processing fee of $1,170 upon submission of the full application.

3. Entities receiving 9% tax credit awards are required to pay a nonrefundable allocation fee equal to 0.64% of the project's total qualified basis.

4. Entities receiving tax exempt bond volume are required to pay a nonrefundable allocation fee equal to forty (40) basis points of the awarded bond volume. (For example, the fee due on a $10 million bond award would be $40,000.) The allocation fee will be due at the time the bond volume is awarded. Failure to return the required documentation and fee by the date specified may result in cancellation of the bond allocation. The Agency may assess other fees for additional monitoring responsibilities.

5. Owners must pay a monitoring fee of $720 per unit (includes all units, qualified, unrestricted and employee) prior to issuance of the project's IRS Form 8609.

6. If expenses for legal services are incurred by the Committee or Agency to correct mistakes of the Owner which jeopardize use of the tax credits, such legal costs will be paid by the Owner in the amount charged to the Agency or the Committee.

7. The Agency may assess applicants or owners a fee of up to $2,000 for each instance of failure to comply with a written requirement, whether or not such requirement is in the Plan. The Agency will not process applications or other documentation relating to any Principal who has an outstanding balance of fees owed; such a delay in processing may result in disqualification of application(s).

8. The Agency will assess $1,500 for closing a state tax credit loan and $2,000 for an RPP closing.

C. APPLICATION PROCESS AND REQUIREMENTS

1. The Agency may require applicants to submit any information, letter or representation relating to Plan requirements or point scoring as part of the application process. Unless otherwise noted, the Agency may elect to not consider information submitted after the relevant deadline.
2. Any failure to comply with an Agency request under subsection (C)(1) above or any misrepresentation, false information or omission in any application document may result in disqualification of that application and any other involving the same owner(s), Principal(s), consultant(s) and/or application preparer(s). Any misrepresentation, false information or omission in the application document may also result in a revocation of a tax credit allocation.
3. The Agency may elect to treat applications involving more than one site, population type (family/elderly) or activity (new/rehabilitation) as separate for purposes of the Agency's application process. Each application would require a separate initial application fee. The Agency may allow such applications to be considered as one for the full application underwriting if all sites are secured by one permanent mortgage and are not intended for separation and sale after the tax credit allocation.
4. The Agency will notify the appropriate unit of government about the project after submission of the full application. The Agency reserves the right to reject applications opposed in writing by the chief elected official (supported by the council or board), but is not obligated to do so.
5. For each application one individual or validly existing entity must be identified as the applicant and execute the preliminary and full applications. An entity may be one of the following:

   (a) corporation, including nonprofits,

   (b) limited partnership, or

   (c) limited liability company.

   Only the identified applicant will have the ability to make decisions with regard to that application. The applicant may enter into joint venture or other agreements but the Agency will not be responsible for evaluating those documents to determine the relative rights of the parties. If the application receives an award the applicant must become a managing member or general partner of the ownership entity.

SELECTION CRITERIA AND THRESHOLD REQUIREMENTS

New construction applications must meet all threshold requirements and receive 110 points to be considered for award and funding. Rehabilitation applications will not receive point scores but instead will be evaluated using the criteria listed in Section IV(H)(3) (thus all references to receipt of points only apply to new construction projects). All threshold requirements also apply to rehabilitation projects unless otherwise noted. Scoring and threshold determinations made in prior years are not binding on the Agency for the 2010 cycle.

A. SITE AND MARKET EVALUATION

The Agency will not accept a full application where the preliminary application does not meet all site and market threshold requirements.

1. SITE EVALUATION (MAXIMUM 100 POINTS)

(a) General Site Requirements:

(i) Sites must be sized to accommodate the number and type of units proposed. The applicant or a Principal must have site control by the preliminary application deadline, which may be evidenced by an option, contract or deed. The documentation of site control must include a plot plan.

(ii) Required zoning must be in place by the full application submission date, including special/conditional use permits, and any other discretionary land use approval required (includes all legislative or quasi-judicial decisions). The Agency may grant an extension of this deadline if:

- requested by the applicant in advance of the full application due date, and
- all approval(s) are scheduled to be considered for final approval no later than forty five (45) days from the full application date.

In evaluating extension requests, the Agency will consider whether the applicant complied with the jurisdiction's deadlines and other requirements in a timely manner.

(iii) Utilities (water, sewer and electricity) must be available with adequate capacity to serve the site. Sites should be accessed directly by existing paved, publicly maintained roads. If not, it will be the owner's responsibility to extend utilities and roads to the site. In such cases, the applicant must explain and budget for such plans at the preliminary application stage and document the right to perform such work.

(b) Criteria for Site Score Evaluation:

Site scores will be based on the following factors. Each will also serve as a threshold requirement; the Agency may remove an application from consideration if the site is sufficiently inadequate in one of the categories. Evaluation of sites will involve a relative comparison with other applications in the same geographic set-aside. The Agency will consider revitalization plans and other proposed development based on certainty, extent and timing. The score for a particular category will reflect the project's tenant type (family/elderly/supportive housing).

(i) NEIGHBORHOOD CHARACTERISTICS (MAXIMUM 30 POINTS)

- Trend and direction of real estate development and area economic health.
- Physical condition of buildings and improvements in the immediate vicinity.
- Concentration of affordable housing, including HUD, Rural Development, and tax credit projects as well as unsubsidized, below-market housing.

(ii) SURROUNDING LAND USES AND AMENITIES (MAXIMUM 60 POINTS)

- Land use pattern is residential in character (single and multifamily housing).
- Availability, quality and proximity of services, amenities and features, including but not limited to: grocery store; mall/strip center; basic health care; pharmacy; schools/athletic fields; day care/after school; supportive services, public park, library, hospital, community/senior center.
- Effect of industrial, large-scale institutional or other incompatible uses, including but not limited to: wastewater treatment facilities, high traffic corridors, junkyards, prisons, landfills, large swamps, distribution facilities, frequently used railroad tracks, power transmission lines and towers, factories or similar operations, sources of excessive noise, and sites with environmental concerns (such as odors or pollution).
- Extent that the location is isolated.

(iii) SITE SUITABILITY AND BUILDING LOCATION (MAXIMUM 10 POINTS, POSSIBLE 10 POINT DEDUCTION)

- Adequate traffic safety controls (i.e. stop lights, speed limits, turn lanes).
- Burden on public facilities (particularly roads).
- Access to mass transit (if applicable).
- Degree of negative features, design challenges or physical barriers that will impede project construction or adversely affect future tenants; for example: power transmission lines and towers, flood hazards, steep slopes, large boulders, ravines, year-round streams, wetlands, and other similar features (for adaptive reuse projects-suitability for residential use and difficulties posed by the building(s), such as limited parking, environmental problems or the need for excessive demolition).
- The proximity of the buildings to adjacent residential structures would be a problem because of their height and/or scale.
- The project would not be visible to potential tenants using normal travel patterns.

2. MARKET ANALYSIS

The Agency will administer the market study process based on this Section and the terms of **Appendix A** (incorporated herein by reference).

(a) The Agency will contract directly with market analysts to perform studies. Applicants may interact with market analysts and will have an opportunity to revise their project (unit mix, targeting). Any revisions must be submitted in writing to both the market analyst and to the Agency, following the schedule in Section III(A), and will be binding on the applicant for the full application.

(b) The Agency will limit the number of projects awarded in the same application round to those that it determines can be supported in the market.

(c) The following four criteria are threshold requirements for new construction applications:

(i) the project's capture rate,

(ii) the project's absorption rate,

(iii) the vacancy rate at comparable properties (what qualifies as a comparable will vary based on the circumstances), and

(iv) the project's effect on existing or awarded properties with 9% tax credits or Agency loans.

(c) The Agency is not bound by the conclusions or recommendations of the market analyst(s), and will use its discretion in evaluating the criteria listed in this subsection (A)(2).

(d) Projects may not give preferences to potential tenants based on:

(i) residing in the jurisdiction of a particular local government,

(ii) having a particular disability, or

(iii) being part of a specific occupational group (e.g. artists).

B. RENT AFFORDABILITY

1. FEDERAL RENTAL ASSISTANCE

(a) Applicants proposing to convert tenant-based Housing Choice Vouchers (Section 8) to a project-based subsidy (pursuant to 24 CFR Part 983) must submit a letter from the issuing authority in a form approved by the Agency. Conversion of vouchers will be treated as funding source under Section VI(B)(6)(d); a project will be ineligible for an allocation if it does not meet requirements set by the Agency as part of the application and award process. Such requirements may involve the public housing authority's (PHA's) Annual Plan, selection policy, and approval for advertising.

(b) Applicants must include a written agreement between the owner and all PHAs and Section 8 providers with jurisdiction inside the project's primary market area. The agreement must commit the PHAs to include the project in any listing of housing opportunities where households with tenant-based subsidies are welcome, and the project's management agent to actively seek referrals from the PHAs to apply for units at the proposed project. If one or more of the PHAs refuses to cooperate for any reason, an explanation must be submitted as well as a statement of commitment by the applicant to seek referrals from the PHA(s). This requirement does not apply to projects with rental assistance provided through RD.

2. MORTGAGE SUBSIDIES AND LEVERAGING (MAXIMUM 20 POINTS)

(a) Eligibility:

Only loans or grants from the following sources will qualify for points under this subsection (B)(2):

(i) the local PHA,

(ii) Community Development Block Grant (CDBG) program funds,

(iii) HUD Section 202 or 811,

(iv) Federal Home Loan Bank Affordable Housing Program (AHP),

(v) established local government housing development funds, and

(vi) RD Section 515.

Other sources of funding may qualify PROVIDED THEY ARE APPROVED IN WRITING IN ADVANCE by the Agency. (Approval of a particular source in prior years does not meet this requirement.) Applications including market-rate units will be ineligible for points under subsection (B)(2) unless the total housing expense for all market-rate units are at least twenty percent (20%) higher than the maximum allowed for a unit at 60% area median income. Adjustments to the purchase price of the land by the seller, Agency loans, state credits and bond financing are not sources of mortgage subsidy.

(b) Required Terms:

In order to qualify for points under subsection (B)(2), loans must be listed as a source in the full application, comply with the requirements of Section VI(B)(6)(b), and have a term of at least twenty (20) years and an interest rate less than or equal to two percent (2%). See Section IV(C)(2) for a restriction on RPP loans for applications with local government financing.

(c) Metro Region:

Applications will earn points based on the total amount of qualifying funds committed per unit (excluding an employee/manager's unit), as described below:

Funds/Unit	Points	Funds/Unit	Points
$6,000	6	$14,000	14
$8,000	8	$16,000	16
$10,000	10	$18,000	18
$12,000	12	$20,000	20

The calculation includes all units and amounts will not be rounded up. The funds-to-unit ratio approved by the lending source determines the score. The amount provided by a local government will be reduced by the amount included in the project budget for any impact, tap or related fees charged by that local government and the cost of land sold by that local government.

(d) East, Central and West Regions:

Applications will earn points based on the total amount of qualifying funds committed per unit (excluding an employee/manager's unit), as described below:

Funds/Unit	Points	Funds/Unit	Points
$2,000	5	$6,000	15
$4,000	10	$8,000	20

The calculation includes all units and amounts will not be rounded up. The funds-to-unit ratio approved by the lending source determines the score. The amount provided by a local government will be reduced by the amount included in the project budget for any impact, tap or related fees charged by that local government and the cost of land sold by that local government.

(e) Projects that will utilize federal and state historic rehabilitation tax credits and are funded entirely with equity and state low-income housing tax credits (no grants or debt sources other than deferred developer fees) will be awarded five (5) points. Any deferred fee must comply with Section VI(B)(5).

3. TENANT RENT LEVELS (MAXIMUM 15 POINTS)

The application may earn points under one of the following scenarios:

(a) If the project is in a High Income county:
- Ten (10) points will be awarded if at least twenty-five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of county median income.
- Five (5) points will be awarded if at least fifty percent (50%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.

(The two options for point scoring in this subsection are mutually exclusive.)

(b) If the project is in a Moderate Income county:
- Fifteen (15) points will be awarded if at least twenty-five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.
- Ten (10) points will be awarded if at least fifty percent (50%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income.

(The two options for point scoring in this subsection are mutually exclusive.)

(c) If the project is in a Low Income county, fifteen (15) points will be awarded for projects in which at least forty percent (40%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income.

(d) Ten (10) points will be awarded to applications for new construction tax exempt bond projects that meet one of the following requirements:
- at least twenty percent (20%) of total units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income, or
- at least ten percent (10%) of total units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.

(The two options for point scoring in this subsection are mutually exclusive.)

C. PROJECT DEVELOPMENT COSTS AND RPP LIMITATIONS

1. MAXIMUM PROJECT DEVELOPMENT COSTS (NEGATIVE 20 POINTS)

The Agency will assess negative points to applications listing more than the following in lines 5 and 6 of the Project Development Cost (PDC) description, as outlined in Chart A below. The point structure in Chart B will apply to the following:

(a) all units are detached single family houses or duplexes,

(b) serving persons with severe mobility impairments,

(c) development challenges resulting from being within or adjacent to a central business district,

(d) public housing redevelopment projects, or

(e) building(s) with both steel and concrete construction and at least four (4) stories of housing.

Chart A		**Chart B**	
$60,000	-10	$71,000	-10

$69,000	-20	$85,000	-20

The Agency will review proposed costs for historic adaptive re-use projects and approve the amount during the application review process.

See Sections VI(B)(7), (8), and (9) for other cost restrictions.

2. RESTRICTIONS ON RPP AWARDS

(a) Projects requesting RPP funds may not:

(i) request RPP loan funds in excess of the following amounts per unit- $15,000 in High Income counties; $20,000 in Moderate Income counties; $25,000 in Low Income counties,

(ii) include market-rate units unless there is a commitment for a grant or no-payment financing equal to at least the amount of foregone tax credit equity,

(iii) involve Principals who have entered into a workout or deferment plan within the previous year for an RPP loan awarded after January 1, 1999,

(iv) request less than $150,000 or more than $1,200,000 per project, or

(v) have a commitment of funds from a local government under terms that will result in more repayment than the RPP financing (see description in subsection (C)(2)(b) below).

The maximum award of RPP funds to any one Principal will be a total of $2,000,000. Requesting an RPP loan may result in an application being ineligible under Section VI(B)(6)(d) if the Agency has inadequate funds.

(b) Projects may only request an RPP loan if the principal and interest payments for RPP and any local government financing will be equal to the anticipated net operating income divided by 1.15, less conventional debt service:

Repayment of RPP and local government loans = (NOI / 1.15) – conventional debt service.

The amount of repayment will be split between the RPP loan and local government lenders based on their relative percentage of loan amounts. For example:

RPP Loan = $400,000

local government loan = $200,000

	Year 1	Year 2	Year 3	Year 4
Anticipated amount available for repayment	$10,000	$8,000	$6,000	$4,000
RPP principal and interest payments	$6,667	$5,333	$4,000	$2,667
local government P&I payments	$3,333	$2,667	$2,000	$1,333

(c) Loan payments made to the applicant, any Principal, member, partner, of the ownership entity, or any affiliate thereof will be taken out of cash flow remaining after RPP payments.

D. CAPABILITY OF THE PROJECT TEAM

1. DEVELOPMENT EXPERIENCE

(a) At least one Principal must have successfully developed, operated and maintained in compliance either one (1) North Carolina low-income housing tax credit project or six (6) separate low-income housing tax credit projects totaling in excess of 200 units. The project(s) must have been placed in service between December 1, 2003 and January 1, 2009. (The Agency may waive this requirement for applicants with adequate experience in the North Carolina tax credit program.) Such Principal must:

(i) be identified in the preliminary application,

(ii) become a general partner or managing member of the ownership entity, and

(iii) remain responsible for overseeing the project and operation of the project for a period of two (2) years after placed in service.

The Agency will determine what qualifies as successful and who can be considered as involved in a particular project.

(b) All owners and Principals must disclose all previous participation in the low-income housing tax credit program. Additionally, owners and Principals that have participated in an out of state tax credit allocation may be required to complete an Authorization for Release of Information form.

(c) The Agency reserves the right to determine that a particular development team does not meet the threshold requirement of subsection (D)(1)(a) due to differences between its prior work and the proposed project. Particularly important in this evaluation is the type of subsidy program used in the previous experience (such as tax-exempt bonds, RD).

2. MANAGEMENT EXPERIENCE

The management agent must have at least:

(a) one similar tax credit project in their current portfolio, and

(b) one staff person serving in a supervisory capacity with regard to the project who has been certified as a tax credit compliance specialist.

Such certification must be from an organization accepted by the Agency (refer to the list in **Appendix C**). None of the persons or entities serving as management agent may have in their portfolio a project with material or uncorrected non-compliance beyond the cure period. The management agent listed on the application must be retained by the ownership entity for at least two (2) years after project completion, unless the agent is guilty of specific nonperformance of duties.

3. PROJECT TEAM DISQUALIFICATIONS

The Agency may disqualify any owner, Principal or management agent, who:

(a) has been debarred or received a limited denial of participation in the past ten years by any federal or state agency from participating in any development program;

(b) within the past ten years has been in a bankruptcy, an adverse fair housing settlement, an adverse civil rights settlement, or an adverse federal or state government proceeding and settlement;

(c) has been in a mortgage default or arrearage of three months or more within the last five years on any publicly subsidized project;

(d) has been involved within the past ten years in a project which previously received an allocation of tax credits but failed to meet standards or requirements of the tax credit allocation or failed to fulfill one of the representations contained in an application for tax credits;

(e) has been found to be directly or indirectly responsible for any other project within the past five years in which there is or was uncorrected noncompliance more than three months from the date of notification by the Agency or any other state allocating agency;

(f) interferes with a tax credit application for which it is not an owner or Principal at a public hearing or other official meeting;

(g) has outstanding flags in HUD's national 2530 National Participation system;

(h) has been involved in any project awarded tax credits in 2006 or earlier for which either the permanent financing or equity investment has not closed;

(i) has been involved in any project awarded tax credits in 2006 or earlier for which the final cost certification requirements have not been met by December 18, 2009;

(j) has been involved in any project awarded tax credits after 2000 where there has been a change in general partners or managing members during the last five years that the Agency did not approve in writing beforehand;

(k) would be removed from the ownership of a property that is the subject of an application for under the rehabilitation set-aside in the current cycle; or

(l) is not in good standing with the Agency.

A disqualification under this subsection (D)(3) will result in the individual or entity involved not being allowed to participate in the 2010 cycle and removing from consideration any application where they are identified.

E. UNIT MIX AND PROJECT SIZE

1. Ten (-10) points will be subtracted from any full application that includes market-rate units. This penalty will not apply where, as of the full application, the rents for all market rate units are at least five percent (5%) higher than the maximum allowed for a unit at 60% AMI and the market study indicates that such rents are feasible.
2. New construction 9% tax credit projects may not exceed one hundred and twenty (120) units.
3. New construction bond financed projects may not exceed two hundred (200) units.
4. All projects must have at least sixteen (16) qualified low-income units.

The Agency reserves the right to waive the penalties and limitations in this Section IV(E) for proposals that reduce low-income and minority concentration, including public housing projects, and subsection (E)(2) for proposals that are within a transit station area as defined by the Charlotte Region Transit Station Area Joint Development Principles and Policy Guidelines or adaptive re-use projects where made necessary by the building(s) physical structure.

F. SPECIAL CRITERIA AND TIEBREAKERS

1. ENERGY STAR

New construction residential buildings must comply with all Energy Star standards as defined in **Appendix B** (incorporated herein by reference). Adaptive re-use and rehabilitation projects must comply to the extent doing so is economically feasible and as allowed by historic preservation rules.

2. COMMUNITY REVITALIZATION PLANS (MAXIMUM 10 POINTS)

Ten (10) points will be awarded to applications if all of the following apply:

(a) the project is within the geographic area identified by a community revitalization plan (CRP), which does not include basic local land use plans unless there is a specific revitalization component;

(b) the project is in a Qualified Census Tract or the CRP is primarily focused on an existing residential neighborhood;

(c) completion of the project would contribute to one or more of the goal(s) stated in the CRP; and

(d) the CRP either (i) was officially adopted or amended by a local government between January 1, 2003 and the preliminary application deadline or (ii) is actively underway.

Only documents or information included in the officially adopted CRP will be considered in evaluating the criteria in this subsection. The CRP must be included with the preliminary application to be eligible for points in this subsection.

3. UNITS FOR THE MOBILITY IMPAIRED

Five percent (5%) of all units in new construction projects must:

(a) be fully accessible according to the standards set forth in Volume 1-C (1999) of the North Carolina State Building Code, (Chapter 30, Multi-Family Dwellings),

(b) have at least one bathroom with a toilet located in a five foot by five foot clear floor space (may overlap with the five foot turning diameter described in Chapter 30), with no overlapping elements or fixtures; the toilet must be positioned in a corner with the centerline of the toilet bowl 18 inches from the sidewall, and

(c) have at least one bathroom with a 36 inch by 60 inch (minimum size) curbless, roll-in shower. Such showers must also meet the requirements for accessible controls as required by Volume 1-C.

At least one unit in each class of fully accessible units must meet the above requirements. Unit classes are measured by the number of bedrooms, pursuant to Volume 1-C (1999) of the North Carolina State Building Code (Chapter 30, Section 30.3.2). THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES). Units for the mobility impaired should be available to all tenants who would benefit from their design and are not necessarily reserved under the Targeting Plan requirements of subsection (F)(4).

4. TARGETING PLANS

All projects will be required to target ten percent (10%) of the total units to persons with disabilities or homeless populations. Projects with federal project-based rental assistance must target at least five (5) units regardless of size. Projects that are targeting units under this subsection are not required to provide onsite supportive services or a service coordinator.

Owners must demonstrate a partnership with a local lead agency and submit a Targeting Plan for review and certification by the N.C. Department of Health and Human Services (DHHS). At a minimum, Targeting Plans must include:

(a) A description of how the project will meet the needs of the targeted tenants including access to supportive services, transportation, proximity to community amenities, etc.

(b) A description of the experience of the local lead agency and their capacity to provide access to supportive services, and to maintain relationships with the management agent and community service providers for the duration of the compliance period.

(c) A Memorandum of Understanding (MOU) between the developer(s), management agent and the lead local agency. The MOU will include-

(i) A commitment from the local lead agency to provide, coordinate and/or act as a referral agent to assure that supportive services will be available to the targeted tenants.

(ii) The referral and screening process that will be used to refer tenants to the project, the screening criteria that will be used, and the willingness of all parties to negotiate reasonable accommodations to facilitate the admittance of persons with disabilities into the project.

(iii) A communications plan between the project management and the local lead agency that will accommodate staff turnover and assure continuing linkages between the project and the local lead agency for the duration of the compliance period.

(d) Certification that participation in supportive services will not be a condition of tenancy.

(e) Agreement that for a period of ninety (90) days after certificate of occupancy, the required number of units for persons with disabilities will be held vacant other than for such population(s).

(f) Agreement to maintain a separate waiting list for persons with disabilities and prioritizing these individuals for any units that may become vacant after the initial rent-up period, up to the required number of units.

(g) Agreement to affirmatively market to persons with disabilities.

(h) Agreement to include a section on reasonable accommodation in property management's application for tenancy.

(i) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and not require total income for persons with rental assistance beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSDI benefits.

(j) A description of how the project will make the targeted units affordable to persons with extremely low incomes. NOTE: Key Program assistance is only available to persons receiving income based upon a disability. Projects targeting units to non–disabled homeless populations or persons in recovery with only a substance abuse diagnosis must have an alternative mechanism to assure affordability.

The requirements of this subsection (F)(4) may be fully or partially waived to the extent the Agency determines that they are not feasible. A Targeting Plan template and other documents related to this subsection are included in **Appendix D** (incorporated herein by reference). Owners will agree to complete the requirements of this subsection (F)(4) and **Appendix D** by the earlier of July 22, 2011 or four months prior to the project's placed in service date. (The Agency may set additional interim requirements.) This subsection (F)(4) does not apply to tax-exempt bond applications.

5. LOCAL GOVERNMENT LAND DONATION (MAXIMUM 5 POINTS)

Applications that meet the following criteria will be awarded five (5) points:

(a) the real estate that will contain the proposed project buildings is owned by a unit of local government as of the preliminary application deadline;

(b) the local government did not purchase any portion of the real estate from the applicant or any owner, Principal or affiliate thereof; and

(c) the application shows no more than a total of $1,000 in the line-items for purchase of land and buildings (in the case of a ground lease, no more than $50 per year).

6. SECTION 1602 EXCHANGE PROJECTS (-40 POINT DEDUCTION)

The Agency may deduct up to forty (-40) points from any application if the applicant, any owner, Principal or affiliate thereof is also involved in a Section 1602 Exchange project with uncorrected material noncompliance.

7. TIEBREAKER CRITERIA

The following will be used to award tax credits in the event that the final scores of more than one project are identical.

First Tiebreaker: The project requesting the least amount of federal tax credits per unit based on the Agency's equity needs analysis.

Second Tiebreaker: Tenants with Children: Projects that can serve tenant populations with children. Projects will qualify for this designation if at least twenty-five (25%) of the units are three or four bedrooms. This tiebreaker will only apply where the market study shows a clear demand for this population (as determined by the Agency).

Third Tiebreaker: Tenant Ownership: Projects that are intended for eventual tenant ownership. Such projects must utilize a detached single family site plan and building design and have a business plan describing how the project will convert to tenant ownership at the end of the 30-year compliance period.

In the event that a tie remains after considering the above tiebreakers, the project requesting the least amount of federal tax credits will be awarded.

G. DESIGN STANDARDS

All proposed measures must be shown on the plans or in specifications in the application in order to receive points.

1. THRESHOLD REQUIREMENTS

The minimum threshold requirements for design are found in **Appendix B** (incorporated herein by reference) and must be used for all projects receiving tax credits or RPP funding. These minimum requirements include, but are not limited to, standards in the following categories:

- on-site playground areas;
- on-site postal and laundry facilities;
- community/office space;
- on-site parking and refuse collection areas;
- exterior and interior building design;
- plumbing and electrical provisions;
- heating, ventilating and air conditioning provisions;
- sitework;
- bedrooms, bathrooms and kitchens;
- provisions for all elderly housing;
- building envelope and insulation;
- provisions for sight and hearing impaired residents;
- additional requirements for rehabilitation of existing apartments;
- additional requirements for adaptive reuse; and
- Fair Housing, Americans with Disabilities Act and the North Carolina State Accessibility Code requirements.

2. CRITERIA FOR SCORE EVALUATION (MAXIMUM OF 50 POINTS)

The Agency will determine points based on the following criteria as applied to the site drawings submitted with the full application.

(a) Site Layout

The Agency will award up to ten (10) points based on its evaluation of the site layout. The following characteristics will be considered.

(i) The location of residential buildings in relation to parking, site amenities, community building, postal facilities and trash collection areas.

(ii) The degree to which site layout ensures a low, controlled traffic speed through the project.

(b) Quality of Design and Construction

(The points in this subsection are mutually exclusive with Section IV(G)(2)(c) below.)

The Agency will award up to forty (40) points for new construction projects based on its evaluation of the quality of the building design, and the materials and finishes specified. The following characteristics will be considered:

(i) The extent to which the design uses multiple roof lines, gables, dormers and similar elements to break up large roof sections.

(ii) The extent to which the design uses multiple types, styles, and colors of siding and brick veneer to add visual appeal to the building elevations.

(iii) The level of detail that is achieved through the use of porches, railings, and other exterior features.

(iv) Use of brick veneer or masonry products on building exteriors.

(c) Adaptive Re-Use

(The points in this subsection are mutually exclusive with Section IV(G)(2)(b) above.)

The Agency will award up to forty (40) points based on the following characteristics:

(i) The extent to which the building(s) fit with surrounding streetscape after adaptation or have problems with orientation, sightlines, bulk and scale.

(ii) Aesthetics after adaptation.

(iii) Presence of special design elements or architectural features that may not be physically or financially available if new construction was introduced on the same site.

H. CRITERIA FOR SELECTION OF REHABILITATION PROJECTS

1. GENERAL THRESHOLD REQUIREMENTS

In order to be eligible for funding under Section II(B), a project must:

(a) have either (i) committed mortgage subsidies from a local government in excess of $5,000 per unit or (ii) federal rental assistance for at least thirty percent (30%) of the total units, which may consist of a project-based contract, households with Section 8 vouchers as of the preliminary application deadline, or a combination of the two,

(b) have been placed in service on or before December 31, 1994,

(c) require rehabilitation expenses in excess of $15,000 per unit (as supported by a physical needs assessment conducted or approved by the Agency),

(d) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,

(e) not be feasible using tax exempt bonds (as determined by the Agency),

(f) not have received an Agency loan in the last five (5) years,

(g) not be deteriorated to the point of requiring demolition,

(h) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five (5) years, and

(i) have total replacement costs of less than $110,000 per unit, including all Agency-required rehabilitation work.

Rehabilitation expenses include hard construction costs directly attributable to the project, excluding costs for a new community building, as calculated using lines 2 through 7 (less line 6) in the PDC description.

2. THRESHOLD DESIGN REQUIREMENTS

In addition to the relevant sections of **Appendix B**, the Agency will require owners to complete the following as appropriate for their project.

(a) Improve site amenities and common areas by upgrading or adding a freestanding community building, making repairs and additions to landscaping, adding new site amenities such as playgrounds, and repairing parking areas.

(b) Improve building exteriors by replacing deteriorated siding, replacing aged roofing, adding gutters and downspouts, and adding new architectural features to improve appearance.

(c) Upgrade unit interiors by replacing flooring, installing new cabinets and countertops, replacing damaged interior doors, replacing light fixtures, and repainting units.

(d) Replace and upgrade mechanical systems and appliances including HVAC systems, water heaters and plumbing fixtures, electrical panels, refrigerators, and ranges.

(e) Improve energy efficiency by replacing inefficient doors and windows, adding additional insulation in attics, and upgrading the efficiency of mechanical systems and appliances.

(f) Improve site and unit accessibility for persons with disabilities by making necessary alterations at common areas, alterations at single story ground floor units, adding or improving handicapped parking areas, and repairing or replacing sidewalks along accessible routes.

3. EVALUATION CRITERIA

The Agency will evaluate applications under Section II(B) based on the following criteria, which are listed in order of importance. Each one will serve both to determine awards and as a threshold requirement; the Agency may remove an application from consideration if the proposal is sufficiently inadequate in any of the categories. For purposes of making awards, the Agency will not consider subsections (d) through (g) below if the outcome is determined by the criteria in subsections (a) through (c).

(a) The Agency will give the highest priority to applications proposing to rehabilitate the state's most distressed federally subsidized existing housing, particularly buildings with accessibility or life, health and safety problems.

(b) Applications will have a reduced likelihood of being awarded tax credits to the extent that the purpose is to subsidize an ownership transfer.

(c) Shortcomings in the above criteria will be mitigated to the extent that a tax credit allocation is necessary to prevent (i) conversion of units to market rate rents or (ii) loss of government resources (including past, present and future investments).

(d) The Agency will give priority to applications that have mortgage subsidy resources committed as part of the application.

(e) Applications will have priority to the extent that the rehabilitation improvements are a part of a community revitalization plan or will benefit the surrounding community. However, projects in severely distressed areas will have a reduced likelihood of being awarded tax credits.

(f) Applications will have a reduced likelihood of being awarded tax credits based on the number of tenants that would be permanently relocated (including market-rate).

(g) While the rehabilitation set-aside is not subject to any regional set-aside, the Agency will consider the geographic distribution of this resource and will attempt to avoid a concentration of awards in any one area of the state.

ALLOCATION OF BOND CAP

A. ORDER OF PRIORITY

The Committee will allocate the multifamily portion of the state's tax-exempt bond authority in the following order of priority:

1. Projects that serve as a component of an overall HOPE VI revitalization effort.
2. Rehabilitation of existing rent restricted housing.
3. Rehabilitation of projects consisting of entirely market-rate units.
4. Adaptive reuse projects.
5. Other new construction projects.

Applications will only be allocated bond authority if there is enough remaining after awarding all eligible applications in higher priority levels. Within each category, applications seeking the least amount of authority per low-income unit will have priority.

B. ELIGIBILITY FOR AWARD

Except as otherwise indicated, owners of projects with tax exempt bonds and 4% credits must meet all requirements of the Plan. Even with an allocation of bond authority, projects must meet the threshold requirements to be eligible for tax credits.

1. New construction applications must earn 100 points.
2. All projects must meet one of the following requirements:
   (a) at least ten percent (10%) of total units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income, or
   (b) at least five percent (5%) of total units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.
3. Rehabilitation applications must:

(a) have been placed in service on or before December 31, 1994,

(b) require rehabilitation expenses in excess of $10,000 per unit,

(c) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,

(d) not have begun or completed after December 31, 2001 a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five (5) years, and

(e) not be deteriorated to the point of requiring demolition.

GENERAL REQUIREMENTS

A. GENERAL THRESHOLD REQUIREMENTS FOR PROJECT PROPOSALS

1. PROJECTS WITH HISTORIC TAX CREDITS

Buildings either must be on the National Register of Historic Places or approved for the State Housing Preservation Office's study list at the time of the full application. Evidence of meeting this requirement should be provided.

2. NONPROFIT SET-ASIDE

For purposes of being considered as a nonprofit sponsored application under Section II(D), at least one nonprofit entity (or, where applicable, its qualified corporation) involved in a project must:

(a) be qualified under Section 501(c)(3) or (4) of the Code,

(b) materially participate, as defined under federal law, in the acquisition, development, ownership, and ongoing operation of the property for the entire compliance period,

(c) have as one of its exempt purposes the fostering of low-income housing,

(d) be a managing member or general partner of the ownership entity.

The Agency reserves the right to make a determination that the nonprofit owner is not affiliated with or controlled by a for-profit entity or entities other than a qualified corporation. There can be no identity of interest between any nonprofit owner and for-profit entity, other than a qualified corporation.

3. ENVIRONMENTAL HAZARDS

All projects involving use of existing structures must submit a hazardous material report which provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. The testing must be performed by professionals licensed to do hazardous materials testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

4. APPRAISALS

The Agency will not allow the project budget to include more for land costs than the lesser of its appraised market value or the purchase price. Any project involving an existing structure or budgeting more than $15,000 per acre toward land costs must submit with the full application a real estate "as is" appraisal that is a) dated no more than six (6) months from the full application deadline, b) prepared by an independent, state certified appraiser and c) complies with the Uniform Standards of Professional Appraisal Practice. The Agency may order an additional appraisal with costs to be paid by the applicant. Appraisals for rehabilitation and adaptive reuse projects must break out the land and building values from the total value.

5. CONCENTRATION

Projects cannot be in areas of minority and low-income concentration (measured by comparing the percentage of minority and low-income households in the site's census tract with the community overall). The Agency may make an exception for projects in economically distressed areas which have community revitalization plans with public funds committed to support the effort.

6. DISPLACEMENT

For rehabilitation projects and in every other instance of tenant displacement, including temporary, the applicant must supply with the full application a plan describing how displaced persons will be relocated, including a description of the costs of relocation. The owner is responsible for all relocation expenses, which must be included in the project's development

budget. Owners must also comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as revised in 49 C.F.R. Part 24.

7. RENT INCREASES

Owners of projects with 9% tax credits must seek approval from the Agency prior to increasing rents for qualified low-income units during the time between award and issuance of the federal form 8609.

8. FEASIBILITY

The Agency will not allocate tax credits or RPP funding to applications that may have difficulty being completed or operated for the compliance period. Examples include projects that may not secure an equity investment or a Principal that has inadequate capacity to successfully carry out the development process.

9. EXTENDED USE PERIOD

Owners must agree to record a thirty (30) year Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits (Extended Use Agreement) stating that the owner (a) will not apply for relief under Section 42(h)(6)(E)(i)(II) of the Code, (b) will not refuse to lease any residential unit in the Project to a holder of a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937 because of the status of the prospective tenant as such a holder, and (c) will comply with other requirements under the Code, Plan, other relevant statutes and regulations and all representations made in the project application. The Extended Use Agreement may also contain other provisions as determined by the Agency.

B. UNDERWRITING THRESHOLD REQUIREMENTS

The following minimum financial underwriting requirements apply to all projects. Projects that cannot meet these minimum requirements, as determined by the Agency, will not receive tax credits or RPP funding.

1. LOAN UNDERWRITING STANDARDS

(a) Projects applying for tax credits only will be underwritten with rents escalating at two percent (2%) and operating expenses escalating at three percent (3%).

(b) All projects will be underwritten assuming a constant seven percent (7%) vacancy and must reflect a 1.15 Debt Coverage Ratio (DCR) for the term of any debt financing on the project.

(c) Applications requesting RPP funds may be required to comply with HOME program requirements, including 42 U.S.C. 12701 et seq., 24 C.F.R. Part 92 and all relevant administrative guidance. Projects awarded RPP funds must also comply with the applicable RPP Guidelines.

(d) The Agency may determine that the interest rate on a loan must be reduced where an application shows an excessive amount accruing towards a balloon payment.

2. OPERATING EXPENSES

(a) New construction (excluding adaptive reuse): minimum of $3,000 per unit per year not including taxes, reserves and resident support services.

(b) Renovation (includes rehabilitation and adaptive reuse): minimum of $3,200 per unit per year not including taxes, reserves and resident support services.

(c) The proposed management agent (or management staff if there is an identity of interest) must sign a statement (to be submitted with the full application) agreeing that the operating expense projections are reasonable.

3. EQUITY PRICING

The Agency will conduct a survey of tax credit equity investors to determine appropriate pricing assumptions. Projects will be underwritten using the greater of this amount and the applicant's projection. The Agency may also set a maximum price. Equity should be calculated net of any syndication fees. Bridge loan interest typically incurred by the syndicator to enable an up front payment of equity should not be charged to the project directly, but be reflected in the net payment of equity. Equity should be based on tax credits to be used by the investor(s), excluding those allocated to the Principals unless these entities are making an equity contribution in exchange for the tax credits.

4. RESERVES

(a) Rent-up Reserve: Required for all except bond financed projects. A reasonable amount must be established based on the projected rent-up time considering the market and target population, but in no event shall be less than $300 per unit. These funds must be available to the management agent to pay rent-up expenses incurred in excess of rent-up expenses budgeted for in the PDC description. The funds are to be deposited in a separate bank account and evidence of such transaction provided to the Agency ninety (90) days prior to the expected placed in service date. All funds remaining in the rent-up reserve at the time the project reaches ninety-three (93%) occupancy must be transferred to the project replacement reserve account.

For those projects receiving loan funds from RD, the 2% initial operating and maintenance capital established by RD will be considered the required rent-up reserve deposit.

(b) Operating Reserve: Required for all projects except those receiving loan funds from RD. The operating reserve will be the greater of a) $1,500 per unit or b) six month's debt service and operating expenses (four months for tax-exempt bond projects), and must be maintained for the duration of the low-income use period.

The operating reserve can be funded by deferring the developer fees of the project. If this method is utilized, the deferred amounts owed to the developer can only be repaid from cash flow if all required replacement reserve deposits have been made. For tax credit projects where no RPP loan applies, the operating reserve can be capitalized by an equity pay in up to one year after certificate of occupancy is received. This will be monitored by the Agency.

(c) Replacement Reserve: All new construction projects must budget replacement reserves of $250 per unit per year. Rehabilitation and adaptive reuse projects must budget replacement reserves of $350 per unit per year. The replacement reserve must be capitalized from the project's operations, escalating by four percent (4%) annually.

In both types of renovation projects mentioned above, the Agency reserves the right to increase the required amount of annual replacement reserves if the Agency determines such an increase is warranted after a detailed review of the project's physical needs assessment.

For those projects receiving RD loan funds, the required funding of the replacement reserve will be established, administered and approved by RD.

5. DEFERRED DEVELOPER FEES

Developer fees can be deferred to cover a gap in funding sources as long as:

(a) the entire amount will be paid within fifteen (15) years and meets the standards required by the IRS to stay in basis,

(b) the deferred portion does not exceed fifty percent (50%) of the total amount as of the full application, and

(c) payment projections do not negatively impact the operation of the project.

Each of these will be determined by the Agency. Nonprofit organizations must include a resolution from the Board of Directors allowing such a deferred payment obligation to the project. The developer may not charge interest on the deferred amount in excess of the long term AFR.

6. FINANCING COMMITMENT

(a) For all projects proposing private permanent financing, a letter of intent is required. This letter must clearly state the term of the permanent loan is at least eighteen (18) years, how the interest rate will be indexed and the current rate at the time of the letter, the amortization period, any prepayment penalties, anticipated security interest in the property and lien position. The interest rate must be fixed and no balloon payments may be due for eighteen (18) years.

(b) All projects proposing public permanent financing, binding commitments are required to be submitted by the full application due date. The Agency may grant a forty-five (45) day extension of this deadline for local governments if requested by the applicant in advance of the full application due date. Local governments also must identify the source of funding (e.g. HOME, trust fund). All loans must have a fixed interest rate and no balloon payments for at least eighteen (18) years after project completion. A binding commitment is defined as a letter, resolution or binding contract from a unit of government. The same terms described for the letter of intent (using the format approved by the Agency) from a private lender must be included in the commitment.

(c) The Agency may request a letter from a construction lender documenting the loan amount, interest rate, and any origination fees.

(d) Applications may only include one set of proposed funding sources; the Agency will not consider multiple financial scenarios. A project will be ineligible for allocation if any of the listed funding sources will not be available in an

amount or under the terms described in the application. The Agency may waive this limitation if the project otherwise demonstrates financial feasibility.

7. DEVELOPER FEES AND ADDITIONAL CONTINGENCY

(a) Developer fees for new construction projects shall be the lesser of $10,500 per unit or $800,000 (the maximum for projects with tax-exempt bonds is $1,500,000).

(b) Developer fees for rehabilitation projects shall be the greater of $7,500 per unit or twenty five percent (25%) of the PDC description line item for rehabilitation (line 4), but in no event will exceed $800,000 (the maximum for projects with tax-exempt bonds is $1,500,000).

(c) Builder's general requirements shall be limited to six percent (6%) of hard costs.

(d) Builder's profit and overhead shall be limited to ten percent (10%) (8% profit, 2% overhead) of total hard costs, including general requirements.

(e) Where an identity of interest exists between the owner and builder, the builder's profit and overhead shall be limited to eight percent (8%) (6% profit, 2% overhead).

(f) The application may include up to the greater of $500 per unit or $30,000 in additional contingency to cover overruns in any project development cost. To the extent this amount is not used for cost overruns it may be taken as additional developer fee.

8. CONSULTING FEES

The total amount of any consulting fees and developer fees shall be no more than the maximum developer fee allowed to that project.

9. ARCHITECTS' FEES

The architects' fees, including design and inspection fees, shall be limited to three percent (3%) of the total hard costs plus general requirements, overhead, profit and construction contingency (total of lines 2 through 10 on the PDC description).

10. INVESTOR SERVICES FEES

Investor services fees must be paid from net cash flow and not be calculated into the minimum debt coverage ratio.

11. PROJECT CONTINGENCY FUNDING

All new construction projects shall have a hard cost contingency line item of NO MORE THAN five percent (5%) of total hard costs, including general requirements, builder profit and overhead. Rehabilitation and adaptive reuse projects shall include a hard cost contingency line item of NO MORE THAN ten percent (10%) of total hard costs.

12. PROJECT OWNERSHIP

There must be common ownership between all units and buildings within a single project for the duration of the compliance period.

13. SECTION 8 PROJECT-BASED RENTAL ASSISTANCE

For all projects that propose to utilize Section 8 project-based rental assistance, the Agency will underwrite the rents according to the tax credit and HOME limits. These limits are based on data published annually by HUD. If the Section 8 contract administrator is willing to allow rents above these limits, the project may receive the additional revenue in practice, but Agency underwriting will use the lower revenue projections regardless of the length of the Section 8 contract.

Given the uncertainty of long-term federal commitment to Section 8 rental assistance, the Agency considers underwriting to the more conservative revenue levels to best serve the project's long-term financial viability.

14. WATER, SEWER, AND TAP FEES

Any water, sewer, and tap fees charged to the project must be entered on a separate line item of the PDC description. Any application that does not include these costs must provide a letter from the local provider that no fees will be charged.

POST-AWARD PROCESSES AND REQUIREMENTS

A. GENERAL REQUIREMENTS

1. The 9% tax credit reservation amount will be the total anticipated qualified basis amount multiplied by nine percent (9%), or three and three quarters percent (3.75%) for the 4% tax credit. The actual tax credits allocated will be the lesser of the tax credits reserved, the applicable rate multiplied by qualified basis (as approved by the Agency), or the amount determined by the Agency pursuant to its evaluation as required under Section 42(m)(2) of the Code.

2. Ownership entities must (a) expend ten percent (10%) of the project's reasonably expected basis by a date to be determined by the Agency and (b) submit to the Agency a completed carryover agreement and cost certification by a date to be determined by the Agency. (This requirement also applies to projects with partial allocations.) Failure to meet these deadlines will preclude the project from participation in the state credit program. Pursuant to Section VI(B)(6), the Agency may determine that an awarded application listing state tax credits as a source of funding is ineligible for allocation due to failure to comply with the requirements of this subsection (A)(2). Projects will be required to elect a project-based allocation.

3. Once approved, the ownership entity will proceed to acquire, construct or rehabilitate the project. Owners may not start construction, including sitework, before the Agency has approved the project's final plans and specifications. Upon completion for occupancy, the ownership entity must notify the Agency and furnish a completed Final Cost Certification that complies with the Agency's guidelines and requirements. Project cash flow is a prohibited source of funds for the project budget.

4. Projects must meet all applicable federal, state and local laws and ordinances, including the Code and Fair Housing Act; the Agency may treat any failure to do so as a violation of the Plan.

5. Allocated tax credits may also be returned to the Agency under the following conditions: (a) credits have been allocated to a project building that is not a qualified building within the time period required by the Code, for example, because it is not placed in service within the period required under the Code, (b) credits have been allocated to a building that does not comply with the terms of its allocation agreement, (c) credits have been allocated to a project that are not necessary for the financial feasibility of the project, or (d) by mutual written agreement between the allocation recipient and the Agency. Returned credits may include credits previously allocated to project that fails to meet the 10% test under Section 42(b)(1)(E)(ii) of the Code.

6. The Agency may conduct construction inspections for adherence to approved final plans and specifications.

7. The owner of the project must sign and record the Extended Use Agreement in the county in which the project is located by the end of the first year after the tax credits are allocated. The owner must have good and marketable title at that time, and must obtain the consent of any lienholder on the project property recorded prior to the Extended Use Agreement (other than a lienholder relative to the financing of the construction of the project that by its terms will be cancelled within one year of the last building in the project being placed in service) to be bound by the terms of this Extended Use Agreement.

8. The Agency may revoke tax credits if the Agency determines that the owner has failed to implement all representations in the application to the Agency's satisfaction. Owners will acknowledge that the following constitute conditions to their allocation:

   (a) accuracy of the facts and compliance with representations contained in the project's final accepted application, including all exhibits and attachments,

   (b) completion of construction as depicted on the site layout, floor plan and elevations submitted with the project application,

   (c) adherence to the Plan, and

   (d) provision and maintenance of those certain unit and project amenities for the benefit of the tenants described in the project application.

   An owner's or project's failure to comply with all such conditions without written authorization from the Agency will entitle the Agency, in its discretion, to deem the allocation to be cancelled by mutual consent. After any such cancellation, the owner will acknowledge that neither it nor the project will have any right to claim tax credits pursuant to this allocation. The Agency reserves the right, in its discretion, to modify or waive any such failed condition.

9. Federal form 8609 will not be issued until:

   (a) the owner and management company produces evidence of attending a low-income housing tax credit compliance seminar sponsored either by the Agency or a sponsor acceptable to the Agency within the last 12 months;

   (b) the Agency confirms that the monitoring fees have been paid and that the project has adhered to all representations made in the application (including design elements); and

(c) the project demonstrates that it will meet all relevant Plan requirements.

The Agency may require evidence of escrowed funds to complete landscaping.

10. In making application for tax credits, the applicant agrees that the Committee, the Agency, and their designees will have access to any information pertaining to the project. This includes having physical access to the project, all financial records and tenant information for any monitoring that may be deemed necessary to determine compliance with the Code. Applicants are advised that the Agency, on behalf of the Committee, is required to do compliance monitoring and to notify the IRS and the owner of any discovered noncompliance with tax credit laws and regulations, whether corrected or uncorrected. The Agency intends to conduct desk audits and monitoring visits of projects for the purpose of evaluating continuing compliance with tax credit regulations, selection criteria, ensuring that the project continues to provide decent, safe and sanitary housing. The Agency will periodically modify monitoring procedures to ensure compliance with the requirements set forth in the Code and from time to time amended.

11. An allocation of tax credits does not constitute a representation or warranty that the ownership entity or its owners will qualify for or be able to use the tax credits. The Agency's interpretation of the Code is not binding on the IRS, and the Agency neither represents nor warrants to any owner, equity investor, Principal or other program participant how the IRS will interpret or apply any provision of the Code. Each owner and its agents should consult its own legal and tax advisors.

NOTE: Applicants are advised that some portion or all of a project's application may be subject to disclosure to the public under the North Carolina Public Records Act.

B. STATE TAX CREDITS

As the administrative agent for state credit refunds issued under N.C.G.S. § 105-129.42, the Agency has a responsibility to ensure that ownership entities do not receive resources ahead of corresponding value being created in the project. Therefore the following restrictions will apply to the state tax credit refund program.

1. Loan Option: Loans made by the Agency pursuant to N.C.G.S. § 105-129.42(d) will not be closed until the outstanding balance on the first-tier construction financing exceeds the total state credit amount; the entire loan must be used to pay down a portion of the then existing construction debt.

2. Direct Refund Option: The Agency and ownership entity will enter into an escrow agreement with regard to the refund dollars. The agreement will state, among other reasonable limitations, that issuance of the funds under N.C.G.S. § 105-129.42(g)(1) will not occur until all of the following requirements have been met:

   (a) at least fifty percent (50%) of the activities included in the project's eligible basis have been completed;

   (b) the Agency and local government inspector have conducted their framing inspections and approved all buildings (including community facilities); and

   (c) the outstanding balance on the first-tier construction financing exceeds the total state credit amount (the entire refund must be used to pay down a portion of the then existing construction debt).

Applicants must indicate which of the two options will apply to the project as part of the full application process; such decision may not be changed for the carryover allocation. Ownership entities will have to fully comply with the Plan, including Section VII(A)(2), to be eligible for participation in the state tax credit program. The Agency may adopt other policies regarding the state tax credit after adoption of the Plan. Owners, partners, members, developers or other Principals (and their affiliated entities) that are involved in a violation of any state tax credit requirement or fail to place a project in service after taking a loan or refund may be assessed up to forty (-40) negative points or disqualified from participation in Agency programs.

C. COMPLIANCE MONITORING

1. Basic Requirements: Owners must comply with Section 42 of the Code, IRS regulations, rulings, procedures, decisions and notices, state statutes, local codes, the Plan, Agency loan documents, **Appendix F** (incorporated herein by reference), and any other legal requirements.

2. Agency Requirements: The Agency will adopt and revise standards, policies, procedures, and other requirements in administering the tax credit program. Examples include training and on-line reporting. Owners must comply with all such requirements regardless of whether or not they expressly appear in the Plan or **Appendix F**.

DEFINITIONS

The terms listed below will be defined in the Plan as indicated below regardless of capitalization, unless the context clearly indicates otherwise. Terms used in the Plan but not defined below will have the same meaning as under the Code and IRS regulations.

Affiliate: As to any person or entity (i) any entity of which a majority of the voting interest is owned by such person or entity, (ii) any person or entity directly or indirectly controlling (10% or more) such person or entity, (iii) any person or entity under direct or indirect common control with any such person or entity, or (iv) any officer, director, employee, manager, stockholder (10% or more), partner or member of any such person or entity or of any person or entity referred to in the preceding clauses (i), (ii) or (iii).
Applicant: The entity that is applying for the tax credits and/or any RPP loan funds, as applicable.
Choice-Limiting Activity: Includes leasing or disposition of real property and any activity that will result in a physical change to the property, including acquisition, demolition, movement, rehabilitation, conversion, repair, or construction.
Community Service Facility: Any building or portion of building that qualifies under Section 42(d)(4)(C)(iii) of the Code, Revenue Ruling 2003-77, and any Agency requirements for such facilities (which may be published as part of the Plan, an Appendix or separately).
Developer: Any individual or entity responsible for initiating and controlling the development process and ensuring that all, or any material portion of all, phases of the development process are accomplished. Furthermore, the developer is the individual or entity identified as such in the Ownership Entity Agreement and any and all Development Fee Agreements.
Displacement: The moving of a person or such person's personal property from their current residence.
Entity: Without limitation, any general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, public agency or other entity, other than a human being.
Homeless Populations: People who are living in places not meant for habitation (such as streets, cars, parks), emergency shelters, or in transitional or temporary housing but originally came from places not meant for habitation or emergency shelters.
Management Agent: Individual(s) or Entity responsible for the day to day operations of the project, which may or may not be related to the Owner(s) or ownership entity.
Market-Rate Units: Units that are not subject to tax credit restrictions; does not include manager units.
Material Participation: Involvement in the development and operation of the project on a basis which is regular, continuous and substantial throughout the compliance period as defined in Code Sections 42 and 469(h) and the regulations promulgated thereunder.
Net Square Footage: The outside to outside measurements of all finished areas that are heated and cooled (conditioned). Examples include hallways, community and office buildings, dwelling units, meeting rooms, sitting areas, recreation rooms, game rooms, etc. Breezeways, stairwells, gazebos and picnic shelters are examples of unconditioned outside structures that may not be used as net square footage.
Owner(s): Person(s) or entity(ies) that own an equity interest in the Ownership Entity.
Ownership Entity: The ownership entity to which tax credits and/or any RPP loan funds will be awarded.
Ownership Entity Agreement: A written, legally binding agreement describing the rights, duties and obligations of owners in the ownership entity.
9% Tax Credit: Low-income housing tax credits available for allocation under the state's volume cap pursuant to Section 42(h)(3) of the Code.
Person: Any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so requires.
Person with a Disability: An adult who has a permanent physical or mental impairment which substantially limits one or more major life activities as further defined in North Carolina's Persons with Disabilities Protection Act (N.C.G.S. § 168A-3 (7a)).
Principal: Principal includes (1) all persons or entities who are or who will become partners or members of the ownership entity, (2) all persons or entities whose affiliates are or who will become partners or members of the ownership entity, (3) all persons or entities who directly or indirectly earn a portion of the development fee for development services with respect to a project and/or earn any compensation for development services rendered to such project, which compensation is funded directly or indirectly from the development fee of such project, and such amount earned exceeds the lesser of twenty-five percent (25%) of the development fee for such project or $100,000, and (4) all affiliates of such persons or entities in clause (3) who directly or indirectly earn a portion of the development fee for development services with respect to any project in the current year and/or earn any compensation for development services rendered to any project in the current year, which compensation is funded directly or indirectly from the development fee of any such project, and such amount earned exceeds the lesser of twenty-five percent 25% of the development fee for such project or $100,000. For purposes of determining Principal status the Agency may disregard multiple layers of pass-through or corporate entities. A partner or member will not be a Principal where its only involvement is that of the tax credit equity investor.
Qualified Corporation: Any corporation if, at all times such corporation is in existence, 100% of the stock of such corporation is held by a nonprofit organization that meets the requirements under Code Section 42(h)(5).
Rental Production Program (RPP): Agency loan program for multifamily affordable rental housing.
Stabilized Occupancy: Maintenance of at least ninety percent (90%) occupancy for three consecutive months.

APPENDIX B

Design Quality Standards and Requirements

The terms of this Appendix B are the minimum requirements for any project awarded tax credits in 2010. Required documents must be prepared by an engineer or architect licensed to do business in North Carolina.

Once final plans and specifications have been completed, owners must submit them to the Agency and receive written approval before commencing sitework or construction.
At all times after award the owner is responsible for promptly informing the Agency of any changes or alterations which deviate from the final plans and specifications approved by the Agency. In particular owners must not take action on any material change in the site layout, floor plan, elevations or amenities without written authorization from the Agency. This includes changes required by local governments to receive building permits.

I. DESIGN DOCUMENT STANDARDS

All required documents must be prepared by an engineer or architect licensed to do business in North Carolina. All drawings should be to scale, using the minimum required scale as detailed below.

A. PRELIMINARY APPLICATION PLAN REQUIREMENTS

Plans must be 11" x 17" and indicate the following:

1. Street name(s) where site access is made, site acreage, planned parking areas, layout of building(s) on site to scale, any flood plains that will prohibit development on site, retaining walls where needed, and adjacent properties with descriptions.
2. Front, rear and side elevations of **ALL** building types and identify all materials to be used on building exteriors.
3. Use a 1/8" or 1/16" scale for each building.

B. FULL APPLICATION PLAN REQUIREMENTS

Site and floor plans must be 24" x 36" and indicate the following:

1. Location of, and any proposed changes to, existing buildings, roadways, and parking areas.
2. All existing site and zoning restrictions including set backs, right of ways, boundary lines, wetlands and any flood plains.
3. Existing topography of site and any proposed changes including retaining walls.
4. Front, rear and side elevations of **ALL** building types and identify all materials to be used on building exteriors.
5. Landscaping and planting areas (a plant list is not necessary). If existing site timber or natural areas are to remain throughout construction, the area must be marked as such on the site plans.
6. Locations of site features such as playground(s), gazebos, walking trails, refuse collection areas, postal facilities, and site entrance signage.
7. The location of units, common use areas and other spaces using a minimum scale of 1/16" = 1'for each building.
8. Dimensioned floor plans for all unit types using a minimum scale of 1/4" = 1'.
9. Net building square footage and heated square footage. See "Definitions" in this Appendix.
10. For projects involving renovation and/or demolition of existing structures, proposed changes to building components and design and also describe removal and new construction methods.
11. For projects involving removal of asbestos and/or lead based paint removal, general notes identifying location and procedures for removal.

II. BUILDING AND UNIT DESIGN PROVISIONS

A. EXTERIOR DESIGN AND MATERIALS

1. Building design must use different roof planes and contours to "break" up roof lines. Wide window and door trim must be used to better accent siding. If horizontal banding is used between floor levels, use separate color tones for upper and lower levels. If possible, use horizontal and vertical siding applications to add detail to dormers, gables, and extended front facade areas.
2. The use of no or very low maintenance materials is required for exterior building coverings on all new construction projects. These include high quality vinyl siding, brick, or fiber cement siding. The use of metal siding is prohibited.
3. All exterior trim, including fascia and soffits, window and door trim, gable vents, etc, must also be constructed of no or very low maintenance materials.
4. All buildings must include seamless gutters and aluminum drip edge on all gable rakes and fascia boards.

5. All building foundations must have a minimum of 12 inches exposed brick veneer above finished grade level (after landscaping).
6. Breezeway and stairwell ceilings must be constructed of materials rated for exterior exposure.
7. Buildings and units must be identified using clearly visible signage and numbers. Building and unit identification signage must be well lit from dusk till dawn.
8. Exterior stairs must have a minimum clear width of 40 inches and be completely under roof cover.
9. Exterior railings must be made of vinyl, aluminum, or steel (no wood).
10. Anti-fungal shingles with a minimum 25-year warranty are required for all shingle roof applications.

B. DOORS AND WINDOWS

1. All primary unit entries must either be within a breezeway or have a minimum roof covering of 3 feet deep by 5 feet wide, including a corresponding porch or concrete pad.
2. High durability, insulated doors (such as steel and fiberglass) are required at all exterior locations. Single lever deadbolts and eye viewers are required on all main entry doors to residential units.
3. Exterior doors for fully accessible units ("Type A") must include spring hinges.
4. Insulated, double pane, vinyl windows with a U-factor of 0.40 or below and a SHGC of 0.48 or below are required for new construction.
5. Windows must not be located over tub or shower units.

C. UNIT DESIGN AND MATERIALS

1. All residential units must meet minimum unit size requirements. The square footage measurements below will be for heated square feet only, measured interior wall to interior wall, and do not include exterior wall square footage. Unheated areas such as patios, decks, porches, stoops, or storage rooms cannot be included.

Single Room Occupancy ("SRO")	250 square feet
Studio	375 square feet
Efficiency	450 square feet
1 Bedroom	660 square feet
2 Bedroom	900 square feet
3 Bedroom	1,100 square feet
4 Bedroom	1,250 square feet

For additional requirements see the "Definitions" section at the end of this Appendix.

2. All units must have a separate dining area, except for SRO, Studio and Efficiency units (see "Definitions" for description).
3. Newly constructed residential units containing two (2) or more bedrooms must have an exterior storage closet with a minimum of 16 unobstructed square feet. The square footage utilized by a water heater in the exterior storage closet may not be included in the 16 square foot calculation.
4. Carpet and pad must meet FHA minimum standards.
5. Kitchens, dining areas, and entrance areas must have vinyl, VCT or other non-carpet flooring.
6. The minimum width of interior hallways in residential units is 40 inches.
7. For new construction, interior doors must be constructed of six panel hardboard, solid core birch or solid core lauan. Hollow core, flat-panel wood doors are prohibited.
8. Bi-fold, by-pass, and pocket doors are prohibited.
9. Fireplaces are prohibited in residential units.
10. Residential floors and common tenant walls must have sound insulation batts.

D. BEDROOMS

1. The primary bedroom must have at least 130 square feet, excluding the closet(s).

2. Secondary bedrooms must have at least 110 square feet, excluding the closet(s).
3. Every bedroom must have a closet with a shelf, closet rod and door. The average size of all bedroom closets in each unit type must be at least 7 linear feet.

E. BATHROOMS

1. A medicine cabinet must be installed in every full bathroom in each residential unit.
2. Exclusive of fully accessible units, the average size of all vanities in each unit type must be at least 36 inches.
3. Mirrors in bathrooms must be low enough to reach the counter backsplashes.
4. All bathrooms must include an exhaust fan rated at 70 CFM vented to the exterior of the building using hard ductwork along the shortest run possible. The exhaust fan must be wired to run whenever the bathroom light is on.
5. For ceramic tile applications, tile should be applied over cement backer board rather than directly to drywall.
6. All new construction projects must comply with QAP Section IV(F)(3) regarding additional accessible bathrooms, including curbless showers. All curbless showers must have a collapsible water dam installed before occupancy.
7. Approaches to curbless showers must be level, not sloped.

F. KITCHENS

1. New cabinets must include dual side tracks on drawers. Door fronts, styles, and drawer fronts must be made with solid wood or wood/plastic veneer products. Particle board or hardboard doors, stiles, and drawer fronts are prohibited.
2. The minimum aisle width between cabinets and/or appliances is 42 inches.
3. A pantry cabinet or closet in or near each kitchen must be provided (does not include SRO, studio or efficiency units).
4. All residential units must have either a dry chemical fire extinguisher mounted and readily visible and accessible in every kitchen, including kitchen in community building if present, or an automatic fire suppression canister mounted in each range hood.
5. Each kitchen must have at the least the following minimum linear footage of countertop, excluding the sink space (only include countertops that are at or below 36 inches in height above finished floor):

SRO	4.5 linear feet
Studio	5.0 linear feet
Efficiency	5.0 linear feet
1 Bedroom	10.0 linear feet
2 Bedroom	12.0 linear feet
3 Bedroom	13.0 linear feet
4 Bedroom	13.0 linear feet

6. All residential units must have a frost-free Energy Star rated refrigerator with a freezer compartment. For fully accessible ("Type A") units the refrigerator must be side by side. The following are the minimum sizes:

0-2 Bedroom	14 cubic feet
3 Bedroom	16 cubic feet
4 Bedroom	18 cubic feet

7. All residential units must have an Energy Star rated dishwasher (excluding elderly properties).
8. All handicap (Type "A") kitchen sinks must be rear-draining and have sink bottoms insulated if bottom of sink is at or below 29" above finished floor.
9. Pull-out worktops are prohibited in handicap units. Must use workstations.

G. LAUNDRY ROOM CLOSETS

1. Laundry room closets must be 36" minimum depth measured from back wall to back of closet doors.
2. Clothes dryer vent connection must be 2" maximum above finished floor.

H. PROVISIONS FOR ALL ELDERLY HOUSING

1. All elderly residential units must be equipped with emergency pull chains in the master bedroom and full bathroom. The pull chains must be wired to an exterior warning device which consists of a strobe light and an audible alarm.
2. Provide loop or "D" shape handles on cabinet doors and drawers.
3. Exhaust vents and lighting above ranges must be wired to a remote switch near the range in an accessible location.
4. Provide solid blocking at all water closets and tub/shower units for grab bar installation.
5. Provide a minimum 12" grab bar in all tub/shower units. The grab bar will be installed centered vertically at 48" A.F.F. on the wall opposite the controls.
6. Corridors in any common areas must have a continuous suitable handrail on one side mounted 34 inches above finished floor, and be 1 ¼ inches in diameter.
7. All doors leading to habitable rooms must have a minimum 3'-0" door and include lever handle hardware.
8. Hallways must have a minimum width of 42 inches.
9. The maximum threshold height at any entry door is ½ inch.

I. PROVISIONS FOR SIGHT AND HEARING IMPAIRED UNITS

Applies ONLY to projects using Rental Production Program funds. Under Section 504 of the Rehabilitation Act of 1973, two percent of the total number of units constructed, or a minimum of one, must be able to be equipped for residents with sight and hearing impairments. These requirements include the following:

1. The unit(s) must be roughed in to allow for smoke alarms with strobe lights in every bedroom and living area.
2. The units must have a receptacle next to phone jacks in units for future installation of TTY devices.
3. Each overhead light fixture and receptacle must be wired to accommodate a 150 watt load.
4. The unit must also be fully accessible ("Type A").

The requirements of this provision can be satisfied by adding the elements described above to the additional fully accessible units with curbless showers required by QAP Section IV(F)(3) such that at least two percent (2%) of all units are properly equipped to serve persons with sight and or hearing impairments.

III. MECHANICAL, SITE AND INSULATION PROVISIONS

A. PLUMBING PROVISIONS

1. Zero to two bedroom units require at least one (1) full bathroom.
2. Three bedroom units require at least 1.75 bathrooms (including one bath with upright shower and one bath with full tub).
3. Four bedroom units require at least two (2) full bathrooms.
4. All tubs and showers must have slip resistant floors.
5. All electric water heaters must have an Energy Factor of at least .91. All natural gas water heaters must have an Energy Factor of at least .61.
6. All water heater tanks must be placed in an overflow pan piped to the exterior of the building, regardless of location and floor level. The temperature and relief valve must also be piped to the exterior.
7. Whirlpool baths or spas are prohibited.
8. A frost-proof exterior faucet must be installed on an exterior wall of the community/office building.
9. All tub/shower control knobs must be single lever handled and offset towards the front of the tub/shower.
10. Provide lever faucet controls for the kitchen and bathroom sinks.
11. All sinks, shower heads, and toilets must be low-flow.

B. ELECTRICAL PROVISIONS

1. Provide overhead lighting, a ceiling fan, telephone jack and a cable connection in every bedroom and living room. If using ceiling fans with light kits, the fan and light must have separate switches.

2. Any walk-in closets must also have a switched overhead light.
3. Switches and thermostats must not be located more than 48 inches above finished floor height.
4. Receptacles, telephone jacks and cable jacks must not be located less than 16 inches above finished floor height.
5. Exterior lighting is required at each unit entry door.
6. Additional exterior light fixtures not specific to a unit will be wired to a "house" panel. The fixtures will be activated by a photo cell placed on the east or north side of the buildings.
7. All exterior stairways must have light fixtures wired to a "house" panel and activated by a photo cell placed on the east or north side of the buildings.
8. Projects with gas heating and/or appliances must provide a hard-wired carbon monoxide detector with a battery back-up in each residential unit.
9. All non-residential and residential spaces must have separate electrical systems.
10. Initially-installed bulbs in residential units and common areas must be compact fluorescent (other than in ceiling fans and range hoods).

C. HEATING, VENTILATING AND AIR CONDITIONING PROVISIONS

1. All non-residential areas and residential units must have their own separate heating and air conditioning systems.
2. Through the wall HVAC units are prohibited in all but Studio, Efficiency and SRO units. They are allowed in laundry rooms and management offices where provided.
3. HVAC systems, including the air handler and line sets, must be rated at 13.0 SEER or greater and properly sized for the unit. All HVAC systems must use 410A refrigerant instead of R-22.
4. Connections in duct system must be sealed with mastic and fiberglass mesh.
5. All openings in duct work at registers and grills must be covered after installation to keep out debris during construction.
6. Fresh air returns must be a minimum of 12" above the floor.

D. BUILDING ENVELOPE AND INSULATION

1. Buildings with residential units must be wrapped with an exterior air and water infiltration barrier.
2. Framing must provide for complete building insulation including the use of insulated headers on all exterior walls, framing roofs and ceilings to allow the full depth of ceiling insulation to extend over the top plate of the exterior walls of the building, and framing all corners and wall intersections to allow for insulation.
3. Seal at doors, windows, plumbing and electrical penetrations to prevent moisture and air leakage.

E. SITEWORK AND LANDSCAPING

1. Provide positive drainage at all driveways, parking areas, ramps, walkways and dumpster pads to prevent standing water.
2. Provide a non-skid finish to all walkways.
3. All water from roof and gutter system must be piped away from buildings and discharged no less than 6' from building foundation.
4. Lots must be graded so as to drain surface water away from foundation walls. The grade away from foundation walls must fall a minimum of 6 inches within the first 10 feet.
5. Burying construction waste on-site is prohibited.
6. No part of the disturbed site may be left uncovered or unstabilized once construction is complete.
7. Minimum landscaping budgets of $300 per residential unit are required. This allowance is for plants and trees only and may not be used for fine grading, seeding and straw or sod.
8. Plant material must be native to the climate and area.

IV. ENERGY STAR CERTIFICATION

Developers are required to have their projects certified as compliant with the requirements of the ENERGY STAR program which is administered by the U. S. Environmental Protection Agency. In general, ENERGY STAR qualified homes are at least 15% more energy efficient than homes built to the 2006 International Energy Conservation Code (IECC). ENERGY STAR qualified homes achieve energy savings through established, reliable building technologies that address 5 critical elements:

- Effective Insulation
- High-Performance Windows
- Tight Construction and Ducts
- Efficient Heating and Cooling Equipment
- Lighting and Appliances

Additionally, to receive ENERGY STAR certification, developers must work with independent, third-party experts who assist with project design, verify construction quality, and test completed units to certify energy efficiency.
Additional information regarding the requirements for energy star certification can be found on the EPA website. (http://www.energystar.gov/index.cfm?c=new_homes.nh_features)

V. COMMON AREA AND SITE AMENITY PROVISIONS

All common use areas must be fully accessible to those with disabilities in compliance with all applicable State and Federal laws and regulations.

A. REQUIRED SITE AMENITIES

All projects are required to include a minimum of six (6) tenant amenities. There are four (4) amenities that are mandatory and the additional two (2) can be selected from the list below.

The required amenities vary by project type:

~~Family~~	~~Senior~~
~~Playground~~	~~Indoor or Outdoor Sitting Areas (min. of 3 locations)~~
~~Resident Computer Center (min. of 2 computers)~~	~~Multi-Purpose Room (250 sq.ft.)~~
~~Covered Picnic Area (150 sq.ft. with 2 tables and grill)~~	~~Resident Computer Center (min. of 2 computers)~~
~~Outdoor Sitting Areas with Benches (min. of 3 locations)~~	~~Tenant Storage Areas~~

~~In addition to the required amenities, projects must also include at least two (2) of the following additional amenities:~~

- ~~covered drive-thru or drop-off at entry~~
- ~~covered patio with seating (150 sq. ft.)~~
- ~~covered picnic area with two tables and one grille (150 sq. ft.)~~
- ~~exercise room (must include new equipment)~~
- ~~raised bed garden plots (50 sq. ft. per plot, 24 inches deep, one plot per 10 residents, elderly projects only)~~
- ~~gazebo (100 sq. ft.)~~
- ~~high-speed Internet access (involves both a data connection in the living area of each unit that is separate from the cable/telephone connection and support from a project-wide network or a functional equivalent)~~
- ~~sunroom with chairs (150 sq. ft.)~~
- ~~screened porch (150 sq. ft.)~~
- ~~tot lot (family projects only)~~
- ~~walking trails (4 ft. wide paved continuous around property)~~

Dimensions listed are the minimum required. Amenities must be located on the project site.

B. PLAYGROUND AREAS

1. Wherever possible tot lots and playgrounds must be located away from areas of frequent automobile traffic and situated so that the play area is visible from the office and maximum number of residential units.
2. A bench must be provided at playgrounds to allow a child's supervisor to sit. The bench must be anchored permanently, weather resistant and have a back.

C. POSTAL FACILITIES

1. Postal facilities must be located adjacent to available parking and sited such that tenants will not obstruct traffic while collecting mail.
2. On-site postal facilities must have a roof covering which offers residents ample protection from the rain while gathering mail.
3. Postal facilities must include adequate lighting on from dusk to dawn.

D. LAUNDRY FACILITIES

1. Laundry facilities are required at all projects.
2. There must be a minimum of one washer and one dryer per twelve (12) residential units if washer/dryer hookups are not available in each unit. If hookups are available in each unit, there must be a minimum of one washer and one dryer per twenty (20) units.
3. Laundry facilities must be located on an accessible route.
4. The entrance must have a minimum roof covering of 20 square feet.
5. The threshold height of the entrance door to the laundry room must not exceed ½ inch above finished interior grade level.
6. A "folding" table or countertop must be installed. The working surface must be 28 to 34 inches above the floor, and must have a 27 inch high clear knee space below. The working surface must be a minimum 48 inches long, and have a 30 by 48 inch clear floor space around it.
7. The primary entrance door to the laundry must be of solid construction and include a full height tempered glassed panel to allow residents a view of the outside/inside.
8. The laundry room must be positioned on the site to allow for a high level of visibility from residential units or the community building/office.
9. The laundry room must have adequate entrance lighting that is on from dusk to dawn.
10. If the project has only one laundry facility, it must be adjacent to the community building/office (if provided) to allow easy access and provide a handicap parking space(s).
11. One washer and one dryer must be front loading and usable by residents with mobility impairments (front loading), including at least a 30 by 48 inch clear floor space in front of each.

E. COMMUNITY / OFFICE SPACES

1. All projects must have an office on site of at least 200 square feet (inclusive of handicapped toilet facility) and a maintenance room of at least 100 square feet. This includes subsequent phases of a multi-phase development.
2. Projects with twenty four (24) or more units and more than one residential building must have a separate community building.
3. The community building must contain a both a handicapped toilet facility and a kitchen area that includes a refrigerator and sink.
4. The community building/space, including toilet facilities and kitchenette but excluding maintenance room and site office, must contain a minimum of seven (7) square feet for each residential unit.
5. The office must be situated as to allow the site manager a prominent view of the residential units, playground, entrances/exits, and vehicular traffic.
6. The community building/office must be clearly marked as such by exterior signs, placed at a visible location close to the building. The signs must use contrasting colors and large letters and numbers.

F. PARKING

1. Two parking spaces per unit are required for family projects.
2. Elderly projects require a minimum of two-thirds (2/3) parking space per unit.
3. If local guidelines require less parking, the number of parking spaces required by the Agency may be reduced to meet those

standards upon receiving Agency approval.

4. There must be at least one handicap parking space for each designated fully accessible apartment unit and must be the nearest available parking space to the unit.

G. REFUSE COLLECTION AREAS

1. Fencing consistent with the appearance of the residential buildings must screen the collection area. The fencing must be made of PVC or treated lumber and constructed for permanent use.
2. The pad for the refuse collection area, including the approach area, must be concrete (not asphalt).
3. The refuse collection areas may not be at the entrances or exits of the project.
4. Signs must be at all refuse collection areas to prohibit parking in front of collection facilities.
5. A concrete parking bumper, pipe bollards or 8 inch x 8 inch treated timber must be installed behind dumpsters.
6. All projects must include a pad for tenant recycling receptacles as part of the collection area even if recycling is not yet available.

VI. ADDITIONAL PROVISIONS FOR REHABILITATION OF EXISTING HOUSING

The following requirements apply to rehabilitation of existing units. Existing apartments do not need to be physically altered to meet new construction standards. Any replacement of existing materials or components must comply with the design standards for new construction.

A. Design documents must show all proposed changes to existing and proposed buildings, parking, utilities, and landscaping. An architect or engineer must prepare the design drawings.

B. Submit a hazardous material report that provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. Professionals licensed to do hazardous materials testing must perform the testing. A report written by an architect, building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

C. Submit an engineer's report assessing the structural integrity of the building(s) being renovated.

D. Submit a current termite inspection report.

E. Show "reserves for replacements" adequate to maintain and replace any existing systems and conditions not being replaced or addressed during rehabilitation.

VII. ADDITIONAL PROVISIONS FOR ADAPTIVE RE-USE OF EXISTING STRUCTURES

A. Mechanical Systems: All mechanical systems (including HVAC, plumbing, electrical, fire suppression, security system, etc.) must be completely enclosed and concealed. This may be achieved by utilizing existing spaces in walls, floors, and ceilings, constructing mechanical chases or soffits, dropping ceilings in portions of units, or other means. Where structural or other significant limitations make complete enclosure and concealment impossible, the applicant must secure approval from the Agency prior to installation of affected systems.

B. Windows: Retain original window sashes, frames, and trim where possible. All original sashes must be repaired and otherwise upgraded to insure that all gaps and spaces are sealed so as to be weather tight. All damaged or broken window panes must be replaced. Where original window sashes cannot be retained, install replacement sashes be installed into existing frames. In all cases, windows must be finished with a complete coating of paint.

C. Floors: All wood flooring is to be restored as closely to original condition as possible. Where repairs are necessary, flooring salvaged from other areas of the building must be utilized as fill material. If salvaged wood is not available, flooring of similar dimension and species must be used. All repairs must be made by feathering in replacement flooring so as to make the repair as discreet as possible. Cutting out and replacing square sections of flooring is prohibited. Where original flooring has gaps in excess of 1/8 inch, the gaps must be filled with an appropriate filler material prior to the application of final finish.

D. Hazardous Materials: Submit a hazardous material report that provides the results of testing for asbestos containing materials,

lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. Professionals licensed to do hazardous materials testing must perform the testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.

VIII. APPLICABLE ACCESSIBILITY REGULATIONS

A. FAIR HOUSING AMENDMENTS ACT

All new construction projects are required by law to meet the handicap-accessibility standards outlined in the Fair Housing Laws, including the Federal Fair Housing Amendments Act of 1988 (the "Act"). The law provides that failure to design and construct certain residential dwelling units to include certain features of accessible design will be regarded as unlawful discrimination. Renovation projects may be exempt from design guidelines.
The law applies to all housing built after March 13, 1991 with four or more units. All units in buildings with four or more units must meet the requirements of the law if the buildings have one or more elevators. All ground floor units in other buildings containing four or more units must meet the requirements of the law. Certain sites with steep terrain may have some exclusions.

B. THE AMERICANS WITH DISABILITIES ACT

All projects are required by law to meet the handicap accessibility standards outlined in the Americans With Disabilities Act (ADA). The law provides that failure to design and construct certain public accommodations to include certain features of accessible design will be regarded as unlawful discrimination.
ADA Legislation became effective on July 26, 1992. Title III deals with non-discrimination on the basis of disability by public accommodations and in commercial facilities. Public accommodations include all new construction effective January 26, 1993 and impacts any rental office, model unit, public bathroom, building entrances, or any other public or common use area. Existing public accommodations must be retrofitted or altered beginning January 26, 1992, unless a financial or administrative burden exists.
The ADA guidelines do not affect residential units, since these are covered under Fair Housing and Section 504 laws.

C. NORTH CAROLINA STATE ACCESSIBILITY CODE

All projects are required by law to meet the handicap accessibility standards as outlined in the North Carolina State Building Code. State and/or local building code officials enforce the design and construction guidelines. Compliance with these guidelines is mandatory in order to receive a Certificate of Occupancy for your proposed development.
A main feature of the state accessibility code is the provision requiring all multifamily residential projects intended as full time residences for rent or lease that have eleven or more living units to have a minimum of five percent of the units, or a minimum of one, that meet the requirements. These fully accessible designated units must also be distributed throughout the project, and not placed all in one building or just in one area of the site.

DEFINITIONS

Efficiency Apartment: A unit with a minimum of 450 heated square footage (assuming new construction) in which the bedroom and living area are contained in the same room. Each unit has a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, full size refrigerator) that is located in a separate room.
Heated Square Feet: The floor area of an apartment unit, measured interior wall to interior wall, not including exterior wall square footage. Interior walls are not to be deducted, and the area occupied by a staircase may only be counted once.
Net Square Feet: Total area, including exterior wall square footage, of all conditioned (heated/cooled) space, including hallways and common areas.
One Bedroom Apartment: A unit of at least 660 heated square feet (assuming new construction) containing at least four separate rooms including a living/dining room, full kitchen, a bedroom and full bathroom.
Single Room Occupancy (SRO) Unit: A single room unit with a minimum of 250 heated square feet (assuming new construction) that is the primary residence of its occupant(s). The unit must contain either food preparation or sanitary facilities. At least one component of either a full bathroom (shower, water closet, lavatory) and/or a full kitchen (refrigerator, stove top and oven, sink) is missing. There are shared common areas in each building that contain elements of food preparation and/or sanitary facilities that are missing in the individual units.
Studio Apartment: A unit with a minimum of 375 heated square feet (assuming new construction) in which the bedroom, living area and kitchenette are contained in the same room. Each unit has components of a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, refrigerator).

Three Bedroom Apartment: A unit with a minimum of 1,100 heated square feet (assuming new construction) containing at least seven separate rooms including a living/dining room, full kitchen, three bedrooms and 1.75 bathrooms, with each unit including a minimum of one bath with a full tub and one bath with an upright shower stall.
Two Bedroom Apartment: A unit with a minimum of 900 heated square feet (assuming new construction) containing at least five separate rooms including a living/dining room, full kitchen, two bedrooms and full bathroom.

Appendix F

Monitoring Compliance with Low-Income Housing Tax Credit Requirements

(a) General.

Owners of low-income housing tax credit properties must comply with the following rules and procedures.

(b) Recordkeeping and record retention.

(1) *Recordkeeping.* Owners must keep records for each qualified low-income building in the project that show for each year in the compliance period—

(i) the total number of residential rental units in the building (including the number of bedrooms and the size in square feet of each residential rental unit);

(ii) the percentage of residential rental units in the building that are low-income units;

(iii) the rent charged on each residential rental unit in the building (including any utility allowances);

(iv) the number of occupants in each low-income unit, but only if rent is determined by the number of occupants in each unit under Section 42(g)(2);

(v) the low-income unit vacancies in the building and information that shows when, and to whom, the next available units were rented;

(vi) the annual income certification of each low-income tenant per unit (for an exception to this requirement, see Section 42(g)(8)(B));

(vii) documentation to support each low-income tenant's income certification (other than as covered by the special rule for a 100 percent low-income building) as determined under Section 8 or by a public housing authority;

(viii) the eligible basis and qualified basis of the building at the end of the first year of the credit period; and

(ix) the character and use of the nonresidential portion of the building included in the building's eligible basis under Section 42(d).

(2) *Record retention.* Owners must retain the records described in paragraph (b)(1) of this section for at least six (6) years after the due date (with extensions) for filing the federal income tax return for that year. The records for the first year of the credit period, however, must be retained for at least six (6) years beyond the due date (with extensions) for filing the federal income tax return for the last year of the compliance period of the building.

(3) *Inspection record retention.* Owners must retain the original local health, safety, or building code violation reports or notices that were issued by the State or local government unit (as described in paragraph (c)(1)(vi) of this section) for the Agency's inspection under paragraph (d) of this section. Retention of the original violation reports or notices is not required once the Agency reviews the violation reports or notices and completes its inspection, unless the violation remains uncorrected.

(c) Certification and review.

(1) *Certification.* Owners must certify at least annually to the Agency that, for the preceding twelve (12) month period—

(i) the project met the requirements of the 20-50 test under Section 42(g)(1)(A), the 40-60 test under Section 42(g)(1)(B), whichever is applicable to the project;

(ii) there was no change in the applicable fraction (as defined in Section 42(c)(1)(B)) of any building in the project, or that there was a change, and a description of the change;

(iii) the owner has received an annual income certification from each low-income tenant, and documentation to support that certification consistent with paragraph (b)(1)(vii) of this section;

(iv) each low-income unit in the project was rent-restricted under Section 42(g)(2);

(v) all units in the project were for use by the general public, including the requirement that no finding of discrimination under the Fair Housing Act occurred for the project (meaning an adverse final decision by HUD, a substantially equivalent state or local fair housing agency or federal court);

(vi) the buildings and low-income units in the project were suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards), and the State or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or low-income unit in the project (owners must attach any violation report or notice to its annual certification and state whether the violation has been corrected);

(vii) there was no change in the eligible basis (as defined in Section 42(d)) of any building in the project, or if there was a change, the nature of the change;

(viii) all tenant facilities included in the eligible basis under Section 42(d) of any building in the project were provided on a comparable basis without charge to all tenants in the building;

(ix) if a low-income unit in the building became vacant during the year, that reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income;

(x) if the income of tenants of a low-income unit in the project increased above the limit allowed in Section 42(g)(2)(D)(ii), the next available unit of comparable or smaller size in the project was or will be rented to tenants having a qualifying income; and

(xi) an extended low-income housing commitment as described in Section 42(h)(6) was in effect, including the requirement under Section 42(h)(6)(B)(iv) that an owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937;

(xii) all low-income units in the project were used on a non-transient basis (except for transitional housing for the homeless provided under Section 42(i)(3)(B)(iii) or single-room-occupancy units rented on a month-by-month basis under Section 42(i)(3)(B)(iv));

(xiii) no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under Section 42;

(xiv) the ownership entity meets the requirements of the nonprofit set-aside if the project was allocated as such; and

(xv) no unauthorized changes in ownership or management agent(s) have occurred.

(2) Review.

(i) The Agency will review the certifications submitted under paragraph (c)(1) of this section for compliance with the requirements of Section 42.

(ii) With respect to each tax credit project—

(A) the Agency will conduct on-site inspections of all buildings in the project by the end of the second calendar year following the year the last building in the project is placed in service and, for at least twenty percent (20%) of the project's low-income units, inspect the units and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units; and

(B) at least once every three (3) years, the Agency will conduct on-site inspections of all buildings in the project and, for at least twenty percent (20%) of the project's low-income units, inspect the units and review the low-income certifications, the documentation supporting the certifications, and the rent records for the tenants in those units.

(iii) The Agency will randomly select low-income units and tenant records to be inspected and reviewed.

(3) Frequency and form of certification. The certifications and reviews of paragraph (c)(1) and (2) of this section will be made annually covering each year of the fifteen (15) year compliance period under Section 42(i)(1). The owner certifications will be made under penalty of perjury.

(d) Inspections.

(1) In general. The Agency has the right to perform an on-site inspection of any tax credit project at least through the end of the extended use period.

(2) *Inspection standard.* For the on-site inspections of buildings and low-income units required by paragraph (c)(2)(ii) of this section, the Agency will review any local health, safety, or building code violations reports or notices retained by the owner under paragraph (b)(3) in order to determine whether—

(i) the buildings and units are suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards); or

(ii) the buildings and units satisfy, as determined by the Agency, the uniform physical condition standards for public housing established by HUD (24 CFR 5.703).

The HUD physical condition standards do not supersede or preempt local health, safety, and building codes. A tax credit project under Section 42 must continue to satisfy these codes. The Agency will report any violation of these codes to the Service.

(e) Notification-of-noncompliance.

(1) *In general.* The Agency will give the notice described in paragraph (e)(2) of this section to the owner of a tax credit project and the notice described in paragraph (e)(3) of this section to the Service.

(2) *Notice to owner.* The Agency will provide prompt written notice to the owner of a tax credit project if the Agency does not receive the certification described in paragraph (c)(1) of this section, or does not receive or is not permitted to inspect the tenant income certifications, supporting documentation, and rent records described in paragraph (c)(2)(ii) of this section, or discovers by inspection, review, or in some other manner, that the project is not in compliance with the provisions of Section 42.

(3) *Notice to Internal Revenue Service.*

(i) In general. The Agency will file Form 8823, "Low-Income Housing Credit Agencies Report of Noncompliance," with the Service no later than 45 days after the end of the correction period (as described in paragraph (e)(4) of this section, including extensions permitted under that paragraph) and no earlier than the end of the correction period, whether or not the noncompliance or failure to certify is corrected. The Agency will explain on Form 8823 the nature of the noncompliance or failure to certify and indicate whether the owner has corrected the noncompliance or failure to certify. Any change in either the applicable fraction or eligible basis under paragraph (c)(1)(ii) and (vii) of this section, respectively, that results in a decrease in the qualified basis of the project under Section 42(c)(1)(A) is noncompliance that will be reported to the Service under this paragraph (e)(3). If the noncompliance or failure to certify is corrected within three (3) years after the end of the correction period, the Agency will file Form 8823 with the Service reporting the correction of the noncompliance or failure to certify.

(ii) Agency retention of records. The Agency will retain records of noncompliance or failure to certify for six (6) years beyond the Agency's filing of the respective Form 8823. In all other cases, the Agency will retain the certifications and records described in paragraph (c) of this section for three (3) years from the end of the calendar year the Agency receives the certifications and records.

(4) *Correction period.* The correction period shall be that period specified in the monitoring procedure during which an owner must supply any missing certifications and bring the project into compliance with the provisions of Section 42. The correction period is not to exceed ninety (90) days from the date of the notice to the owner described in paragraph (e)(2) of this section. The Agency may extend the correction period for up to six (6) months for good cause.

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 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Division of Medical Assistance intends to adopt the rules cited as 10A NCAC 22N .0103-.0110 and amend the rules cited as 10A NCAC 22N .0101-.0102.*

Proposed Effective Date: *February 1, 2010*

Public Hearing:
Date: *October 20, 2009*
Time: *9:00 a.m.*
Location: *1985 Umstead Drive, Raleigh, NC 2761 Kirby Building, Room 132*

Reason for Proposed Action: *The Division of Medical Assistance (DMA) is responsible for enrolling qualified providers to participate in the Medicaid program for the state of North Carolina. Currently there are over 30 Medicaid program areas which have specific licensure, endorsement, and certification requirements for providers. The revisions are submitted with the intent to administer the following: 1. Ensure qualified provider applicants are enrolled; 2. Ensure non-qualified provider applicants are denied and; 3. Uphold those DMA enrollment decisions which result in a provider appeals process.*
The new and amended rules will have a positive impact on the quality of care provided to the Medicaid recipient community by clearly specifying standards for provider participation that are common across all program areas.
State Budget Impact: Minimal fiscal impact is expected. DMA does not project any expenditure of funds by the state based on the proposed rule changes.
DMA's Program Integrity Section (PI) actively participates in post payment validation and monitoring activities which result in recoupment of invalid claims payments to providers. Enactment of these rule changes and additions should increase cost avoidance dollars since unqualified providers would not be able to enroll and "default" on recoupments.

Procedure by which a person can object to the agency on a proposed rule: *Should you desire to object to a proposed rule(s) please respond to DMA with the objection, reasons for the objection, and the clearly identified portion of the rule to which the objection pertains. This must be submitted in writing to Teresa Smith, Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603, 2501 Mail Service Center, Raleigh, NC 27699-2501, Kirby Building.*

Comments may be submitted to: *Teresa Smith, 1985 Umstead Drive, Raleigh, NC 27603, 2501 Mail Service Center, Kirby Building, Raleigh, NC 27699-2501, email teresa.smith@dhhs.nc.gov*

Comment period ends: *November 30, 2009*

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 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 22 – MEDICAL ASSISTANCE ELIGIBILITY

SUBCHAPTER 22N – PROVIDER ENROLLMENT

SECTION .0100 – GENERAL

10A NCAC 22N .0101 DEFINITIONS
~~For the purpose of this Subchapter, a "provider" is any individual, facility or entity that applies to furnish services to authorized Medicaid recipients and bill Medicaid directly for reimbursement. The term "provider" also includes suppliers of medical equipment and supplies.~~
For the purposes of this Subchapter, all definitions set forth in 42 U.S.C. 1320a-7, 42 C.F.R. sections 1001.2, 1001.1001(a)(2) and 1002.203 are hereby incorporated by reference, including subsequent amendments and additions, with the following additions and modifications:
(1) Department means the North Carolina Department of Health and Human Services.

(2) Division means the Division of Medical Assistance within the North Carolina Department of Health and Human Services.
(3) MIU means the Medicaid Investigations Unit within the North Carolina Department of Justice.
(3) OIG means the Office of Inspector General within the United States Department of Health and Human Services.
(4) Exclusion means that a provider can no longer participate in the Medical Assistance Program and that medical care, services, supplies or equipment furnished, ordered or prescribed by an excluded provider will not be reimbursed under Medicaid until the provider is reinstated by the Office of Inspector General (OIG) or the Division.
(5) Managing employee means a general manager, business manager, administrator, director, or other person who exercises operational or managerial control of a provider, or who directly or indirectly conducts the day-to-day operation of a provider.
(6) Person means a natural person, individual, corporation, partnership, association, clinic, group or any other business entity.
(7) Person with an ownership or control interest means a person who:
(a) has a direct ownership interest totaling five percent or more in a provider;
(b) has an indirect ownership interest equal to five percent or more in a provider;
(c) has a combined direct and indirect ownership interest equal to five percent or more in a provider;
(d) owns an interest of five percent or more in any mortgage, deed of trust, note, or other obligation secured by the provider if that interest equals at least five percent of the value of the property or assets of the provider;
(e) is an officer or director of a provider that is organized as a corporation; or
(f) is a partner in a provider that is organized as a partnership.
(8) Provider is any person, including any person acting as an employee, representative or agent of such person that is enrolled in the Medical Assistance Program to furnish medical care, services, supplies, or equipment or to arrange for the furnishing of such care, services, supplies or equipment.

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0102 APPLICATIONS AND AGREEMENTS

~~Each provider shall sign a participation contract agreement with the Division of Medical Assistance and shall not be reimbursed for services rendered prior to the effective date of the participation agreement.~~

(a) Providers must meet the qualifications specified in state and federal laws, rules and regulations, and Program-specific provider agreements. To enroll as a Medicaid provider an applicant shall submit to the Division:
(1) a complete, original, signed application;
(2) a complete, original, signed agreement. By entering into the provider agreement, the provider agrees to abide by all terms and conditions set forth therein and to comply with all applicable laws, rules, regulations; and
(3) any additional documentation required by the Division rules as part of the application process, including documentation of licensure, certification, or endorsement.

(b) The provider must be in good standing with the Office of Inspector General, appropriate medical boards and other sources of verification, such as the Provider Penalty Tracking Database mandated by S.L. 2003-294, National Practitioner Databank (NPDB), Healthcare Integrity and Protection Databank (HPDB), prior to enrollment.

(c) The effective date for an approved application is the date the Division received the complete, original, signed application.

(d) Periods of provider ineligibility shall not be reimbursed by the Division.

(e) Provider enrollment is not a guarantee of payment or prior approval.

(f) Neither the agreement nor the assigned provider number is transferable or assignable, except as provided by federal regulations.

(g) Claims may not be reassigned to an individual or organization that advances money to the provider of services for accounts receivable that the provider has assigned, sold or transferred to the individual or organization for an added fee or deduction of a portion of the accounts receivable.

Authority G.S. 42 CFR 431.107.

10A NCAC 22N .0103 RETROACTIVE PROVIER ELIGIBILITY

(a) The Division shall grant retroactive provider eligibility;
(1) When a Medicaid recipient has been granted retroactive eligibility; or
(2) When the medical care, services, supplies, or equipment were rendered out of state services in accordance with 10A NCAC 22O .0119.

(b) When a provider meets the requirements set forth in Rule .0102 of this Subchapter, the effective date shall be retroactive for up to 365 days to encompass dates on which the provider furnished, to a Medicaid recipient, covered services for which it has not been paid.

(c) Retroactive provider eligibility does not guarantee payment. Time limitations regulations remain applicable in accordance with 10A NCAC 22B .0104.

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0104 PROVIDER DUTIES

By enrolling as a provider, the provider agrees to comply with the terms of the provider agreement and shall:

(1) be licensed, certified, registered, or endorsed as required by State and Federal law rule or policy at all times that services are provided; notify the Division within seven calendar days of learning of any adverse action initiated against and/or expiration of the license, certification, registration or endorsement of the provider or any of its officers, agents, or employees; neither provide services nor bill the Division if any services may have been rendered during the lapse, for whatever reason, of any license, certification, registration or endorsement as required by State and Federal laws, rules and regulations;

(2) prepare and maintain at the time of providing medical care, services, supplies or equipment, documentation necessary to substantiate a claim for services rendered under the Medical Assistance Program and keep for a period of six years from the date of furnishing the care, services, supplies or equipment, all records necessary to disclose the nature and extent of services furnished and all information regarding claims for payment submitted by, or on behalf of, the provider and furnish such records and information immediately upon request, to the Department, its agents, the Secretary of the United States Department of Health and Human Services, and the North Carolina Medicaid Investigative Unit;

(3) comply with the requirements of 42 CFR Part 455, Subpart B, regarding disclosure of ownership and controlling interests, disclosure of business transactions, and notify the Division of any person with an ownership or controlling interest or any agent or managing employee who has been convicted of a criminal offense related to Titles XVIII, XIX or XX of the Social Security Act;

(4) notify the Division of change of business address within 15 calendar days of the change;

(5) accept payment from the Medical Assistance Program as payment in full for all medical care, services, supplies and equipment billed at the usual and customary charges under the Program, except as otherwise specifically provided in law to the contrary;

(6) provide services to Medicaid eligible recipients of the same quality as are provided to private paying individuals without regard to race, color, age, sex, religion, disability, or national origin;

(7) execute an agreement with any entity acting on behalf of the provider which requires the entity to comply with all applicable federal and state laws, rules, regulations and policies;

(8) submit claims on paper or electronically in the manner specified by the Division which shall constitute a certification that:

(a) the medical care, services, supplies or equipment for which payment is claimed were furnished in accordance with the written and published requirements of the Division;

(b) the provider possessed the required and current license, certification, registration, or endorsement at the time the Medicaid covered services were provided;

(c) the medical care, services, supplies or equipment for which payment is claimed were actually furnished to the Medicaid eligible person identified as the patient at the time and in the manner stated and were medically necessary or were otherwise authorized by the Division when furnished;

(d) the payment claimed does not exceed the provider's usual and customary charges or the maximum amount negotiated under applicable rules of the Division;

(e) the information submitted in, with, or in support of the claim is true, accurate, and complete;

(f) the provider has complied with all terms and conditions of the provider agreement and all applicable laws, rules, regulations, written and published policies of the Division;

(g) the acts or omissions of the provider's staff or its agents shall be deemed those of the provider; and

(h) payment and satisfaction of the claim will be from federal and state funds, and that any false claims, statements, or documents, or concealment of a material fact, may be prosecuted under applicable federal or state laws.

(i) comply with the laws, rules, regulations, written and published policies of the North Carolina and United States Department of Health and Human Services.

(j) comply with the requirements set forth in 42 USC 1396a(a)(68) concerning the establishment of detailed, specific written policies regarding the Federal False Claims Act, the North Carolina False Claims Act, and Whistleblower Protection.

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0105 DUTIES OF THE DIVISION

The Division shall:

(1) Enroll an applicant in the Medical Assistance Program if the applicant meets all requirements as set forth in Section .0100 of this Subchapter.

(2) Make payment at the established rate for care, services, supplies or equipment furnished to a recipient by the provider upon receipt of a properly completed and properly supported claim in accordance with the provider agreement.

(3) Include in the provider agreement, other lawful requirements the Division finds necessary to properly and efficiently administer the Medical Assistance Program.

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0106 DENIAL OF APPLICATION

(a) The Division shall deny a provider application if any of the following are found to be applicable to the provider applicant:

(1) Made a false representation or omission of any material fact in making the application, including the submission of an application that conceals the controlling or ownership interest of any officer, director, agent, managing employee, affiliated person, or partner or shareholder who is not eligible to participate;

(2) Transferred or changed ownership in anticipation of (or following) a conviction, assessment, sanction, recoupment, or exclusion;

(3) Has been or is currently excluded, suspended, terminated from, or has involuntarily withdrawn from participation in, North Carolina's Medical Assistance Program or any other state's Medicaid program, or from participation in any other governmental or private health care or health insurance program;

(4) Has been convicted of a criminal offense relating to the delivery of any goods or services under Medicaid or Medicare or any other public or private health care or health insurance program including the performance of management or administrative services relating to the delivery of goods or services under any such program;

(5) Has been convicted under federal or state law of a criminal offense related to the neglect or abuse of a patient in connection with the delivery of any health care goods or services;

(6) Has been convicted under federal or state law of a criminal offense relating to the unlawful use, transfer, possession, sale, manufacture, distribution, prescription, or dispensing of a controlled substance;

(7) Has been convicted of any criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct;

(8) Has been convicted under federal or state law of a crime which involves moral turpitude;

(9) Has been convicted in connection with the interference or obstruction of any investigation into any criminal offense listed in this subsection;

(10) Has been found to have violated federal or state laws, rules, or regulations governing North Carolina's Medical Assistance Program or any other state's Medicaid program, the Medicare program, or any other publicly funded federal or state health care or health insurance program, and been sanctioned accordingly;

(11) Has been previously found by a licensing, certifying, endorsing, or professional standards board or agency to have violated any of the standards or conditions imposed by such board or agency; or does not possess the current valid license, certification, registration or endorsement as required by federal or state law, rules, regulations or the provider agreement;

(12) Failed to pay any fine or overpayment properly assessed under the Medical Assistance Program or any other state agency program in which no appeal is pending or after resolution of the proceeding by stipulation or agreement, unless the agency has issued a specific letter of forgiveness or has approved a repayment schedule to which the provider agrees to adhere;

(13) Failed to supply within 30 days further information concerning the application for provider enrollment after receiving a written request for clarifying information; or

(14) Failed to meet any condition of enrollment as set forth in this Subchapter.

(b) The Division shall approve or deny a provider application if it finds that it is in the best interest of the Medical Assistance Program to do so. The agency shall consider any factor that could affect the effective and efficient administration of the Program, including, the applicant's demonstrated ability to provide services, conduct business, and operate a financially viable concern; the current availability of medical care, services, or supplies to recipients, taking into account geographic location and reasonable travel time; the number of providers of the same type already enrolled in the same geographic area; and the credentials, experience, success, and patient outcomes of the provider for the services that it is making application to provide in the Medical Assistance Program.

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0107 MANDATORY EXCLUSIONS

The Division shall impose all mandatory exclusions and length of exclusions set forth in 42 U.S.C. 1320a-7, 42 C.F.R. sections 1001.101, 1001.102 and 1002.203 which are incorporated by reference with all subsequent amendments and editions.

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0108 PERMISSIVE EXCLUSIONS

(a) The Division shall impose all permissive exclusions and lengths of exclusions set forth in 42 U.S.C. 1320a-7, 42 C.F.R. sections 1001.201 through 1001.1701, 1002.210 through 1002.215 and 1003.105 which are incorporated by reference with all subsequent amendments and editions with the following additions:

(1) A provider or applicant who has been convicted of any felony, or offense involving moral turpitude, may be excluded for a period of five years from the date of conviction.

(2) An enrolled provider who fails to perform any duty set forth in Rule .0104 of this Subchapter shall be excluded from participation.

(3) An applicant who meets any condition set forth in Rule.0106 of this Subchapter may be excluded from participation.

(b) Exclusions may be imposed retroactively. If claims were paid during the period of exclusion they are subject to recoupment and repayment.

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0109 REINSTATEMENT

For purposes of reinstatement into the North Carolina Medical Assistance Program, 42 U.S.C. 1396a, 42 C.F.R. sections 1001 Subpart F, 1002.214 and 1002.215 are incorporated by reference with all subsequent amendments and editions, with the following addition: As a condition of reinstatement and continued participation in the Medical Assistance Program , a provider shall post a performance bond equal to the actual billing level for the most recent calendar year of participation, not to exceed one hundred thousand dollars ($100,000). The performance bond must be obtained from a surety company that has been issued a Certificate of Authority by the United States Department of the Treasury. The bond must name the provider as "principal," the Division as "beneficiary" and the surety company as "surety."

Authority G.S. 108A-54; 143B-139.1.

10A NCAC 22N .0110 APPEAL RIGHTS FOR EXCLUSION, DENIAL OF APPLICATION AND REINSTATEMENT

(a) If the Division determines that mandatory or permissive exclusion is warranted, it shall send a written notice of this decision to the affected individual or entity that the exclusion will be effective 20 calendar days from the date of the notice.

(b) If the Division determines that an application or request for reinstatement should be denied, it shall send a written notice of this decision to the affected individual or entity.

(c) Appeal may be had by filing a written request for reconsideration review with the Department within 30 calendar days of the date of the notice of exclusion or denial of the application. An excluded provider shall not participate in the Program during the pendency of the appeal.

(d) An appellant may submit documentation or written arguments to the Division no later than 14 calendar days prior to the reconsideration review. One extension of time within which to file documentation or written arguments shall be granted.

(e) The Division shall conduct a review and issue a written determination within 30 calendar days after the reconsideration review is concluded.

(f) A provider or applicant who disagrees with the reconsideration review determination may request a contested case hearing in accordance with G.S. 150B-23.

Authority G.S. 108A-54; 143B-139.1.

TITLE 11 – DEPARTMENT OF INSURANCE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to repeal the rules cited as 11 NCAC 11C .0308 and 11 NCAC 14 .0504-.0505.*

Proposed Effective Date: *February 1, 2010*

Instructions on How to Demand a Public Hearing *(must be requested in writing within 15 days of notice)***:** *The request for Hearing must be received by the Department of Insurance at 1201 Mail Service Center, Raleigh, NC 27699-1201, in writing within fifteen days of publication in the Register.*

Reason for Proposed Action: *These rules are no longer necessary. There was a change in the statute during the 2009 session of the North Carolina General Assembly. Session Law 2009-172 changed G.S. 58-16-5 to remove the requirement for successful conduct in business.*

Procedure by which a person can object to the agency on a proposed rule: *The Department of Insurance will accept written objections to these rules until the expiration of the comment period on November 30, 2009.*

Comments may be submitted to: *Karen E. Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201; phone (919) 733-4529; fax (919) 733-6495; email karen.waddell@ncdoi.gov*

Comment period ends: *November 30, 2009*

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 919-431-3000.

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

CHAPTER 11 - FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11C - ANALYSIS AND EXAMINATIONS

SECTION .0300 - HEALTH MAINTENANCE ORGANIZATIONS

11 NCAC 11C .0308 FOREIGN HMO: SUCCESSFUL OPERATION

~~(a) Foreign health maintenance organizations seeking admission to North Carolina must have net operational gains for three consecutive years next preceding the date of application for admission; however, on an individual case basis only, an applicant may be considered for admission if it has a minimum of one year of net operational gains and the financial certification as described in 11 NCAC 11C .0307 reflects continuing operational gains for at least the next three years.~~

~~(b) The three year operational gain requirement for a foreign health maintenance organization applying for admission to North Carolina may be waived by the Commissioner if such organization can satisfy all other provisions of G.S. 58-67-10 and the requirements contained herein and if the organization is a subsidiary of, or affiliated with, an already licensed insurance company that:~~

~~(1) has been licensed in North Carolina for a minimum of 10 years;~~

~~(2) has reflected net gains from its operations for at least three of the last five years; or must reflect verifiable total statutory capital and surplus in excess of fifty million dollars ($50,000,000) in its most recent statutory financial statement filed with the Commissioner;~~

~~(3) is in compliance with North Carolina Insurance Laws;~~

~~(4) has control, as defined in G.S. 58-19-5, over the operations of the applicant organization; and~~

~~(5) can provide evidence that ample funds will be committed by the insurance company in behalf of the health maintenance organization to support the potential success of the organization for at least a three year period.~~

Authority G.S. 58-2-40; 58-67-10.

CHAPTER 14 - ADMISSION REQUIREMENTS

SECTION .0500 - ADMISSION OF A FOREIGN OR ALIEN INSURANCE COMPANY

11 NCAC 14 .0504 FOREIGN COMPANY MUST HAVE CONDUCTED SUCCESSFUL BUSINESS

~~In order to be eligible for admission to do business in North Carolina, foreign insurance companies shall have net income for three consecutive years immediately preceding the date of application for admission and must continue to reflect net income throughout the admission process.~~

Authority G.S. 58-2-40; 58-16-5(2).

11 NCAC 14 .0505 WAIVERS OF THREE-YEAR NET INCOME REQUIREMENT

~~(a) The Commissioner shall waive the three year net income requirement for a foreign insurance company of any type listed in G.S. 58-7-75 applying for admission to do business in North Carolina if the company meets all other requirements for admission and it is a subsidiary of, or affiliated under a holding company system, as defined in G.S. 58-19-5, with a licensed insurance company:~~

~~(1) that has been licensed in North Carolina for a minimum of 10 years;~~

~~(2) that has reflected net income three of the most recent five years;~~

~~(3) that enjoys a satisfactory reputation in its dealings with its North Carolina policyholders, demonstrated by a volume of consumer complaints that are not material and market conduct examination findings which are not harmful to its policyholders; and~~

~~(4) whose management has control as defined in G.S. 58-19-5 over the operations of the applicant company.~~

~~To be eligible for the waiver, the affiliated company shall guarantee to maintain the capital and surplus of the applicant company at or above the admission requirements in North Carolina for a minimum of three years or until the applicant company can provide a report on examination that certifies three consecutive years of net income, whichever last occurs. The affiliated company shall use the forms prescribed in 11 NCAC 14 .0421 and 14 .0422 to make such guaranty. Any guaranty provided by the affiliated company, that if exercised would place the guarantor in a hazardous financial condition as defined in G.S. 58-47-60, is ineffective in providing eligibility for the waiver. Any applicant company that is granted a waiver of this requirement shall place on deposit with the Commissioner, in addition to any other minimum required deposit for admission, qualified securities in the amount of two hundred thousand dollars ($200,000) of the kind and nature set forth under G.S. 58-5-20.~~

~~(b) On an individual case basis, a foreign life insurance company of the type listed in G.S. 58-7-75(1), (2) and (6) shall be eligible for a waiver of the net income requirement if it has net income for the current or immediately preceding year and can provide a certified financial projection, prepared by a qualified actuary, pursuant to and as defined in the most current~~

~~NAIC Annual Statement Instructions, or a certified financial forecast prepared by an independent certified public accountant that has experience in audits of insurers, pursuant to G.S. 58-2-205, reflecting continuing net income for at least the next three years. This financial projection or forecast shall be in a format similar to the Annual Statement for evaluation by the Commissioner. All assumptions used in the preparation of such a projection or forecast shall be included with the filing. Any applicant company that is granted a waiver under this Rule shall place on deposit with the Commissioner, in addition to any other required deposit for admission, eligible securities in the amount of two hundred thousand dollars ($200,000) of the kind and nature set forth under G.S. 58-5-20.~~

~~(c) A foreign fire, casualty, or fire and casualty insurance company of the type listed in G.S. 58-7-75(3), (4), (5), (7) and (8) shall be eligible for the waiver of the three year net income requirement under the following conditions:~~

- ~~(1) the applicant company reflects verifiable total statutory capital and surplus in excess of ten million dollars ($10,000,000) on its most recent reporting period whether annually or quarterly;~~
- ~~(2) the applicant company has been in business for at least five years under the same ultimate ownership and writing the same or similar lines of business;~~
- ~~(3) the applicant company reflects net income for at least three of the most recent five years; or reflects verifiable total statutory capital and surplus in excess of twenty-five million dollars ($25,000,000) in its most recent reporting period whether annually or quarterly; and~~
- ~~(4) the applicant company certifies the adequacy of its loss and loss adjustment expense reserves, pursuant to and as defined in the most current NAIC Annual Statement Instructions as they pertain to its most recent annual statement.~~

~~Any company that is granted a waiver under this provision shall place on deposit with the Commissioner, in addition to any other required deposit for admission, eligible securities in the amount of five hundred thousand dollars ($500,000) of the kind and nature set forth under G.S. 58-5-20.~~

~~(d) On an individual case basis, a foreign insurance company of any type listed in G.S. 58-7-75 shall be eligible for a waiver of the net income requirement under the following conditions:~~

- ~~(1) the applicant company is owned by, or will within 12 months be owned by, a North Carolina licensed insurance company without restriction or an insurance company holding company system as defined in G.S. 58, Article 19, that has been or had been in existence for any three of the most recent five years. The North Carolina licensed insurance company must have reflected net income for any three of the most recent five years; or the largest insurer, whether or not licensed in North Carolina, based on its equity within the insurance holding company system must have reflected net income for any three of the most recent five years.~~
- ~~(2) the applicant company is purchasing, or has had transferred to it, an existing block of insurance business and the existing management personnel;~~
- ~~(3) the applicant company can demonstrate that the block of insurance business being purchased, or transferred to it, has net income for at least any three of the most recent five years and is projected by an actuary, or forecasted by a certified public accountant, to reflect net income for at least the next three years; and~~
- ~~(4) the total capital and surplus of the applicant company is at least six times the authorized control level risk based capital pursuant to G.S. 58, Article 12, after the purchase of the block of business.~~

~~Any company that is granted a waiver under this provision shall deposit with the Commissioner, in addition to any other required deposit for admission, eligible securities in the amount of two hundred thousand dollars ($200,000) of the kind and nature set forth under G.S. 58-5-20.~~

Authority G.S. 58-2-40; 58-5-20; 58-5-40; 58-2-165; 58-7-75; 58-16-5(2).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to amend the rules cited as 15A NCAC 18A .2508-.2511, .2514-.2516, .2518, .2521, .2523-.2524, .2528, .2531-.2532, .2535, and .2539.*

Proposed Effective Date: *April 1, 2010*

Public Hearing:
Date: *October 20, 2009*
Time: *10:00 a.m.*
Location: *2728 Capital Boulevard, Room 1A-201, Raleigh, NC 27604*

Reason for Proposed Action: *(Virginia Graeme Baker Pool and Spa Safety Act)*
***15A NCAC 18A .2508** – Define terms used in amendments to other rules of this Section and clarify some existing definitions.*
***15A NCAC 18A .2509** – Clarify that the requirements for plans to be prepared by a registered design professional are dependent on the requirements in G.S. 83A and G.S. 89C, that the requirement for pools to be built by a licensed contractor is dependent on the requirements of G.S. 87-1, and to require contractors to notify the local health department when pool piping is completed and ready for inspection.*
***15A NCAC 18A .2510** – Clarify that exception to the design and construction requirements for pre-existing public swimming*

pools does not apply to water supplies and sewage disposal, and to remove some outdated language regarding effective dates.

15A NCAC 18A .2511 *– Require local health department inspections of public swimming pools to be conducted prior to permitting and correct references to amended rules in the assessment of demerits.*

15A NCAC 18A .2514 *– Clarify how to determine if a pool finish is white or light-colored.*

15A NCAC 18A .2515, .2516 *– Allow shallow water sun shelves to be installed in public swimming pools with a stairway transition to the swimming area.*

15A NCAC 18A .2518 *– Require pool piping on all new pools to be capable of handling 100 percent of the pump flow through the surface overflow system and the bottom drain system, if present. Allow pools to be constructed without bottom drains. Require suction outlets in all new pools to meet federal requirements of the Virginia Graeme Baker Pool and Spa Safety Act and current industry standards. Allow use of portable vacuum systems for cleaning pools.*

15A NCAC 18A .2521 *– Clarify construction requirements for pool stairs and set a maximum horizontal tread depth at 36 inches.*

15A NCAC 18A .2523 *– Clarify requirements for depth markings and safety ropes at public swimming pools.*

15A NCAC 18A .2524 *– Change the way lighting is evaluated so light meters can be used to verify adequate lighting.*

15A NCAC 18A .2528 *– Change fence requirements for new pools to match the new requirements in the North Carolina Building Code. Require doors into pool areas from occupied buildings to meet the same requirements as bather access gates or be child-protected by an audible alarm.*

15A NCAC 18A .2531 *– Allow wading pools to be constructed without main drain suction outlets.*

15A NCAC 18A .2532 *– Allow public spas to be constructed without main drain suction outlets or with an unblockable single drain outlet.*

15A NCAC 18A .2535 *– Change the mandatory pool closing time for diarrhea in a pool to match the current recommendations of the U.S. Centers for Disease Control and Prevention.*

15A NCAC 18A .2539 *– Require all existing public swimming pools in North Carolina to meet the federal requirements of the Virginia Graeme Baker Pool and Spa Safety Act and require pool owners to provide proof of compliance.*

Procedure by which a person can object to the agency on a proposed rule: *Objection to these rules can be submitted in writing by mail, email or hand delivered to: Jim Hayes, Environmental Health Services Section, 1632 Mail Service Center, Raleigh, NC 27699-1632, jim.hayes@ncdenr.gov. For hand deliveries the street address is 2728 Capital Boulevard, Room 1A-113, Raleigh, NC 27604.*

Comments may be submitted to: *Jim Hayes, Environmental Health Services Section, 1632 Mail Service Center, Raleigh, NC 27699-1632; phone (919) 715-0924; fax (919) 715-4739; email jim.hayes@ncdenr.gov*

Comment period ends: *November 30, 2009*

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 919-431-3000.

Fiscal Impact: A copy of the fiscal note can be obtained from the agency.

☐ **State**
☒ **Local** *15A NCAC 18A .2539*
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None** *15A NCAC 18A .2508-.2511, .2514-.2516, .2518, .2521, .2523-.2524, .2528, .2531-.2532, and .2535*

CHAPTER 18 - ENVIRONMENTAL HEALTH

SUBCHAPTER 18A - SANITATION

SECTION .2500 - PUBLIC SWIMMING POOLS

15A NCAC 18A .2508 DEFINITIONS

The following definitions ~~shall~~ apply throughout this Section:

(1) Equipment replacement means replacement of individual components of the hydraulic and disinfection systems such as pumps, filters, and automatic chemical feeders.

(2) Public swimming pool means public swimming pool as defined in G.S. 130A-280. Public swimming pools are divided into four types:

(a) Swimming pools are public swimming pools used primarily for swimming.

(b) Spas are public swimming pools designed for recreational and therapeutic use that are not drained, cleaned, or refilled after each individual use. Spas may include units designed for hydrojet circulation, hot water, cold water mineral bath, air induction bubbles, or any combination thereof. Common terminology for spas includes "therapeutic pool", "hydrotherapy pool", "whirlpool", "hot spa", and "hot tub".

(c) Wading pools are public swimming pools designed for use by children,

including wading pools for toddlers and children's activity pools designed for casual water play ranging from splashing activity to the use of interactive water features placed in the pool.

(d) Specialized water recreation attractions are pools designed for special purposes that differentiate them from swimming pools, wading pools and spas. They include, but are not limited to:

(i) water slide plunge pools and run out lanes;

(ii) wave pools;

(iii) rapid rides;

(iv) lazy rivers;

(v) interactive play attractions that incorporate devices using sprayed, jetted, or other water sources contacting the users and that do not incorporate standing or captured water as part of the user activity area; and

(vi) training pools deeper than a 24 inch deep wading pool and shallower than a 36 inch deep swimming pool.

(3) Registered Design Professional means an individual who is registered or licensed to practice engineering as defined by G.S. 89C or architecture as defined by G.S. 83A.

(4)~~(3)~~ Remodeled means renovations requiring disruption of the majority of the pool shell or deck, changes in the pool profile, or redesign of the pool hydraulic system. ~~Remodeled does not include equipment replacement, repair, or addition of outlets for the purpose of reducing suction hazards.~~

(5)~~(4)~~ Repair means ~~repair of existing equipment,~~ returning existing equipment to working order, replastering or repainting of the pool interior, replacement of tiles or coping and similar maintenance activities. This term includes replacement of pool decks where the Department has determined that no changes are needed to underlying pipes or other pool structures.

(6)~~(5)~~ Safety vacuum release system means a system or device capable of providing vacuum release at a suction outlet caused by a high vacuum occurrence due to suction outlet flow blockage.

(7)~~(6)~~ Splash zone means the area of an interactive play attraction that sheds water to a surge tank or container to be recirculated.

Authority G.S. 130A-282.

15A NCAC 18A .2509 PLAN REVIEW AND APPROVAL

(a) ~~For public~~ Public swimming pools ~~which are constructed or remodeled on or after May 1, 1991,~~ plans and specifications shall be prepared by a registered ~~professional engineer or registered architect,~~ design professional as required by G.S. 89C Architecture or G.S. 83A Engineering, and shall be approved by the Department prior to construction. As required by G.S. 87-1 General Contractors, public ~~Public~~ swimming pools ~~constructed after May 1, 1992,~~ shall be constructed by swimming pool contractors licensed by the North Carolina Licensing Board for General Contractors. ~~Contractors, Post Office Box 17187, Raleigh, North Carolina 27619. The General Contractor's license shall include the Swimming Pool Classification.~~

(b) The owner shall submit a ~~A~~ minimum of two complete sets of plans ~~shall be submitted~~ to the Health Department for review. Plans shall be drawn to scale and accompanied by specifications so as to permit a clear, comprehensive review by the local health department. All prints of drawings shall be a minimum of 18 x 24 inches and a maximum size of 36 x 42 inches. These plans shall include:

(1) Plan and sectional view dimensions of both the pool and the area enclosed by the barrier fences to include the bathhouse and the equipment room and pool accessories;

(2) Specifications of all treatment equipment used and their layout in the equipment room;

(3) A piping schematic showing piping, pipe size, inlets, main drains, skimmers, gutter outlets, vacuum fittings and all other appurtenances connected to the pool-piping system;

(4) Layout of the chemical storage room; and

(5) Specifications for the water supply and wastewater disposal systems ~~would include~~ that includes aspects such as well location and backwash water disposal where applicable.

~~Any additional data requested by the local health department after the initial application shall be submitted in order to clarify any related phase of the project.~~

(c) The Department shall approve, disapprove, or provide written comments on plans and specifications for public swimming pools within 30 days of their receipt. If such action is not taken within 30 days, the plans and specifications shall be deemed approved.

(d) If construction is not initiated within one year from the date of approval, the approval ~~shall be voided.~~ is void.

(e) The swimming pool contractor shall contact the local health department when pool pipes are in place and visible so that the local health department can conduct an open-pipe inspection of the pool piping.

(f)~~(e)~~ Prior to issuance of the operation permit, the owner shall submit to the local health department a statement signed by a registered ~~architect, or a registered professional engineer~~ design professional stating that construction is complete and in accordance with approved plans and specifications and approved modifications. Periodic observations of construction and a final inspection for design compliance by the certifying registered ~~architect, or registered professional engineer~~ design professional or his representative ~~shall be~~ are required for this statement.

(g)~~(f)~~ Upon completion of construction, the contractor shall notify the local health department and the owner. The contractor shall provide the owner with a complete set of drawings, which show as built, the location of all pipes and the connections of all equipment and written operating instructions for all equipment.

Authority G.S. 130A-282.

15A NCAC 18A .2510 PUBLIC SWIMMING POOL OPERATION PERMITS

(a) No public swimming pool shall commence or continue operation on or after May 1, 1990, unless the owner or operator has an operation permit issued by the Department for each public swimming pool. Unless suspended or revoked, the operation permit shall be valid for the period of operation specified in the application but in no event shall it be valid for more than 12 months. For public swimming pools which are constructed or remodeled, ~~remodeled on or after May 1, 1991,~~ plans and specifications shall have been approved by the Department in accordance with Rule .2509. Compliance with the design and construction requirements in Rules ~~.2512 -~~.2514 through .2534 and approval of plans and specifications shall not be required for public swimming pools constructed or remodeled prior to May 1, 1993.

(b) ~~On or after May 1, 1991, equipment~~ Equipment replacement shall comply with Rules ~~.2512 -~~ .2514 through .2534 and shall be approved by the Department prior to installation. ~~However, for swimming pools with existing turnover rates of less than four times in 24 hours, wading pools with existing turnover rates of less than 12 times in 24 hours, and spas with existing turnover rates of less than 48 times in 24 hours, pumps are not required to comply with Rule .2518 of this Section.~~ However, for existing swimming pools with recirculation systems unable to meet the pool volume turnover rates specified in the rules of this Section, pump replacement shall match the flow capabilities of the system. Repairs do not require prior approval by the Department.

~~(c) These Rules shall not apply until May 1, 1992 to public swimming pools in counties or districts where a local board of health has adopted rules prior to July 5, 1989 that establish public swimming pool standards. On or after May 1, 1992, all public swimming pools must meet these Rules. Construction, remodeling, or equipment replacement permitted under local rules prior to May 1, 1992 shall not be required to meet the design and construction requirements of these Rules.~~

(c)~~(d)~~ A separate application for an operation permit must be submitted for each public swimming pool. The owner or operator shall apply annually to the Department for an operator's permit. A form must be obtained from the Department to provide the following information:

(1) the owner's name, address, and phone number;
(2) the operator's name, address, and phone number;
(3) street address of the public swimming pool;
(4) the physical location of the public swimming pool;
(5) type of public swimming pool;
(6) construction date;
(7) proposed operating dates;
(8) type of disinfection;
(9) signature of owner or designated representative.

Authority G.S. 130A-282.

15A NCAC 18A .2511 INSPECTIONS

(a) Each public swimming pool shall be inspected by the Department to determine compliance with the rules of this ~~Section.~~ Section prior to issuance of an annual operation permit. Pools that open on or after April 1 and close on or before October 31 shall be inspected at least once during the period of operation. All other pools shall be inspected at least twice a year.

(b) Inspections of public swimming pools shall be conducted by Environmental Health Specialists authorized by the Department to enforce the rules of this Section. Inspections shall be documented on Inspection of Swimming Pool Form DENR 3960. Items on the grade sheet shall be divided into two, four and six-demerit items. Six-demerit items are failures to maintain minimum water quality or safety standards and warrant immediate suspension of an operation permits under G.S. 130A-23(d). Four-demerit items are rule violations which warrant denial of an operation permit or notification of an intent to suspend an operation permit. Two-demerit items are rule violations that do not warrant permit action unless such violation causes an imminent hazard, a failure to meet water quality or safety standard, or a suction hazard. Demerits shall be assessed for each item found not to be in compliance with the rules of this Section. Demerits shall be assessed as follows:

(1) Violation of Rule ~~18A~~ .2535(2) of this Section regarding water clarity shall be assessed six demerits.
(2) Violation of Rule ~~18A .2531(a)(11).~~2531(a)(10) .2531(b)(3), .2535(3), (4), (5), (7), (8), or (9), or .2543(d)(7) or (e)(2) of this Section regarding disinfectant residuals shall be assessed six demerits.
(3) Violation of Rule ~~18A~~ .2535(1) of this Section regarding pool water pH shall be assessed six demerits.
(4) Violation of Rule ~~18A~~ .2535(12) of this Section or regarding control of water temperature in heated pools shall be assessed six demerits.
(5) Violation of Rule ~~18A~~ .2535(10), (11), or (13), .2537(c), or .2540 of this Section regarding pool operator training, water quality records and test kits shall be assessed four demerits.
(6) Violation of Rule ~~18A .2518(k).~~2518(j), .2537(b)(7) or (16), or .2539 of this Section regarding pool drains and suction hazards shall be assessed six demerits.
(7) Violation of Rule ~~18A~~ .2537(b)(3), (8), (9) or (14) of this Section regarding maintenance of pool walls and floor shall be assessed four demerits.

(8) Violation of Rule ~~18A .2518(l)~~.2518(k) or ~~(m),~~ (l), ~~.2531(5),~~ .2531(4), .2532(4)(b) or .2537(b)(14) of this Section regarding water surface skimmers shall be assessed four demerits.

(9) Violation of Rule ~~18A~~ .2523 or .2537(b)(6) of this Section regarding depth markers and no diving markers shall be assessed four demerits.

(10) Violation of Rule ~~18A~~ .2515(d) or (f), ~~.2523(d)~~ .2523(e) or .2537(b)(12) of this Section regarding floating safety ropes and contrasting color bands at breakpoints shall be assessed two demerits.

(11) Violation of Rule ~~18A~~ .2517, .2521, .2527, .2537(b)(10), .2527, or .2542 of this Section regarding diving equipment, slides, ladders, steps, handrails and in-pool exercise equipment shall be assessed two demerits.

(12) Violation of Rule ~~18A .2518(j)~~.2518(i) or .2537(b)(8) of this Section regarding inlets and other fittings shall be assessed four demerits.

(13) Violation of Rule ~~18A~~ .2516(b), .2521(b)(4), .2532(13) or .2537(b)(12) of this Section regarding contrasting color bands on seats or benches shall be assessed four demerits.

(14) Violation of Rule ~~18A~~ .2532(7) or .2537(b)(11) of this Section regarding spa timers shall be assessed four demerits.

(15) Violation of Rule ~~18A~~ .2530(a), or (b), or .2537(b)(1) of this Section regarding lifesaving equipment shall be assessed six demerits.

(16) Violation of Rule ~~18A~~ .2528, ~~.2531(a)(8)~~.2531(a)(7) or .2537(b)(5) of this Section regarding fences, barriers and gates shall be assessed four demerits.

(17) Violation of Rule ~~18A~~ .2522 or .2537(b)(2) of this Section regarding decks shall be assessed four demerits.

(18) Violation of Rule ~~18A~~ .2530(c) of this Section regarding No Lifeguard warning signs shall be assessed four demerits.

(19) Violation of Rule ~~18A~~ .2530(d) or .2543(d)(13) of this Section regarding pet and glass container signs shall be assessed four demerits.

(20) Violation of Rule ~~18A~~ .2532(15) through (17), or .2537(b)(13) of this Section regarding caution signs at hot water spas shall be assessed four demerits.

(21) Violation of Rule ~~18A~~ .2524, or .2537(b)(4) of this Section regarding pool and deck lighting and ventilation shall be assessed four demerits.

(22) Violation of Rule ~~18A~~ .2530(f) of this Section regarding emergency telephones shall be assessed six demerits.

(23) Violation of Rule ~~18A~~ .2535(6) of this Section regarding automatic chlorine or bromine feeders shall be assessed four demerits.

(24) Violation of Rule ~~18A~~ .2518 .2519, .2525, .2531(a)(1) through (3), .2532(1) through (6), or .2543(b), (d)(1) through (6) or (e)(1) of this Section regarding pool filter and circulation systems shall be assessed four demerits.

(25) Violation of Rule ~~18A~~ .2533, .2534 or .2537(b)(15) of this Section regarding equipment rooms and chemical storage rooms shall be assessed two demerits.

(26) Violation of Rule ~~18A .2518(e)~~.2518(d) of this Section regarding identification of valves and pipes shall be assessed two demerits.

(27) Violation of Rule ~~18A~~ .2513(b) of this Section regarding air gaps for filter backwash shall be assessed two demerits

(28) Violation of Rule ~~18A~~ .2526 or .2543(d)(11) of this Section regarding accessible dressing and sanitary facilities shall be assessed two demerits.

(29) Violation of Rule ~~18A~~ .2526 of this Section regarding maintenance and cleaning of dressing and sanitary facilities and fixtures shall be assessed two demerits.

(30) Violation of Rule ~~18A~~ .2512 of this Section regarding water supplies shall be assessed two demerits.

(31) Violation of Rule ~~18A~~ .2513(a) of this Section regarding sewage disposal shall be assessed two demerits.

(32) Violation of Rule ~~18A~~ .2526(c) of this Section regarding floors in dressing and sanitary facilities shall be assessed two demerits.

(33) Violation of Rule ~~18A~~ .2526(c), or (d) of this Section regarding hose bibs and floor drains in dressing and sanitary facilities shall be assessed two demerits.

Authority G.S. 130A-282.

15A NCAC 18A .2514 MATERIALS OF CONSTRUCTION

(a) Pools and appurtenances shall be constructed of materials which are inert, non-toxic to man, impervious and permanent, which can withstand design stresses and which can provide a water-tight tank with a smooth and cleanable surface. Use of vinyl liners ~~shall be~~ is prohibited; however, liners no less than 60 mil thick may be used provided the underlying pool shell is of approved construction. If this material is used for repairs, the existing pool shall be remodeled in accordance with this Rule.

(b) Sand or earth bottoms ~~shall be~~ are prohibited in swimming pool construction.

(c) Pool finish, including bottom and sides, shall be of white or light colored ~~material.~~ material determined visually to contrast least to a value of gray whiter than mid gray on an artists gray scale.

(d) Pool surfaces in areas which are intended to provide footing for bathers including steps, ramps, and pool bottoms in areas with water less than three feet deep, shall be designed to provide a slip-resistant surface.

Authority G.S. 130A-82.

15A NCAC 18A .2515 DESIGN DETAILS

(a) Pools shall be designed and constructed to withstand all ~~anticipated~~ loadings for both full and empty conditions.

(b) A hydrostatic relief valve shall be provided for in-ground swimming pools which extend more than two feet below the grade of surrounding land surface unless a gravity drainage system is provided.

(c) Provisions shall be made for complete, continuous circulation of water through all areas of the swimming pool. Swimming pools shall have a circulation system with approved treatment, disinfection, and filtration equipment as required in ~~these Rules.~~ the rules of this Section.

(d) The minimum depth of water in the swimming pool shall be three feet (0.91 m) except ~~for special purpose swimming pools for which a minimum depth of less than three feet is required or~~ where a minimum depth of less than three feet is needed to provide non-swimming areas such as children's activity areas and sun shelves. ~~for restricted or recessed areas in swimming pools which are set aside primarily for the use of children and handicapped persons. Such areas when included as part of the swimming pool shall be separated from the swimming pool proper by a safety line supported by buoys and attached to the side walls.~~

(e) The maximum depth at the shallow end of ~~the~~ a swimming pool shall be 3.5 feet (1.07 m) except for pools used for competitive swimming, diving or other uses which require water deeper than 3.5 feet. ~~for competitive or other special purpose swimming pools for which a minimum depth of greater than 3.5 feet is required.~~

(f) Connections for safety lines shall be recessed in the walls in a manner which presents no hazard to swimmers.

(g) Decorative features such as planters, umbrellas, fountains and waterfalls located on pool decks shall comply with the following:

(1) Decorative features shall ~~Shall~~ not occupy more than 20 percent of the pool perimeter;

(2) If located adjacent to a water depth of greater than five feet, decorative features shall not be more than 20 feet wide;

(3) Decorative features shall ~~Shall~~ not provide handholds or footholds that could encourage climbing above deck level;

(4) A walkway shall be provided to permit free access around decorative features and shall be as wide as the lesser of five feet or the deck width required in Rule .2528 of this Section;

(5) Decorative features shall ~~Shall~~ not obstruct the view of any part of the pool from any seating area; and

(6) Features with moving water shall be separate from the pool recirculation system.

Authority G.S. 130A-282.

15A NCAC 18A .2516 POOL PROFILE

(a) The vertical walls of a public swimming pool shall not exceed 11 degrees from plumb. Corners formed by intersection of walls and floors shall be coved or radiused. Hopper bottomed pools ~~shall be~~ are prohibited.

(b) Underwater ledges or protrusions ~~shall be~~ are prohibited; except that underwater stairs, sun shelves, seats and benches may be installed in areas of the pool no more than four feet ~~deep,~~ deep. ~~provided underwater seats and~~ Underwater benches shall have a maximum seat depth of two ~~feet,~~ feet from the water surface, protrude no more than 18 inches ~~into the pool~~ from the wall and ~~they are~~ be marked by a contrasting color band on the leading edge. ~~edge and underwater stairs shall meet the requirements of Rule .2521 of this Section.~~ Underwater protrusions may provide seating at swim-up bars located in offset areas away from swim lanes. ~~seats shall not project into swim lanes.~~ Underwater stairs may adjoin a sun shelf to deeper water provided the depth at the bottom of the stairs is no more than four feet and the stairs meet all provisions of Rule .2521 of this Section.

(c) The slope of the bottom of any portion of any public swimming pool having a water depth of less than five feet (1.52 m) shall not be more than one foot vertical change in 10 feet (10 cm in one meter) of horizontal distance and the slope shall be uniform.

(d) In portions of pools with water depths greater than five feet (1.52 m), the slope of the bottom shall not be more than one foot vertical in three feet (33.3 cm in one meter) of horizontal distance.

(e) Design of diving areas shall be in accordance with Tables 1A and 1B of Rule .2517 of this Section.

(f) Fountains installed in public swimming pools shall be approved prior to installation and shall comply with the following:

(1) Fountains shall ~~Shall~~ not be installed in an area with a water depth exceeding 18 inches;

(2) Fountains shall ~~Shall~~ be recommended by the manufacturer for use in a public swimming pool;

(3) Fountains shall ~~Shall~~ be installed in accordance with the manufacturer's instructions;

(4) Fountains shall ~~Shall~~ be separate from the pool water recirculation system; and

(5) Fountains shall ~~Shall~~ not release water at a velocity greater than 10 feet per second.

Authority G.S. 130A-82.

15A NCAC 18A .2518 CIRCULATION SYSTEM

(a) Pools shall be equipped with a circulation system.

(b) The capacity of the circulation system shall be sufficient to clarify and disinfect the entire volume of swimming pool water four times in 24 hours. The system shall be operated 24 hours per day during the operating season.

~~(c) The piping of the circulation system shall be designed and installed so that the main drains and the lines from the perimeter overflow system or the automatic surface skimmers shall be connected to the suction line of the circulation pump.~~

(c)~~(d)~~ The circulation piping shall be designed and installed with the necessary valves and pipes so that the flow from the swimming pool can be from main drains or the surface overflow

system. The circulation piping shall be designed such the flow of water from the swimming pool can be simultaneous from the surface overflow system and the main drains. Skimmer piping constructed after April 1, 2010 shall be sized to handle the maximum flow rate for the required number of skimmers, but in no case less than ~~50 percent~~100 percent of the design flow rate. Perimeter overflow system piping constructed after April 1, 2010 shall be sized to handle ~~50 percent~~100 percent of the design flow rate. The main drain piping constructed after April 1, 2010 shall be sized to handle ~~50 percent~~100 percent of the design flow rate.

(d)~~(e)~~ Piping shall be designed to reduce friction losses to a minimum and to carry the required quantity of water at a maximum velocity not to exceed six feet per second for suction piping and not to exceed 10 feet per second for discharge piping except for copper pipe where the velocity shall not exceed eight feet per second. Piping shall be of non-toxic material, resistant to corrosion, and able to withstand operating pressures. If plastic pipe is used, a minimum of Schedule 40 PVC ~~shall be~~ is required. Flexible pipe shall not be used except that flexible PVC hoses that meet NSF Standard 50 may be affixed to spa shells where rigid pipes do not provide the necessary angles to connect circulation components. Exposed pipes and valves shall be identified by a color code or labels.

(e)~~(f)~~ The circulation system shall include a strainer to prevent hair, lint, and other debris from reaching the pump. A spare basket shall be provided. Strainers shall be corrosion-resistant with openings not more than ¼ inch (6.4 mm) in size that ~~shall~~ provide a free flow area at least four times the cross-section area of pump suction line and ~~shall be~~ are accessible for daily cleaning.

(f)~~(g)~~ A vacuum cleaning system shall be provided to remove debris and foreign material that settles to the bottom of the swimming pool. ~~Pools with more than two skimmers shall be provided with a vacuum cleaning system that is an integral part of the circulation system~~. ~~Connections~~ Where provided, integral vacuum ports shall be located on the pool wall at least 6 inches and no greater than 18 inches below the water level. ~~at intervals sufficient to reach the entire pool with a 50 foot hose.~~ Skimmer vacuums may be used in pools with two or fewer skimmers provided the skimmer basket remains in place while the vacuum is in operation. ~~The~~ Integral vacuum cleaning ~~system~~ systems shall be provided with valves and protective caps. Integral vacuum ports constructed after April 1, 2010 shall have self-closing caps designed to be opened with a tool.

(g)~~(h)~~ A rate-of-flow indicator, reading in liters or gallons per minute, shall be installed on the filtered water line and located so that the rate of circulation is indicated. The indicator shall be capable of measuring flows that are at least 1 ½ times the design flow rate, shall be accurate within 10 per cent of true flow, and shall be easy to read. The indicator shall be installed in accordance with manufacturers' specifications.

(h)~~(i)~~ A pump or pumps shall be provided with ~~adequate~~ capacity to recirculate the swimming pool water four times in 24 hours, and shall be so located as to eliminate the need for priming. If the pump or pumps, or suction piping is located above the overflow level of the pool, the pump or pumps shall be self-priming. The pump or pumps shall be capable of providing a flow adequate for the backwashing of filters. Unless headloss calculations are provided by the designing engineer, pump design shall be based on an assumed total dynamic head of 65 feet of water. Pumps three horsepower or smaller shall be NSF International (NSF) listed or verified by an independent third-party testing laboratory to meet all applicable provisions of NSF/ANSI ~~Standard 50.~~ Standard 50 which is incorporated by reference including any subsequent amendments or editions. Copies may be obtained from NSF International, P.O. Box 130140, Ann Arbor, MI 48113-0140 at a cost of one hundred fifty five dollars ($155.00). Verification shall include testing and in-plant quality control inspections. Larger pumps for which NSF listing is not available shall be approved by the Department on a case-by-case basis.

(i)~~(j)~~ Inlets.

(1) Inlets shall be provided and arranged to produce a uniform circulation of water and maintain a uniform disinfectant residual throughout the pool.

(2) The number of inlets for any swimming pool shall be determined based on return water flow. There shall be at least one inlet per 20 gallons per minute of return water flow. There shall be a minimum of four inlets for any swimming pool.

(3) Inlets shall be located so that no part of the swimming pool is more then 25 feet of horizontal distance from the nearest return inlet.

(4) Provision shall be made to permit adjustment of the flow through each inlet, either with an adjustable orifice or provided with replaceable orifices to permit adjustments of the flows.

(j)~~(k)~~ Drains.

(1) ~~Swimming~~ Public Swimming pools with suction drains shall be provided with at least two main drain outlets which shall be located at the deepest section of the pool and connected by "T" piping. Connecting piping shall be sized and configured such that blocking any one drain will not result in flow through the remaining ~~drains or pipes exceeding a velocity of six feet per second~~ drain cover/grates exceeding the cover/grate manufacturer's safe flow rating while handling ~~50 percent of the design flow rate.~~ 100 percent of the pump system flow. The drains shall be capable of permitting the pool to be emptied completely. Drains shall be spaced not more than 30 feet apart, and not more than 15 feet) away from the side walls. ~~There shall be at least 3 feet of clear separation between drain grates or covers.~~ Drains shall be separated by at least three feet measured from centers of the cover/grates. This shall not preclude construction of a public swimming pool without main drains where water is introduced at the bottom of the pool and removed through a surface overflow system designed to handle 100 percent of the design flow rate. Provision

shall be made to completely drain pools constructed without drains. Public swimming pools constructed prior to April 1, 2010 with a single drain or multiple drains closer than three feet apart shall protect against bather entrapment with an unblockable drain or a secondary method of preventing bather entrapment in accordance with Rule .2539 of this Section.

(2) Suction outlets to pumps other than the recirculation pump shall be provided with two drains with "T" connection pipe. This provision does not apply to capped vacuum outlets.

~~(3) Outlet drain gratings shall have a total area of at least four times the area of the discharge pipe and shall be designed so as not to be readily removed by or create any hazard to bathers.~~

~~(3)~~(4) ~~The outlet grate open area shall be such that when maximum flow of water is being pumped through the floor outlet, the velocity through the open grate shall not be greater than one and one-half feet per second. Outlet grates shall be anchored and openings in grates shall be slotted and the maximum dimension of slots shall not be more than one-half inch. Where outlet fittings consist of parallel plates, of the anti vortex type where the water enters the fittings from the sides, rather than through a grating facing upward, entrance velocities may be increased to six feet per second.~~ Drain outlets shall comply with the American National Standard ASME/ANSI A112.19.8-2007 Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, and Hot Tubs which is hereby incorporated by reference including any subsequent amendments, editions, and successor standards under the Virginia Graeme Baker Pool and Spa Safety Act (15 U.S.C 8001 et seq.). Copies may be obtained from ASME, P.O. Box 2300, Fairfield, NJ 07007-2300 at a cost of fifty three dollars ($53.00).

(4) Public swimming pools constructed after April 1, 2010 shall comply with ANSI/APSP -7 2006 American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs and Catch Basins which is hereby incorporated by reference including any subsequent amendments and editions. Copies may be obtained from APSP, 2111 Eisenhower Avenue, Alexandria, VA 22314 at a cost of three hundred fifty dollars ($350.00).

(k)~~(l)~~ Surface Overflow Systems.

(1) Swimming pools shall be provided with a surface overflow system that is ~~shall be~~ an integral part of the circulation system and that consists ~~shall consist~~ of a built-in-place perimeter overflow system, a pre-fabricated perimeter overflow system, or recessed automatic surface skimmers.

(2) Whenever a built-in-place perimeter overflow system or a pre-fabricated perimeter overflow system is provided, it shall be designed and installed as follows:

(A) The system shall be capable of handling ~~50 percent~~100 percent of the circulation flow without the overflow troughs being flooded;

(B) A surge capacity shall be provided either in the system or by use of a surge tank; and the total surge capacity shall be at least equal to one gallon per square foot (41L per square meter) of swimming pool water surface area;

(C) The water level of the swimming pool shall be maintained above ~~at, or slightly higher than,~~ the level of the overflow rim of the perimeter overflows, except for the time needed to transfer all of the water that may be in the surge capacity back into the swimming pool after a period of use; provided that this transfer time shall not be greater than 20 minutes;

(D) When installed the tolerance of the overflow rim shall not exceed 1/4 inch (6.4 mm) as measured between the highest point and the lowest point of the overflow rim;

(E) During quiescence, the overflow system shall be capable of providing continuously and automatically a skimming action to the water at the surface of the swimming pool;

(F) The overflow troughs shall be installed completely around the perimeter of the swimming pool, except at steps, recessed ladders and stairs;

(G) The exposed surfaces of the overflow trough shall be capable of providing a firm and safe hand-hold; and

(H) The overflow trough shall be cleanable and shall be of such configuration as to minimize accidental injury.

(3) Whenever a recessed automatic surface skimmer or skimmers are installed, they shall be designed and constructed in accordance with Section 8 of NSF Standard #50 for circulation system components for swimming pools, spas, or hot tubs, that is hereby incorporated by reference including any subsequent amendments and editions. This

material is available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Copies may be obtained from the NSF International, 3475 Plymouth Road, P.O. Box 130140, Ann Arbor, Michigan 48113-0140 at a cost of seventy dollars ($70.00). Recessed automatic surface skimmers shall be installed as follows:

(A) The flow-through rate through any one recessed automatic surface skimmer shall be between 20 ~~and 30~~ gallons per ~~minute.~~ minute and the maximum flow the skimmer is certified for under NSF Standard Number 50; ~~Piping shall be sized to allow a flow of 30 gallons per minute for each skimmer except the maximum pipe size for skimmer piping shall not be required to exceed what is needed to handle 100 percent of the design flow rate for the pool, and;~~

(B) There shall be at least one recessed automatic surface skimmer for each 400 square feet of water surface area of the swimming pool or fraction thereof; ~~thereof, and;~~

(C) When two or more recessed automatic surface skimmers are required, they shall be so located as to minimize interference with each other and as to insure proper and complete skimming of the entire swimming pools water surface; and

(D) Skimmers shall not protrude into the swimming pool. Automatic surface skimmer or skimmers without a perimeter overflow system shall be installed so that the operating level of the pool is no more than nine inches below the finished deck level so that the deck can be used as a handhold.

(l)~~(m)~~ Where flooded suction on the pump is not possible to prevent cavitation and loss of prime, skimmers shall have a device or other protection to prevent air entrainment in the suction line. The inlet to the equalizer line shall be provided with a grate.

(m)~~(n)~~ Nothing in this Section shall preclude the use of a roll-out or deck-level type of swimming pool. Such designs shall conform to the general provisions relating to surface overflow systems.

(n)~~(o)~~ Nothing in this Section shall preclude the use of a surface overflow system that combines both a perimeter overflow system and a recessed automatic surface skimmer or skimmers.

Authority G.S. 130A-282.

15A NCAC 18A .2521 LADDERS, RECESSED STEPS, AND STAIRS

(a) If the vertical distance from the bottom of the swimming pool to the deck is over two feet (0.61 m), recessed steps, stairs, or ladders shall be provided in the shallow area of all swimming pools. Recessed steps or ladders shall be provided at the deep portion of all pools; and, if the swimming pool is over 30 feet (9.14 m) wide, such recessed steps or ladders shall be installed on each side near the deep end. ~~At least one~~ A stairway, ladder or set of recessed steps shall be provided every 75 feet along the shallow area perimeter. ~~in the shallow area for each 75 feet of shallow area perimeter, or fraction thereof.~~ Where stairs are provided in the shallow area of the pool, one ladder may be deleted in the shallow area for each stairway provided.

(b) Pool Stairs - The design and construction of pool ladders and stairs shall conform to the following:

(1) Stair treads shall have a minimum unobstructed horizontal depth of 10 inches, a maximum horizontal depth of 36 inches, and a minimum unobstructed surface area of 240 square inches.

(2) Risers at the centerline of the treads shall have a maximum ~~uniform~~ height of 12 ~~inches,~~ inches and shall be within one inch of a uniform height with the bottom riser height allowed to vary plus or minus two inches from the uniform riser height.

(3) Each set of stairs shall be provided with at least one handrail to serve all treads and risers. For stairs wider than 20 feet, additional handrails shall be provided and spaced no more than 10 feet from adjacent handrails or stair ends.

(A) Handrails, if removable, shall be installed in such a way than they cannot be removed without the use of tools.

(B) The leading edge of handrails facilitating stairs and pool entry/exit shall be no more than 18 inches ~~inches, plus or minus three inches,~~ horizontally from the vertical plane of the bottom riser. ~~riser (where applicable).~~

(C) The outside diameter of handrails shall be between one inch and one and nine-tenths inches.

(4) The leading edge of stair treads shall be marked with a contrasting color band or line at least two inches (5 cm) wide visible from above the stairs. Use of contrasting color tiles installed in the stair tread is acceptable ~~shall be accepted~~ provided the tiles are spaced no more than one inch (2.5 cm) from the edge of the tread or from adjacent tiles.

(5) Swimming pool ladders shall be corrosion-resistant and shall be equipped with slip-resistant treads. All ladders shall be ~~so~~ designed ~~as~~ to provide a handhold and shall be

installed rigidly. There shall be a clearance of not more than six inches (15.3 cm), nor less than three inches (7.6 cm), between any ladder and the swimming pool wall. If the steps are inserted in the walls ~~walls;~~ or if step holes are provided, they shall be of such design that they may be cleaned easily and shall be arranged to drain into the swimming pool to prevent the accumulation of dirt thereon. Step holes shall have a minimum tread of five inches (12.7 cm) and a minimum width of 14 inches (35.6 cm).

(6) When step holes or ladders are provided within the swimming pool, there shall be a handrail at each side. ~~side extending over the coping or edge of the deck. Ramps and stairs, including recessed steps, shall have at least one handrail.~~

Authority G.S. 130A-282.

15A NCAC 18A .2523 DEPTH MARKINGS AND SAFETY ROPES

(a) On swimming pools, the depth of the water shall be marked at or above, the water surface on the vertical wall of the swimming pool where possible, and on the edge of the deck next to the swimming pool. Where depth markers cannot be placed on the vertical walls at or above the water level, other means shall be used; provided the ~~said~~ markings shall be visible to persons in the swimming pool. Depth markers shall be placed at the following locations:

(1) at the points of maximum and minimum depths;

(2) at the transition point where the slope of the bottom changes from the uniform slope of the shallow area;

(3) if the pool is designed for diving, at ~~appropriate~~ points ~~as~~ to denote the water depths in the diving area;

(4) at both ends of the pool.

(b) Depth markers shall be so spaced that the distance between adjacent markers is not greater than 25 feet (7.5 m) when measured ~~peripherally.~~ along the perimeter of the pool.

(c) Depth markers shall be in Arabic numerals at least four inches (10 cm) high and of a color contrasting with the background. Depth markings shall indicate the depth of the pool in feet of water and shall include the word "feet" or symbol "ft" to indicate the unit of measurement. Depth markings installed in pool decks shall provide a slip resistant walking surface.

(d) "No Diving" ~~No Diving~~ markers shall be provided on the pool deck adjacent to all areas of the pool less than five feet deep. "No Diving" ~~No Diving~~ markers shall consist of the words "No Diving" in letters at least four inches high and of a color contrasting with the background or at least a six-by-six inch international symbol for no diving in red and black on a white background. The distance between adjacent markers shall not be more than 25 feet. Posting of "No Diving" ~~No Diving~~ markers shall not preclude shallow diving for racing starts and ~~supervised~~ competitive swimming practice.

(e) A minimum of ¾ inch diameter safety rope shall be provided at the breakpoint where the slope of the bottom changes to exceed a 1 to 10 vertical rise to horizontal distance at a water depth of five feet (1.5 m) or less. The position of the rope shall be marked with colored floats at not greater than a five-foot spacing and a minimum 2 inch wide contrasting color band across the pool bottom. Float ropes shall be positioned within two feet on the shallow side of the breakpoint marker.

Authority G.S. 130A-282.

15A NCAC 18A .2524 LIGHTING AND VENTILATION

(a) Artificial lighting shall be provided at all ~~indoor and outdoor~~ pools that are to be used at night, or when natural lighting is insufficient to provide ~~clear~~ visibility in the pool area.

(b) Lighting fixtures shall be of such number and design as to illuminate all parts of the pool, the water, the depth markers, signs, entrances, restrooms, safety equipment and the required deck area and walkways.

(c) Fixtures shall be installed so as not to create hazards such as burning, electrical shock, mechanical injury, or temporary blinding by glare to the bathers, and so that lifeguards, when provided, can ~~clearly~~ see every part of the pool area without being blinded by glare. The illumination shall be sufficient so that the floor of the pool can be seen at all times the pool is in use.

(d) If underwater lighting is used, it shall provide at least 0.5 watts or 8.35 lumens per square foot of water ~~surface.~~ surface and deck lighting shall provide not less than 10 foot candles of light measured at 6 inches above the deck surface.

(e) ~~If underwater lighting is used, area lighting shall provide at least 0.6 watts or 10 lumens per square foot of required deck area.~~ Where underwater lighting is not used, and night swimming is permitted, area and pool lighting combined shall provide not less than ~~2.0 watts or 33.5 lumens per square foot of~~10 foot candles of light to all parts of the pool and required deck area.

(f) Mechanical ventilation ~~shall be~~ is required for all indoor pools.

Authority G.S. 130A-282.

15A NCAC 18A .2528 FENCES

(a) Public Swimming ~~Swimming~~ pools shall be ~~protected~~ completely enclosed by a fence, wall, building, or other enclosure, or any combination thereof, which ~~completely~~ encloses the swimming pool area such that all of the following conditions are met:

(1) ~~Constructed so as to afford no external handholds or footholds. However, the use of wire mesh fences with a mesh size of 2 ¼ inches or less is permitted;~~ The top of the barrier shall be at least 48 inches above grade measured on the side of the barrier that faces away from the swimming pool. The maximum vertical clearance between grade and the bottom of the barrier shall be two inches measured on the side of the barrier that faces away from the swimming pool;

(2) ~~A four foot (1.22 m) minimum height (from the outside approach) is provided entirely around the swimming pool;~~ Openings in the barrier shall not allow passage of a 4-inch-diameter sphere and shall provide no external handholds or footholds. Solid barriers that do not have openings shall not contain indentations or protrusions except for normal construction tolerances and tooled masonry joints;

(3) ~~The horizontal space between vertical members of the enclosure shall not exceed four inches; where the horizontal space between vertical members exceeds 1 3/4 inches there shall be at least 30 inches between any horizontal bottom rails or stringers and the next horizontal rails or stringers;~~ Where the barrier is composed of horizontal and vertical members and the distance between the tops of the horizontal members is 45 inches or more, spacing between the vertical members shall not exceed 4 inches. Where there are decorative cutouts within the vertical members, spacing within the cutouts shall not exceed 1.75 inches in width;

(4) ~~The height of any opening under the bottom of the enclosure shall not exceed four inches (10 cm);~~ Where the barrier is composed of horizontal and vertical members and the distance between the tops of the horizontal members is less than 45 inches, the horizontal members shall be located on the swimming pool side of the fence. Spacing between the vertical members shall not exceed 1.75 inches in width. Where there are decorative cutouts within the vertical members, spacing within the cutouts shall not exceed 1.75 inches in width;

(5) ~~Openings under and through a fringe or barrier with the gate(s) closed shall be sized so that a 4 inch diameter sphere cannot be passed through the openings;~~ Maximum mesh size for chain link fences shall be a 2.25 inch square unless the fence is provided with slats fastened at the top or the bottom that reduce the openings to no more than 1.75 inches;

(6) ~~All gates and doors shall be equipped with self-closing and positive self-latching closure mechanisms and shall be equipped with locking devices. Gates provided to allow bathers access to the pool shall be located so as to open to the pool at a point where the water is no greater than five feet deep. On pools built after May 1, 1996, access gates shall open away from the pool except when natural topography or other conditions dictate that it open inward. Release of the latch on the self latching device shall be activated:~~

~~(a) at a height no less than 54 inches above grade; or~~

~~(b) on the pool side of the gate at a distance of no less than three inches below the top of the gate provided. On fences constructed after April 1, 2000 there shall be no opening greater than one half inch within 18 inches of where the latch release is activated when the gate is closed; or~~

~~(c) by a card reader, key, or combination lock.~~

Where the barrier is composed of diagonal members, the maximum opening formed by the diagonal members shall be no more than 1.75 inches;

(7) ~~Gates provided specifically for access to equipment rooms shall be locked at all times when not in use by the pool operator;~~ Access gates shall comply with the dimensional requirements for fences and shall be equipped to accommodate a locking device. Pedestrian access gates shall open outward away from the pool and shall be self-closing and have a self-latching device except where a gate attendant and lifeguard are on duty. Gates other than pedestrian access gates shall have a self-latching device. Where the release mechanism of the self-latching device is located less than 54 inches from the bottom of the gate, the release mechanism shall require the use of a key, combination or card reader to open or shall be located on the pool side of the gate at least 3 inches below the top of the gate, and the gate and barrier shall have no openings greater than 0.5 inch within 18 inches of the release mechanism; and

(8) ~~Ground level doors and windows opening inside the pool enclosure must be self-closing or child protected by means of a barrier or audible alarm; and~~ Ground level doors and windows opening from occupied buildings to inside the pool enclosure shall be self-closing or child protected by means of a barrier or audible alarm. Where double doors are provided, each door shall latch independently or one door shall be permanently affixed to receive the latching mechanism of the other. Doors opening into the pool enclosure shall have a latch release height of 54 inches or shall be child protected by means of an audible alarm or shall be locked such that a key, combination or access card is needed to gain entry to the pool. Doors from occupied buildings opening into the pool enclosure shall open away from the swimming pool except where emergency egress is required by building or fire codes to open outward from the building. Where emergency exits open

toward the pool, each door shall be equipped with an alarm that produces an audible warning when the door and its screen are opened. The alarm shall sound continuously for a minimum of 30 seconds immediately after the door is opened and be capable of being heard throughout the building. The alarm shall automatically reset under all conditions. The alarm shall be equipped with a manual means to temporarily deactivate the alarm for a single opening. Such deactivation shall last no more than 15 seconds. The deactivation switch shall be located at least 54 inches above the threshold of the door.

~~(9) Self-closing, self-latching gates are not required for gates that are kept locked, or for entrances where access is controlled by a gate attendant and a lifeguard is on duty in the pool area.~~

(b) Public swimming pool fences constructed prior to April 1, 2010 may vary from the provisions of Paragraph (a) of this Rule as follows:

(1) the maximum vertical clearance between grade and the bottom of the barrier may exceed two inches, but shall not exceed four inches;

(2) where the barrier is composed of vertical and horizontal members and the space between vertical members exceeds 1.75 inches, the distance between the tops of the bottom horizontal member and the next higher horizontal member may be less than 45 inches, but shall not be less than 30 inches; and

(3) gates other than pedestrian access gates are not required to have self-latching devices if the gates are kept locked.

Authority G.S. 130A-282.

15A NCAC 18A .2531 WADING POOLS

(a) Wading pools shall meet all design specifications for swimming pools and wading pools included in Rules .2512 through .2530 ~~.2512-.2530~~ of this Section with the following exceptions:

(1) Wading pools shall be physically separate from other public swimming pools except that a fill pipe and valve from a swimming pool recirculation system may ~~can~~ be used to introduce water to a wading pool.

(2) Every wading pool shall be equipped with a circulation system that is separate from, and independent of, the circulation system of the swimming pool. Such circulation system shall at least consist of a circulating pump, piping, a filter, a rate-of-flow meter, a disinfectant feeder, two inlets, ~~two main drains with "T" connecting piping,~~ and one automatic surface skimmer. Individual components of a wading pool system must meet the criteria of Rule .2518 of this Section.

(3) The capacity of the circulation system shall be capable of filtering and disinfecting the entire volume of water in the wading pool 12 times in every 24 hours.

~~(4) Wading pools shall be equipped with main drains located at the deepest point of the wading pool and covered by gratings that meet the requirements of Rule .2518(k) of this Section.~~

(4)~~(5)~~ Wading pools shall be equipped with a surface overflow system capable of removing floating material.

(5)~~(6)~~ Wading pools shall be no deeper than 24 inches (61 cm) at the deepest point.

(6)~~(7)~~ Wading pools' floor slope shall not exceed one foot in 12 feet.

(7)~~(8)~~ Wading pools shall be located in the vicinity of the shallow end of the swimming pool, and shall be separated from the swimming pool by a fence or structure similar to that described in Rule .2528 of this Section, that shall be equipped with self-closing and positive self-latching closure mechanisms, and shall be equipped with permanent locking devices. Wading pool entrance gates located inside another public swimming pool enclosure shall open away from the deeper pool. Wading pool fences constructed after April 1, 2000 shall be at least four feet high.

(8)~~(9)~~ Wading pools shall be designed to provide at least 10 square feet per child.

(9)~~(10)~~ Depth markers are not required at wading pools.

(10)~~(11)~~ The free chlorine residual in wading pools shall be maintained at no less than two parts per million.

(11)~~(12)~~ Wading pools are not required to provide the lifesaving equipment described in Rule .2530(a) of this Section.

(b) Children's activity pools shall be constructed and operated in accordance with the rules of this section including the requirements for wading pools with the following exceptions:

(1) The filter circulation system shall be separate from any feature pump circulation system.

(2) The filter circulation system for stand-alone children's activity pools shall filter and return the entire water capacity in no more than one hour and shall operate 24 hours a day.

(3) The disinfectant residual in children's activity pools shall be maintained at a level of at least two parts per million of free chlorine measured in the pool water and at least one part per million in all water features.

(4) Valves shall be provided to control water flow to the features in accordance with the manufacturers' specifications.

(5) Children's activity pools built prior to February 1, 2004 that do not comply with this Paragraph ~~these design and construction requirements~~

shall be permitted to operate as built if no water quality or safety violations occur.

Authority G.S. 130A-282.

15A NCAC 18A .2532 SPAS AND HOT TUBS

Spas and hot tubs shall meet all design specifications for swimming pools and wading pools included in Rules .2512 through .2530 of this Section with the following exceptions:

(1) The circulation system equipment shall provide a turnover rate for the entire water capacity at least once every 30 minutes.

(2) The arrangement of water inlets and outlets shall produce a uniform circulation of water so as to maintain a uniform disinfectant residual throughout the spa.

(3) A minimum of two inlets shall be provided with inlets added as necessary to maintain required flowrate.

(4) Water outlets shall be designed so that each pumping system in the spa (filter systems or booster systems if so equipped) provides the following:

(a) ~~Two drains connected by "T" piping.~~ Where drains are provided, drains shall be unblockable or shall consist of two or more drains connected by a "T" pipe. Connecting piping shall be of the same diameter as the main drain outlet. Filter system drains shall be capable of emptying the spa completely. In spas constructed after April 1, 2000 drains shall be installed at least three feet apart or located on two different planes of the pool structure.

(b) Filtration systems shall provide at least one surface skimmer per 100 square feet, or fraction thereof of surface area.

(5) The water velocity in spa or hot tub discharge piping shall not exceed 10 feet per second (3.05 meters per second); except for copper pipe where water velocity shall not exceed eight feet per second (2.44 meters per second). Suction water velocity in any piping shall not exceed six feet per second (1.83 meters per second).

(6) Spa recirculation systems shall be separate from companion swimming pools.

(a) Where a two-pump system is used, one pump shall provide the required turnover rate, filtration and disinfection for the spa water. The other pump shall provide water or air for hydrotherapy turbulence without interfering with the operation of the recirculation system. The timer switch shall activate only the hydrotherapy pump.

(b) Where a single two-speed pump is used, the pump shall be designed and installed to provide the required turnover rate for filtration and disinfection of the spa water at all times without exceeding the maximum filtration rates specified in Rule .2519 of this Section. The timer switch shall activate only the hydrotherapy portion of the pump.

(c) Where a single one-speed pump is used, a timer switch shall not be provided.

(7) A timer switch shall be provided for the hydrotherapy turbulence system with a maximum of 15 minutes on the timer. The switch shall be placed such that a bather must leave the spa to reach the switch.

(8) The maximum operational water depth shall be four feet (1.22 m) measured from the water line.

(9) The maximum depth of any seat or sitting bench shall be two feet (61 centimeters) measured from the waterline.

(10) A minimum height between the top of the spa/hot tub rim and the ceiling shall be 7 ½ feet.

(11) Depth markers are not required at spas.

(12) Steps, step-seats, ladders or recessed treads shall be provided where spa and hot tub depths are greater than 24 inches (61 centimeters).

(13) Contrasting color bands or lines shall be used to indicate the leading edge of step treads, seats, and benches.

(14) A spa or hot tub shall be equipped with at least one handrail (or ladder equivalent) for each 50 feet (15.2 meters) of perimeter, or portion thereof, to designate points of entry and exit.

(15) Where water temperature exceeds 90° Fahrenheit (32° C), a caution sign shall be mounted adjacent to the entrance to the spa or hot tub. It shall contain the following warnings in letters at least ½ inch in height:

(a) CAUTION:

(b) -Pregnant women; elderly persons, and persons suffering from heart disease, diabetes, or high or low blood pressure should not enter the spa/hot tub without prior medical consultation and permission from their doctor;

(c) -Do not use the spa/hot tub while under the influence of alcohol, tranquilizers, or other drugs that cause drowsiness or that raise or lower blood pressure;

(d) -Do not use alone;

(e) -Unsupervised use by children is prohibited;
(f) -Enter and exit slowly;
(g) -Observe reasonable time limits (that is, 10-15 minutes), then leave the water and cool down before returning for another brief stay;
(h) -Long exposure may result in nausea, dizziness, or fainting;
(i) -Keep all breakable objects out of the area.

(16) Spas shall meet the emergency telephone and signage requirements for swimming pools in Rule .2530(f).

(17) A sign shall ~~also~~ be posted requiring a shower for each user prior to entering the spa or hot tub and prohibiting oils, body lotion, and minerals in the water.

(18) Spas are not ~~shall not be~~ required to provide the lifesaving equipment described in Rule .2530(a) of this Section

(19) In spas less than four feet deep, ~~deep~~ the slope of the pool wall may exceed 11 degrees from plumb, but shall not exceed 15 degrees from plumb.

Authority G.S. 130A-282.

15A NCAC 18A .2535 WATER QUALITY STANDARDS

Whenever a public swimming pool is open for use, water quality shall be maintained in accordance with the following:

(1) The chemical quality of the water shall be maintained in an alkaline condition at all times with the pH between 7.2 and 7.8.

(2) The clarity of the water shall be maintained such that the main drain grate is visible from the pool deck at all times.

(3) Disinfection shall be provided in accordance with manufacturers' instructions for all pools by a chemical or other process that meets the criteria listed as follows:
(a) registered with the U.S. Environmental Protection Agency for pool water or potable water;
(b) provides a residual effect in the pool water that can be measured by portable field test equipment;
(c) will not impart any immediate or cumulative adverse physiological effects to pool bathers when used as directed;
(d) will not produce any safety hazard when stored or used as directed;
(e) will not damage pool components or equipment; and
(f) will demonstrate reduction of total coliform and fecal coliform to a level at least equivalent to free chlorine at a level of one part per million in the same body of water.

(4) When chlorine is used as the disinfectant, a free chlorine residual of at least one part per million (ppm) shall be maintained throughout the pool whenever it is open or in use. Pools that use chlorine as the disinfectant must be stabilized with cyanuric acid except at indoor pools or where it can be shown that cyanuric acid is not necessary to maintain a stable free chlorine residual. The cyanuric acid level shall not exceed 100 parts per million.

(5) When bromine or compounds of bromine are used as the disinfectant, a free bromine residual of at least two parts per million, shall be maintained throughout the pool whenever it is open or in use.

(6) When chlorine or bromine are used as the disinfectant, automatic chemical feeders shall be used. Automatic chlorine or bromine feeders shall be manufactured and installed in accordance with NSF/ANSI Standard number 50 that is incorporated by reference including any subsequent amendments and additions. This material is available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Copies may be obtained from NSF International, 3475 Plymouth Road, P.O. Box 130140, Ann Arbor, Michigan 48311-0140 at a cost of seventy dollars ($70.00). Automatic chlorine and bromine feeder pumps shall be automatically prevented from operating when the circulation pump is not in operation.

(7) When biguanide is used as the disinfectant, a residual of 30 to 50 parts per million shall be maintained throughout the pool whenever it is open or in use.

(8) When silver/copper ion systems are used, the copper concentration in the pool water shall not exceed one part per million and a chlorine residual must be maintained in accordance with Item (4) of this Rule.

(9) The use of chlorine in its elemental (gaseous) form for disinfection of public swimming pools is prohibited.

(10) Test kits or equipment capable of measuring disinfectant level, pH, and total alkalinity must be maintained at all public swimming pools. Pools using cyanuric acid ~~and~~ or chlorinated isocyanurates must have a test kit capable of measuring cyanuric acid levels.

(11) The pool operator shall inspect the Records shall be maintained at the pool site for a period of not less than six months. Records shall include the following:
(a) daily recording of the disinfectant residual in the pool;

(b) daily recording of pool water pH;
(c) daily recording of water temperature in heated pools; recording of activities pertaining to pool water maintenance including chemical additions and filter backwash cycles; ~~and~~
(d) weekly recording of total alkalinity and cyanuric acid ~~levels.~~ levels; and
(e) daily recording of pool drain cover/grate inspection.

(12) Water temperature in heated swimming pools shall not exceed 90° Fahrenheit (32°C) and in heated spas shall not exceed 104° Fahrenheit (40°C).

(13) The pool operator shall take the following steps to manage fecal and vomitus accidents:
(a) Direct everyone to leave all pools into which water containing the feces or vomit is circulated and do not allow anyone to enter the pool(s) until decontamination is completed;
(b) Remove as much of the feces or vomit as possible using a net or scoop and dispose of it in a sewage treatment and disposal system;
(c) Raise the free available chlorine concentration to 2 ppm at a pH of 7.2 to 7.5 and test to assure the chlorine concentration is thoroughly mixed throughout the pool; and
(d) For accidents involving formed ~~stools,~~ stools or vomit, ~~vomit~~ maintain the free available chlorine concentration at 2 ppm for at least 25 minutes or at 3 ppm for at least 19 minutes before reopening the pool. For accidents involving liquid stools increase the free chlorine residual and closure time to reach a CT inactivation value of ~~9600~~ 15,300 then backwash the pool filter before reopening the pool. CT refers to concentration (C) of free available chlorine in parts per million multiplied by time (T) in minutes.

Authority G.S. 130A-282.

15A NCAC 18A .2539 SUCTION HAZARD REDUCTION

(a) At all public wading pools that use a single main drain for circulation of water, signs shall be posted stating, "WARNING: To prevent serious injury do not allow children in wading pool if drain cover is broken or missing." Signs shall be in letters at least one-half inch in height and shall be posted where they are visible to people entering the wading pool.

(b) ~~No public swimming pool shall operate with a single outlet to any pump. Where flow from a single drain is balanced with flow from a surface skimmer, the skimmer valve shall be kept in the open position and immobilized with a lock, tie or other method to secure against tampering. Effective April 1, 2006 all public swimming pools with a single main drain shall be protected from potential bather entrapment by a safety vacuum release system installed on the drain piping and single drains smaller than 12 inches in diameter shall be protected by an anti-entrapment drain cover meeting ASME/ANSI A112.19.8M comply with Standard that is incorporated by reference including any subsequent amendments and additions. This material is available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Copies may be obtained from Global Engineering Documents, 15 Inverness Way East, Inglewood, CO 80112 at a cost of forty-one dollars ($41.00).~~ All submerged suction outlets other than vacuum ports shall be protected by anti-entrapment cover/grates in compliance with ASME/ANSI A112.19.8-2007 Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, and Hot Tubs. All submerged suction fittings shall be installed in accordance with the manufacturer's instructions. Pumping systems that have a single submerged suction outlet other than an unblockable drain, or which have multiple outlets separated by less than three feet measured at the centers of the cover grates shall have a secondary method of preventing bather entrapment. Secondary methods of preventing bather entrapment include:

(1) Safety vacuum release system which ceases operation of the pump, reverses the circulation flow, or otherwise provides a vacuum release at the suction outlet when a blockage has been detected, that has been tested by a third party and found to conform to ASME/ANSI standard A112.19.17 which is incorporated by reference including any subsequent amendments or editions. Copies may be obtained from ASME, P.O. Box 2300, Fairfield, NJ 07007-2300 at a cost of forty-five dollars ($45.00);
(2) A suction-limiting vent system with a tamper-resistant atmospheric opening;
(3) A gravity drainage system that utilizes a collector tank;
(4) An automatic pump shut-off system;
(5) Drain disablement; or
(6) Any other system determined by the U.S. Consumer Product Safety Commission to be equally effective as, or better than the systems in Subparagraphs (1) through (5) of this Paragraph.

(c) Owners of all public swimming pools shall provide documentation to the Department to verify suction outlet safety compliance. This documentation shall include:

(1) Documentation of the maximum possible flow rate for each pump suction system. This shall be the maximum pump flow shown on the manufacturer's pump performance curve except where flow reductions are justified with total dynamic head measurements or calculations; and

(2) Documentation that cover/grates meeting ASME/ANSI A112.19.8-2007 are installed in compliance with the standard and manufacturer's instructions. This includes documentation that each cover/grate on a single or double-drain pump suction system is rated to meet or exceed the maximum pump system flow and that cover/grates on a pump suction system with three or more suction outlets are together rated to always meet or exceed the maximum pump system flow with one drain completely blocked; and

(3) Documentation that drain sumps meet the dimensional requirements specified in the cover/grate manufacturer's installation instructions.

(d)~~(c)~~ Operators of all public ~~wading~~ swimming pools shall inspect pools daily to ensure the drain covers are in good condition and securely attached.

Authority G.S. 130A-282.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 06 - BOARD OF BARBER EXAMINERS

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Board of Barber Examiners intends to adopt the rules cited as 21 NCAC 06K .0111 and 06O .0116 and amend the rules cited as 21 NCAC 06F .0102, .0110, .0116; 06J .0103; 06L .0106, .0111, .0115-.0116; 06N .0101; and 06Q .0103.*

Proposed Effective Date: *February 1, 2010*

Public Hearing:
Date: *October 19, 2009*
Time: *2:00 p.m.*
Location: *5809-102 Departure Drive, Raleigh, NC 27616*

Reason for Proposed Action:
***21 NCAC 06F .0102** – Additional duties and requirements for a barber school manager.*
***21 NCAC 06F .0110** – Requirement that each barber school maintain a record of the signed acknowledgment required by new 21 NCAC 06F .0116.*
***21 NCAC 06F .0116** – To require barber schools to inform prospective barber students of the rules of the Barber Board regarding criminal convictions and registered sex offenders and have applicants sign and date the form acknowledging that they have been informed.*
***21 NCAC 06J .0103** – To waive the time period in this section for a member of the armed forces as required by a recent act of the General Assembly.*
***21 NCAC 06K .0111** – Definition of when the waiver provision set forth in G.S. 86A-17(c) is applicable to conform to a recent act of the General Assembly.*
***21 NCAC 06L .0106** – Amended to correct typographical error in 21 NCAC 06L .0105(d).*
***21 NCAC 06L .0111** – To allow barber services to be performed in a client's home and establish the requirements for exemption from regular inspection by the N.C. Board of Barber Examiners to conform to a recent act of the General Assembly.*
***21 NCAC 06L .0115** – Amending rule requiring posting of inspection reports and to provide for inspection reports to be made available to the public, if requested.*
***21 NCAC 06L .0116** – Additional duties and requirements for a barber shop manager.*
***21 NCAC 06N .0101** – Defining the procedure for collection of fees and placement in an escrow account maintained by the Board if the Board's authority to expend funds is suspended pursuant to G.S. 93B-2 as required by a recent act of the General Assembly.*
***21 NCAC 06O .0116** – Outlining the presumptive civil penalty fees for failure to comply with new 21 NCAC 06L .0111.*
***21 NCAC 06Q .0103** – Allowing the decision to be discretionary and providing detailed criteria for the circumstances under which the Board may consider issuing a license to a registered sex offender.*

Procedure by which a person can object to the agency on a proposed rule: *Appearance at public hearing or written comment via U.S. mail or email.*

Comments may be submitted to: *Kelly W. Braam, 5809-102 Departure Drive, Raleigh, NC 27616; phone (919) 981-5360; fax (919) 981- 5068; email kbraam@ncbarbers.com*

Comment period ends: *November 30, 2009*

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 919-431-3000.

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

SUBCHAPTER 06F - BARBER SCHOOLS

21 NCAC 06F .0102 MANAGER

(a) Each barber school shall have at least one manager who will be responsible for the overall operation of the school and who shall hold a current instructor's certificate.

(b) A barber school manager cannot also be a manager of a barber shop.

(c) A barber school manager shall devote full time to the barber school by being present on the premises the majority of the time instruction to students is being provided. The barber school manager shall be held accountable for activities at the school whether present on the premises or not.

Authority G.S. 86A-22.

21 NCAC 06F .0110 ROSTER AND STUDENT RECORDS

Each barber school shall:

(1) maintain an up-to-date written roster system which shall be used to ensure that each student serves substantially equal numbers of patrons;

(2) maintain a complete record of each student including a weekly record of the number of days and hours the student attended classes in practical work and theory;

(3) maintain a separate daily record of the number of patrons the student served for haircuts, shaves and other clinical services;

(4) maintain a weekly record of the subject matter taught the student in theory classes; ~~and~~

(5) provide the list of students required by G.S. 86A-22(5) by the 15th day of each ~~month.~~ month; and

(6) maintain the signed acknowledgment regarding notification of the Board's rules regarding criminal convictions and sex offenders required by 21 NCAC 06F .0116.

Authority G.S. 86A-22.

21 NCAC 06F .0116 STUDENTS WITH CRIMINAL RECORDS

(a) Prior to enrollment and the acceptance of any enrollment fee or tuition, the barber school shall notify the applicant of the Board's rules regarding criminal convictions and registered sex offenders and have the applicant sign and date the notice indicating that the applicant has been so informed.

~~(a)~~(b) Persons making application for student permits who have been convicted of a felony shall be responsible for furnishing to the Board a certified copy of their criminal history.

~~(b)~~(c) Failure to include any information ~~on~~ regarding felony convictions on applications for student permits may result in revocation of a student permit after a hearing.

Authority G.S 86A-18.

SUBCHAPTER 06J - APPRENTICE BARBERS

21 NCAC 06J .0103 RENEWAL AS REGISTERED APPRENTICE; WAIVER

(a) Any applicant for renewal of an apprentice certificate whose three-year period expires within the current calendar year must make application for examination to receive a certificate of registration as a registered barber before the apprentice certificate can be renewed or restored and mailed.

(b) The time period in this Section shall be waived for a member of the armed forces of the United States granted an extension of time to file a tax return by G.S. 105-249.2.

Authority G.S. 86A-24; 93B-15.

SUBCHAPTER 06K - REGISTERED BARBER

21 NCAC 06K .0111 WAIVER OF TIME AND RENEWAL FEES

The waiver provision set forth in G.S. 86A-17(c) for renewal of a registered barber license shall only apply to a member of the armed forces of the United States granted an extension of time to file a tax return by G.S. 105-249.2.

Authority G.S. 86A-17; 93B-15.

SUBCHAPTER 06L - BARBER SHOPS

21 NCAC 06L .0106 SEPARATION FROM OTHER BUSINESSES; RESIDENTIAL SHOPS; MOBILE HOMES

(a) When a building or room is used for both a barber shop and for some other business and the building or room has limited air conditioning, ventilation, or heat outlets, or air circulation, the required partition between the shop and the other business may be completed from the floor up to a minimum of six feet with some open-like material from six feet to the ceiling to permit good air circulation.

(b) Notwithstanding Paragraph (a) of this Rule and 21 NCAC 06L .0102 and where a barber shop is located within a shop licensed by the North Carolina Board of Cosmetic Art Examiners and which is permitted on or after January 1, 1995, or which undergoes modifications or structural renovations after that date, the area where the barber chair or chairs are located must comply with all sanitary rules and laws not inconsistent with this Rule.

(c) For barber shops permitted on or after July 1, 2008, a barber shop in a residential building shall maintain a separate entrance which shall not open off the living quarters, and which shall not have any doors or openings leading to the living quarters which are unlocked during business hours. Entrance through garages or any other rooms is not permitted.

(d) The toilet facilities or any sink in the living quarters of any residence shall not be considered in the toilet facility and sink requirements in 21 NCAC 06L .0103 or the sink distance requirement in 21 NCAC 06L .0105.

(e) For barber shops permitted on or after July 1, 2008, mobile homes, motor homes, trailers or any type of recreational vehicle must be permanently affixed so it cannot be moved or they shall not be approved. Any such structure approved for a barber shop shall maintain a separate entrance which shall not open off the

living quarters, and shall not have any doors or openings to the living quarters which are unlocked during business hours.

Authority G.S. 86A-1; 86A-15.

21 NCAC 06L .0111 WHERE BARBER SERVICES MAY BE PERFORMED

(a) Except as provided in this Section, all ~~All~~ barber services as defined in G.S. 86A-2 and 21 NCAC 06P .0103 shall only be performed at a location permitted by the Board as a barber shop.

(b) A Registered Barber may perform barbering services in a client's home, and the home be exempt from the inspection requirements of G.S. 86A-15(b), under the following conditions:

(1) The client upon whom barber services are being performed is unable, due to a medical necessity, to come to a licensed barber shop. A "medical necessity" is defined as a procedure needed for the diagnosis or treatment of a medical condition, meets the standards of good medical practice, and is not mainly for the convenience of the client;

(2) The licensed barber maintains a log of each instance where this exemption is used, including the name of the client, address of the home where the services were performed, and the date services were performed. The log shall be made available to the Board and its inspectors for review upon request;

(3) The licensed barber otherwise complies with G.S. 86A-15(a); and

(4) For purposes of this Rule, a "client's home" shall include the client's residence, nursing homes, rest homes, retirement homes, mental institutions and similar institutions where the client has established permanent residency.

Authority G.S. 86A-15; 86A-15(c).

21 NCAC 06L .0115 INSPECTIONS OF SHOPS

(a) The Board's Executive Director and its inspectors may enter and make reasonable inspections of any shop during its regular business hours for the purpose of determining whether or not the Board's law and administrative rules are being observed. Persons authorized to make an inspection of shops shall prepare a report of such inspections on forms provided by the Board. The report shall be signed by the inspector and by the owner of the shop or by a person authorized to sign for the owner. The carbon copy of such inspection report shall be left with the owner or manager, and ~~posted~~ retained within the barbering area until the next ~~inspection.~~ inspection and made available for review by the public upon request. The carbon copy of any violation notice shall be left with the owner or manager, and ~~posted~~ retained within the barbering area until the violation is resolved with the Board.

(b) The Board's Executive Director and its inspectors may inspect all aspects of the shop including the backstand and its drawers and cabinets, and any other drawers, closets or other enclosures within the permitted shop.

(c) The Board's Executive Director and its inspectors may determine and assign numerical and letter sanitary grades to a shop following inspections as set forth in 21 NCAC 06L .0118 and 21 NCAC 06L .0119. The grade shall be displayed on the sanitary rules required to be posted by G.S. 86A-15(b).

(d) The shop manager shall keep the entire shop open for inspection, including space rented or leased to another licensee.

(e) The shop manager is responsible for the general sanitary condition of the entire shop.

Authority G.S. 86A-5(a)(1); 86A-15.

21 NCAC 06L .0116 ADDITIONAL DUTIES OF BARBER SHOP OWNERS AND MANAGERS AND LIMITATIONS ON SHOP MANAGERS

(a) All barber shop owners and managers shall positively identify any licensee to determine that the licensee is, in fact, the person whose name appears on the license or Registered Barber permit prior to allowing the licensee to perform barbering services in the shop, and maintain a record of the identifying information about the licensee.

(b) A barber shop manager cannot also be manager of a barber school.

(c) A barber shop manager shall devote full time to the barber shop by being present on the premises the majority of the time barber services are being provided. The barber shop manager shall be held accountable for activities at the shop whether present on the premises or not.

Authority G.S. 86A-1; 86A-10; 86A-11.

SUBCHAPTER 06N - FORMS

21 NCAC 06N .0101 FEES

(a) The Board charges the following amounts for the fees authorized by G.S. 86A-25:

(1) Certificate of registration or renewal as a barber $ 35.00

(2) Certificate of registration or renewal as an apprentice barber $ 35.00

(3) Barbershop permit or renewal $ 40.00

(4) Examination to become a registered barber $ 85.00

(5) Examination to become a registered apprentice barber $ 85.00

(6) Late fee for restoration of an expired barber certificate within first year after expiration $ 35.00

(7) Late fee for restoration of an expired barber certificate after first year after expiration but within five years after expiration $ 70.00

(8) Late fee for restoration of an expired apprentice certificate within the first year after expiration $ 35.00

(9) Late fee for restoration of an expired apprentice certificate after first year after expiration but within three years of first issuance of the certificate $ 45.00

(10) Late fee for restoration of an expired barber shop certificate $ 45.00
(11) Examination to become a barber school instructor $150.00
(12) Student permit $ 20.00
(13) Issuance of any duplicate copy of a license, certificate or permit $ 10.00
(14) Barber school permit or renewal $ 85.00
(15) Late fee for restoration of an expired barber school certificate $ 85.00
(16) Barber school instructor certificate or renewal $ 60.00
(17) Late fee for restoration of an expired barber school instructor certificate within first year after expiration $ 45.00
(18) Late fee for restoration of an expired barber school instructor certificate after first year after expiration but within three years after expiration $ 85.00
(19) Inspection of newly established barbershop $120.00
(20) Inspection of newly established barber school $220.00
(21) Issuance of a registered barber or apprentice certificate by certification $ 85.00
(22) Charge for certified copies of public documents $10.00 for first page, $0.25 per page thereafter
(23) Charge for duplication services and material $5.00 for first page, $0.25 for each page thereafter
(24) Certificate of registration or renewal as a barber for barbers over 70 years of age $ 0.00
(25) Administrative fee for paying any required fee for renewal or restoration, or a civil penalty and attorney fee, where the licensee or Registered Barber is subject to a pick-up order issued to an inspector. $ 70.00

(b) In the event the Board's authority to expend funds is suspended pursuant to G.S. 93B-2, the Board shall continue to issue and re-new licenses and all fees tendered shall be placed in the escrow account maintained by the Board for this purpose.

Authority G.S. 86A-25; 86A-27(d); 98B-2.

SUBCHAPTER 06O - CIVIL PENALTY

21 NCAC 06O .0116 BARBER FAILING TO MAINTAIN OR PRODUCE EXEMPTION LOG

(a) The presumptive civil penalty for a barber failing to maintain the exemption log as required by 21 NCAC 06L .0111:

(1) 1st offense $ 50.00
(2) 2nd offense $100.00
(3) 3rd offense $200.00

(b) The presumptive civil penalty for a barber failing to produce the exemption log required by 21 NCAC 06L .0111:

(1) 1st offense $ 50.00
(2) 2nd offense $100.00
(3) 3rd offense $200.00

Authority G.S. 86A-15(c).

SUBCHAPTER 06Q - PROHIBITED PRACTICES

21 NCAC 06Q .0103 REGISTERED SEX OFFENDER

The Board ~~shall~~ may refuse to issue or renew, or shall revoke any license or permit issued pursuant to Chapter 86A of the General Statutes, where the applicant, licensee or permittee has been adjudicated a felony sexual offender and is required to register pursuant to Chapter 14, Section 208.5 of the General Statutes or any similar statutes or ordinances. In determining whether to issue or renew a license, the Board shall consider the following:

(1) Crime committed for which registration was required;
(2) Length of time the applicant, licensee or permittee is to register as a sex offender;
(3) Whether the applicant, licensee or permittee is allowed to have contact with the victim or others;
(4) Length of time licensed as a barber or shop owner in this or another state;
(5) Enrollment in a treatment program relevant to the crime committed;
(6) Whether the registered sex offender is a student applicant;
(7) Additional criminal convictions; and
(8) Letters of recommendation from members of the community where the crime was committed and where the applicant, licensee or permittee currently resides stating whether or not the person considers the applicant, licensee or permittee a threat to the community.

Authority G.S. 86A-17.

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CHAPTER 32 – NORTH CAROLINA MEDICAL BOARD

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

Proposed Effective Date: *February 1, 2010*

Public Hearing:
Date: *November 30, 2009*
Time: *10:00 a.m.*
Location: *North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609*

Reason for Proposed Action: *The purpose of this amendment is to increase the number of Anesthesiologist Assistants that a Supervising Anesthesiologist may supervise.*

Procedure by which a person can object to the agency on a proposed rule: *A person may submit objections to the proposed amendment, in writing by November 30, 2009, Rules Coordinator, North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609 or email at rules@ncmedboard.org.*

Comments may be submitted to: *Rules Coordinator, North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609; phone (919) 326-1100; fax (919) 326-0036; email rules@ncmedboard.org*

Comment period ends: *November 30, 2009*

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 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

SUBCHAPTER 32W - ANESTHESIOLOGIST ASSISTANT REGULATIONS

21 NCAC 32W .0109 SUPERVISION OF ANESTHESIOLOGIST ASSISTANTS

(a) The Primary Supervising Anesthesiologist shall ensure that the Anesthesiologist Assistant's scope of practice is identified; that delegation of anesthesia services is appropriate to the level of competence of the Anesthesiologist Assistant; that the relationship of, and access to, each Supervising Anesthesiologist is defined; and that a process for evaluation of the Anesthesiologist Assistant's performance is established.

(b) The Supervision Agreement defined in Rule .0101(10) of this Subchapter must be signed by the Primary Supervising Anesthesiologist(s) and Anesthesiologist Assistant and shall be made available upon request by the Board or its agents. A list of all Supervising Anesthesiologists, signed and dated by each Supervising Anesthesiologist, the Primary Supervising Anesthesiologist, and the Anesthesiologist Assistant, must be retained as part of the Supervision Agreement and shall be made available upon request by the Board or its representatives.

(c) A Supervising Anesthesiologist, who need not be the Primary Supervising Anesthesiologist, shall supervise the Anesthesiologist Assistant and ensure that all anesthesia services delegated to the Anesthesiologist Assistant are consistent with the Anesthesiologist Assistant's Supervision Agreement.

(d) A Supervising Anesthesiologist may supervise ~~no more than two~~ up to four Anesthesiologist Assistants ~~or Student Anesthesiologist Assistants~~ at one time. ~~The limitation on the number of Anesthesiologist Assistants or Student Anesthesiologist Assistants that an anesthesiologist may supervise does not affect the number of other qualified anesthesia providers an anesthesiologist may concurrently supervise.~~

(e) Entries by an Anesthesiologist Assistant into patient charts of inpatients (hospital, long term care institutions) must comply with the rules and regulations of the institution.

Authority G.S. 90-18(c)(20); 90-18.5.

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CHAPTER 32 – NORTH CAROLINA MEDICAL BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Medical Board intends to adopt the rule cited as 21 NCAC 32Y .0101.*

Proposed Effective Date: *February 1, 2010*

Public Hearing:
Date: *November 30, 2009*
Time: *11:00 a.m.*
Location: *North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609*

Reason for Proposed Action: *The purpose of this new rule is to establish standards for advertising of Specialty and Board certifications.*

Procedure by which a person can object to the agency on a proposed rule: *A person may submit objections to the proposed amendment, in writing by November 30, 2009, Rules Coordinator, North Carolina Medical Board, 1203 Front Street, Raleigh, NC or email at rules@ncmedboard.org.*

Comments may be submitted to: *Rules Coordinator, North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609; phone (919) 326-1100; fax (919) 326-0036; email rules@ncmedboard.org*

Comment period ends: *November 30, 2009*

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 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

SUBCHAPTER 32Y – SPECIALTY AND BOARD CERTIFICATION ADVERTISING

21 NCAC 32Y .0101 ADVERTISING OF SPECIALTY AND BOARD CERTIFICATION

(a) No physician shall advertise or otherwise hold himself or herself out to the public as being "Board Certified" without proof of current certification by a specialty board approved by:

(1) the American Board of Medical Specialties;
(2) the Bureau of Osteopathic Specialists of American Osteopathic Association;
(3) the Royal College of Physicians and Surgeons of Canada;
(4) a board or association with an Accreditation Council for Graduate Medical Education approved postgraduate training program that provides complete training in that specialty or subspecialty; or
(5) a board or association approved by the North Carolina Medical Board as having requirements equivalent to those of the above-listed boards, bureaus, and associations.

(b) Any physicians advertising or otherwise holding himself or herself out to the public as "Board Certified" as contemplated in Paragraph (a) of this Rule shall disclose in the advertisement the specialty board by which the physician was certified.

(c) Physicians shall not list their names under a specific specialty in advertisements, including classified telephone directories and other directories unless:

(1) they are board certified as defined in Paragraph (a) of this Rule; or
(2) they have successfully completed a training program in the advertised specialty that is accredited by the Accreditation Council for Graduate Medical Education or approved by the Council on Postdoctoral Training of the American Osteopathic Association.

Authority G.S. 90-5.1; 90-5.2; 90-14.

Note from the Codifier: *The rules published in this Section of the NC Register are emergency rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code. The agency must subsequently publish a proposed temporary rule on the OAH website (www.ncoah.com/rules) and submit that adopted temporary rule to the Rules Review Commission within 60 days from publication of the emergency rule or the emergency rule will expire on the 60th day from publication.*
This section of the Register may also include, from time to time, a listing of emergency rules that have expired. See G.S. 150B-21.1A and 26 NCAC 02C .0600 for adoption and filing requirements.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *State Registrar*

Rule Citation: *10A NCAC 41H .0701-.0702*

Effective Date: *September 14, 2009*

Findings Reviewed and Approved by the Codifier: *September 3, 2009*

Reason for Action: *All state funding for Vital Records was eliminated by Session law 2009-451, SB 202 Current Operations and Capital Improvements Appropriations Act of 2009 based upon projected receipts from an immediate maximum fee increase.*

CHAPTER 41 – HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41H - VITAL RECORDS

SECTION .0700 - FEES AND REFUNDS

10A NCAC 41H .0701 ROUTINE REQUESTS FOR CERTIFIED COPIES

(a) The fee for searching for a certificate of birth, death, marriage or divorce shall be ~~fifteen~~ twenty-four dollars ~~($15.00),~~ ($24.00), which shall include the cost of a search of the year indicated and if necessary the year immediately prior to and subsequent to the indicated year. This fee also covers issuance of a copy if the record is found. If the record is not located, the fee shall be retained for providing the search.

(b) If expedited service is specifically requested, an additional fee of fifteen dollars ($15.00) for in-state requests and twenty dollars ($20.00) for out-of-state requests, in addition to all shipping and commercial charges, shall be charged in accordance with G.S. 130A-93.1(a)(2).

History Note: Authority G.S. 130A-92(a)(7); 130A-93; 130A-93.1;
Eff. February 1, 1976;
Amended Eff. October 1, 1977;
Readopted Eff. November 15, 1977;
Amended Eff. June 1, 2005; January 1, 1992; October 1, 1985;
Emergency Amendment Eff. September 14, 2009.

10A NCAC 41H .0702 RESEARCH REQUESTS

(a) The State Registrar may permit the use of data from vital records for research purposes. The State Registrar shall require the applicant to specify in writing the conditions under which the records or data will be used, stored, and disposed of; the purpose of the research; the research protocol; access limitations; and security precautions.

(b) The State Registrar may determine fees charged for preparing, searching or providing information from, or non-certified copies of the vital records based on the estimated cost of rendering the service. An hourly rate or charge per name searched may be imposed. The fee shall be ~~fifteen~~ twenty-four dollars ~~($15.00)~~ ($24.00) per name searched. If expedited service is specifically requested, an additional fee of fifteen dollars ~~($15.00),~~ ($15.00) for in-state requests and twenty dollars ($20.00) for out-of-state requests, in addition to all shipping and commercial charges, shall be charged in accordance with G.S. 130A-93.1(a)(2).

(c) Vital records or data provided under this Rule shall be used only for the purposes described in the application.

History Note: Authority G.S. 130A-92(a)(7); 130A-93; 130A-93.1;
Eff. February 1, 1976;
Readopted Eff. November 15, 1977;
Amended Eff. June 1, 2005; February 1, 1994; February 1, 1992; September 1, 1990; October 1, 1985;
Emergency Amendment Eff. September 14, 2009.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARIINGS

Rule-making Agency: *Office of Administrative Hearings*

Rule Citation: *26 NCAC 03 .0101, .0103-.0104, .0106 (Recodified from Rule .0105)*

Effective Date: *October 1, 2009*

Findings Reviewed and Approved by the Codifier: *September 4, 2009*

Reason for Action: *To establish by rule the procedure and filing fees for contested case hearings before the Office of Administrative Hearings pursuant to Senate Bill 202 (Appropriations Act of 2009), Section 21A.1(a)(b)(c).*

CHAPTER 03 - HEARINGS DIVISION

SECTION .0100 - HEARING PROCEDURES

26 NCAC 03 .0101 GENERAL

(a) The Rules of Civil Procedure as contained in G.S. 1A-1, the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.

(b) The Office of Administrative Hearings shall supply forms for use in contested cases. These forms shall conform to the format of the Administrative Office of the Courts' Judicial Department Forms Manual.

(c) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings by facsimile (fax) or electronic mail by an attached file either in PDF format or a document that is compatible with or convertible to the most recent version of Microsoft Word. Electronic mail with attachment shall be sent by electronic transmission to: oah.clerks@oah.nc.gov. The faxed or electronic documents shall be deemed a "filing" within the meaning of 26 NCAC 03 .0102(a)(2) provided the original signed ~~document and~~ document, one copy and the appropriate filing fee (if a fee is required by G.S. 150B-23.2) is received by OAH within seven business days following the faxed or electronic transmission. Other electronic transmissions, for example, electronic mail without attached file as specified in this Paragraph, shall not constitute a valid filing with the Office of Administrative Hearings.

(d) Every pleading and other documents filed with OAH shall be signed by the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, address, telephone number, and North Carolina State Bar number. An original and one copy of each document shall be filed.

(e) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

History Note: Authority G.S. 7A-750; 7A-751(a); 150B-23.2; 150B-40(c);
Eff. August 1, 1986;
Amended Eff. May 1, 2009; January 1, 2006; April 1, 2004; April 1, 2001; August 1, 2000; February 1, 1994; July 1, 1992; May 1, 1989; January 1, 1989;
Emergency Amendment Eff. October 1, 2009.

26 NCAC 03 .0103 COMMENCEMENT OF CONTESTED CASE: NOTICE

(a) A contested case in the Office of Administrative Hearings is commenced by the filing of a petition as required by ~~G.S. 150B-23.~~ G.S. 150B-23 and payment of the appropriate filing fee (if a fee is required by G.S. 150B-23.2).

(b) Within five days of filing a petition to commence a contested case, the Chief Administrative Law Judge shall assign an administrative law judge to the case. Within ten days of the filing of a petition commencing a contested case, the chief hearings clerk of the Office of Administrative Hearings shall serve a Notice of Contested Case Filing and Assignment upon all who are parties to the dispute. The notice shall contain the following:

(1) Name of case and date of filing;
(2) Name, address, and telephone number of the administrative law judge; and
(3) A request that the party send within 30 days a copy of the document constituting the agency action that caused the filing of the petition.

History Note: Authority G.S. 150B-11; 150B-23; 150B-23.2; 150B-33;
Eff. August 1, 1986;
Amended Eff. October 1, 1991; November 1, 1987; September 1, 1986;
Emergency Amendment Eff. October 1, 2009.

26 NCAC 03 .0104 FILING FEE

(a) In contested cases commenced by a person aggrieved involving the following causes of action, the petitioner shall pay a filing fee of one hundred twenty-five dollars ($125.00):

(1) Certificate of need cases filed pursuant to G.S. 131E-188;
(2) Clean Water and Clean Air environmental permitting cases, and all other environmental cases filed pursuant to G.S. 150B when the amount of the civil penalties is fifty thousand dollars ($50,000) or greater;
(3) Department of Revenue cases filed pursuant to G.S. 150B-31.1 where the amount in controversy is fifty thousand dollars ($50,000) or greater; or
(4) Applications submitted pursuant to G.S. 150B-40(e).

(b) In contested cases commenced by a person aggrieved which do not involve the causes of action listed in Paragraph (a) of this Rule, the petitioner shall pay a fee of twenty dollars ($20.00).

(c) The filing fee shall be waived in a contested case in which the petition is filed in forma pauperis and supported by such proofs as are required in G.S. 1-110. A petitioner seeking to have the filing fee waived under this Paragraph shall make the request by filing the appropriate OAH form with the chief hearings clerk prior to filing the petition for a contested case.

(d) The filing fee shall be waived in a contested case involving a mandated federal cause of action.

(e) The method of payment shall be:

(1) cash;
(2) money order;
(3) certified check; or
(4) check drawn on an attorney's trust account.

History Note: Authority G.S. 150B-11; 150B-23; 150B-23.2; 150B-33;
Emergency Adoption Eff. October 1, 2009.

26 NCAC 03 .0106 DUTIES OF THE ADMINISTRATIVE LAW JUDGE

In conjunction with the powers of administrative law judges prescribed by G.S. 150B-33 and G.S. 150B-36, the

administrative law judge shall perform the following duties, consistent with law:

(1) Hear and rule on motions;

(2) Grant or deny continuances;

(3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;

(4) Examine witnesses when deemed necessary to make a complete record and to aid in the full development of material facts in the case;

(5) Make preliminary, interlocutory, or other orders as deemed appropriate;

(6) Grant dismissal when the case or any part thereof has become moot or for other reasons; ~~and~~

(7) Order the State of North Carolina, when it is the losing party as determined by the presiding Administrative Law Judge, to reimburse the filing fee to the petitioner; and

~~(7)~~(8) Apply sanctions in accordance with Rule .0114 of this Section.

History Note: *Authority G.S. 7A-751(a); 8C-1, Rule 614; 150B-23.2; 150B-33; 150B-36;*
Eff. August 1, 1986;
Amended Eff. April 1, 2001; February 1, 1994; November 1, 1987;
Emergency Amendment Eff. October 1, 2009.

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

Rules approved by the Rules Review Commission at its meeting on August 20, 2009.

					REGISTER CITATION TO THE NOTICE OF TEXT
INSURANCE, DEPARTMENT OF					
Refund of Unearned Premium at Death: Credit Life/Credit A...	11	NCAC	12	.0705	23:21 NCR
SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION					
Detention Officer Certification Course	12	NCAC	10B	.0601*	23:19 NCR
ALARM SYSTEMS LICENSING BOARD					
Records Retention	12	NCAC	11	.0206*	23:16 NCR
ENVIRONMENTAL MANAGEMENT COMMISSION					
French Broad River Basin	15A	NCAC	02B	.0304	23:17 NCR
Cape Fear River Basin	15A	NCAC	02B	.0311*	23:15 NCR
Definitions	15A	NCAC	02C	.0102*	22:24 NCR
Registration	15A	NCAC	02C	.0103*	22:24 NCR
Permits	15A	NCAC	02C	.0105*	22:24 NCR
Standards of Construction: Water Supply Wells	15A	NCAC	02C	.0107*	22:24 NCR
Standards of Construction: Wells Other than Water Supply	15A	NCAC	02C	.0108*	22:24 NCR
Pumps and Pumping Equipment	15A	NCAC	02C	.0109*	22:24 NCR
Well Tests for Yield	15A	NCAC	02C	.0110*	22:24 NCR
Disinfection of Water Supply Wells	15A	NCAC	02C	.0111*	22:24 NCR
Well Maintenance: Repair: Groundwater Resources	15A	NCAC	02C	.0112*	22:24 NCR
Abandonment of Wells	15A	NCAC	02C	.0113*	22:24 NCR
Data and Records Required	15A	NCAC	02C	.0114*	22:24 NCR
Designated Areas: Wells Cased to Less than 20 Feet	15A	NCAC	02C	.0116*	22:24 NCR
Designated Areas: Water Supply Wells Cased to Minimum Dep...	15A	NCAC	02C	.0117*	22:24 NCR
Variance	15A	NCAC	02C	.0118	22:24 NCR
BARBER EXAMINERS, BOARD OF					
Instructors	21	NCAC	06F	.0104*	23:22 NCR
Roster and Student Records	21	NCAC	06F	.0110*	23:22 NCR
Copies of Barber School Records	21	NCAC	06F	.0111*	23:22 NCR
Uniforms and Identification	21	NCAC	06F	.0122	23:22 NCR
Time Clock and Recordation of Student Hours	21	NCAC	06F	.0123	23:22 NCR
Student Hours	21	NCAC	06F	.0124	23:22 NCR

School Handbooks and Enrollment Agreements	21	NCAC	06F	.0125	23:22 NCR
Notification of Address Change	21	NCAC	06J	.0110	23:22 NCR
Notification of Change of Address	21	NCAC	06K	.0111	23:22 NCR
Measurements of Barber Shop	21	NCAC	06L	.0102	23:22 NCR
Equipment	21	NCAC	06L	.0103*	23:22 NCR
Moved Shop	21	NCAC	06L	.0108*	23:22 NCR
Notification of Change of Address	21	NCAC	06L	.0120*	23:22 NCR
Fees	21	NCAC	06N	.0101	23:22 NCR
Unsupervised Apprentice	21	NCAC	06O	.0104	23:22 NCR
Identification	21	NCAC	06O	.0112	23:22 NCR
School Failing to Maintain, Falsifying, or Failing to Sub...	21	NCAC	06O	.0115	23:22 NCR
Unlicensed School Instructors	21	NCAC	06O	.0116	23:22 NCR
Display of Sign or Barber Pole	21	NCAC	06R	.0101*	23:22 NCR
General Examination Instructions	21	NCAC	06S	.0101	23:22 NCR
GENERAL CONTRACTORS, LICENSING BOARD FOR					
Classification	21	NCAC	12	.0202*	23:06 NCR
DENTAL EXAMINERS, BOARD OF					
Clinical Examination	21	NCAC	16D	.0201	23:20 NCR
Permitted Functions of Dental Assistant II	21	NCAC	16H	.0203*	23:20 NCR
MEDICAL BOARD					
Locum Tenens Permit	21	NCAC	32O	.0118	23:21 NCR
Title and Practice Protection	21	NCAC	32O	.0119	23:21 NCR
Identification Requirements	21	NCAC	32O	.0120	23:21 NCR
Fees	21	NCAC	32O	.0121	23:21 NCR
Definitions	21	NCAC	32S	.0101	23:21 NCR
Qualifications for License	21	NCAC	32S	.0102	23:21 NCR
Inactive License Status	21	NCAC	32S	.0104	23:21 NCR
Annual Registration	21	NCAC	32S	.0105	23:21 NCR
Continuing Medical Education	21	NCAC	32S	.0106	23:21 NCR
Exemption from License	21	NCAC	32S	.0107	23:21 NCR
Scope of Practice	21	NCAC	32S	.0108	23:21 NCR
Prescriptive Authority	21	NCAC	32S	.0109	23:21 NCR
Supervision of Physician Assistants	21	NCAC	32S	.0110	23:21 NCR
Supervising Physicians	21	NCAC	32S	.0111	23:21 NCR
Notification of Intent to Practice	21	NCAC	32S	.0112	23:21 NCR
Violations	21	NCAC	32S	.0113	23:21 NCR
Title and Practice Protection	21	NCAC	32S	.0115	23:21 NCR
Identification Requirements	21	NCAC	32S	.0116	23:21 NCR
Fees	21	NCAC	32S	.0117	23:21 NCR
Practice During A Disaster	21	NCAC	32S	.0118	23:21 NCR
Definitions	21	NCAC	32S	.0201	23:21 NCR
Qualifications and Requirements for License	21	NCAC	32S	.0202*	23:21 NCR

Mandatory Notification of Intent to Practice	21	NCAC	32S	.0203	23:21 NCR
Annual Renewal	21	NCAC	32S	.0204	23:21 NCR
Inactive License Status	21	NCAC	32S	.0205	23:21 NCR
License Reactivation	21	NCAC	32S	.0206	23:21 NCR
License Reinstatement	21	NCAC	32S	.0207	23:21 NCR
Limited Volunteer License	21	NCAC	32S	.0208	23:21 NCR
Non Applicability	21	NCAC	32S	.0209	23:21 NCR
Identification Requirements	21	NCAC	32S	.0210	23:21 NCR
Agency	21	NCAC	32S	.0211	23:21 NCR
Prescriptive Authority	21	NCAC	32S	.0212*	23:21 NCR
Supervision of Physician Assistants	21	NCAC	32S	.0213	23:21 NCR
Supervising Physician	21	NCAC	32S	.0214	23:21 NCR
Responsibilities of Primary Supervising Physician in Rega...	21	NCAC	32S	.0215	23:21 NCR
Continuing Medical Education	21	NCAC	32S	.0216	23:21 NCR
Violations	21	NCAC	32S	.0217	23:21 NCR
Title and Practice Protection	21	NCAC	32S	.0218	23:21 NCR
Practice During a Disaster	21	NCAC	32S	.0219	23:21 NCR

FUNERAL SERVICE, BOARD OF

Accreditation of Prerecorded Programs and Live Programs B...	21	NCAC	34B	.0413	23:22 NCR
Body Identification Tags	21	NCAC	34B	.0616*	23:22 NCR
Registration of Embalming Facility Located Outside a Fune...	21	NCAC	34B	.0706*	23:22 NCR
Records of Cremation and Delivery	21	NCAC	34C	.0303*	23:22 NCR
Annual Report	21	NCAC	34D	.0302	23:22 NCR

ENGINEERS AND SURVEYORS, BOARD OF EXAMINERS FOR

Organization	21	NCAC	56	.0103*	n/a G.S. 150B-21.5(a)(2)
Examinations	21	NCAC	56	.0503*	n/a G.S. 150B-21.5(a)(2)

RECREATIONAL THERAPY LICENSURE, BOARD OF

Licensure Fees	21	NCAC	65	.0501	23:21 NCR

COMMUNITY COLLEGES, BOARD OF

Work Station Occupational Skills Training	23	NCAC	02E	.0402	23:18 NCR

This rule is subject to the next Legislative Session. (See G.S. 150B-21.3.)

ENVIRONMENTAL MANAGEMENT COMMISSION

Heavy-Duty Vehicle Idling Restrictions	15A	NCAC	02D	.1010*	23:18 NCR

TITLE 11 – DEPARTMENT OF INSURANCE

11 NCAC 12 .0705 REFUND OF UNEARNED PREMIUM AT DEATH: CREDIT LIFE/CREDIT ACCIDENT/HEALTH INSURANCE

History Note: Authority G.S. 58-2-40; 58-57-50;
Eff. May 1, 1989;
Amended Eff. April 8, 2002;
Repealed Eff. September 1, 2009.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 10B .0601 DETENTION OFFICER CERTIFICATION COURSE

(a) This Section establishes the current standard by which Sheriffs' Office and district confinement personnel shall receive detention officer training. The Detention Officer Certification Course shall consist of a minimum of 162 hours of instruction designed to provide the trainee with the skills and knowledge necessary to perform those tasks considered essential to the administration and operation of a confinement facility.

(b) Each Detention Officer Certification Course shall include the following identified topic areas and approximate minimum instructional hours for each area:

(1)	Orientation	2 hours
(2)	Criminal Justice System	3 hours
(3)	Legal Aspects of Management and Supervision	16 hours
(4)	Contraband/Searches	6 hours
(5)	Processing Inmates	7 hours
(6)	First Aid and CPR	10 hours
(7)	Medical Care in the Jail	6 hours
(8)	Patrol and Security Functions of the Jail	5 hours
(9)	Key and Tool Control	2 hours
(10)	Supervision and Management of Inmates	5 hours
(11)	Suicides and Crisis Management	5 hours
(12)	Introduction to Rules and Regulations Governing Jails	2 hours
(13)	Stress	3 hours
(14)	Investigative Process in the Jail	9 hours
(15)	Subject Control Techniques	24 hours
(16)	Aspects of Mental Illness	6 hours
(17)	Transportation of Inmates	7 hours
(18)	Fire Emergencies	4 hours
(19)	Physical Fitness for Detention Officers	22 hours
(20)	Communication Skills	5 hours
(21)	Ethics	3 hours
(22)	Review/Testing	7 hours
(23)	State Comprehensive Examination	3 hours
	TOTAL HOURS	162 hours

(c) Consistent with the curriculum development policy of the Commission as published in the "Detention Officer Certification Course Management Guide", the Commission shall designate the developer of the Detention Officer Certification Course curricula and such designation shall be deemed by the Commission as approval for the developer to conduct pilot Detention Officer Certification Courses. Individuals who complete such a pilot Detention Officer Certification Course offering shall be deemed to have complied with and satisfied the minimum training requirement.

(d) The "Detention Officer Certification Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for the Detention Officer Certification Course. Copies of this manual may be obtained by contacting the North Carolina Justice Academy, Post Office Box 99, Salemburg, North Carolina 28385-0099. The cost of this manual is forty dollars ($40.00) at the time of adoption of this Rule.

(e) The "Detention Officer Certification Course Management Guide" as published by the North Carolina Justice Academy is hereby incorporated by reference and shall automatically include any later amendments, editions of the incorporated matter to be used by school directors in planning, implementing and delivering basic detention officer training. The standards and requirements established by the "Detention Officer Certification Course Management Guide" must be adhered to by the school director. Each certified school director shall be issued a copy of the guide at the time of certification at no cost to the certified school.

History Note: Authority G.S. 17E-4(a);
Eff. January 1, 1989; Eff. August 1, 2009;
Amended Eff. October 1, 2009; January 1, 2006; August 2, 2002; August 1, 2000; August 1, 1998; February 1, 1998; January 1, 1996; June 1, 1992; January 1, 1992; January 1, 1991.

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12 NCAC 11 .0206 RECORDS INSPECTION

(a) Records of a licensee maintained to satisfy the requirements of G.S. Chapter 74D or 12 NCAC Chapter 11 are subject to inspection by the Director or his staff upon demand between 8:00 a.m. and 5:00 p.m. Monday through Friday.

(b) All licensees having registered employees shall submit a copy of their current quarterly Employment Security Commission NCUI 101-625 to the Director's office at the same time the form is submitted to the Employment Security Commission; and an additional list of non-Employment Security Commission employees currently employed by the licensee with the dates of employment. In lieu of submitting copies of the quarterly reports, the Board may request, and the licensee shall provide within 10 days of the request, the businesses' Employment Security Commission account number along with the personal identification number (PIN) so that the Board may access the data electronically. Those licensees who do not submit an Employment Security Commission NCUI 101-625 shall submit the names of their employees on a form provided by the Board. The licensee of a firm, association, or corporation that license a department or division shall also submit additional documentation as required by Paragraph (c) of this Rule.

(c) If a department or division of a firm, association, or corporation is licensed, then the licensee must submit a list of all employees who work with the department or division to the Board prior to the issuance of the license. This list must indicate the employees that work with the department or division and are listed on the report required in Paragraph (b) of this Rule. If the department or division hires a new employee, the licensee must report the hiring within 5 days of employment.
(d) All records required to be kept by either Chapter 74D of the General Statutes of North Carolina or by 12 NCAC 11 shall be retained for at least three years. If the licensee is unable to produce records as required by this Rule, the licensee shall give the Board it's Employment Security Commission account number along with the personal identification number (PIN) so that the Board may access the data electronically.

History Note: Authority G.S. 74D-5;
Temporary Rule Eff. January 9, 1984, for a period of 120 days to expire on May 7, 1984;
Authority G.S. 74D-5;
Eff. May 1, 1984;
Amended Eff. September 1, 2009; March 1, 1993; August 1, 1988; July 1, 1987; January 1, 1986

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 02B .0304 FRENCH BROAD RIVER BASIN

(a) The French Broad River Basin Schedule of Classifications and Water Quality Standards may be inspected at the following places:

(1) the Internet at http://h2o.enr.state.nc.us/csu/; and
(2) the North Carolina Department of Environment and Natural Resources:
  (A) Asheville Regional Office
  2090 US Highway 70
  Swannanoa, North Carolina
  (B) Division of Water Quality
  Central Office
  512 North Salisbury Street
  Raleigh, North Carolina.

(b) Unnamed Streams. Such streams entering Tennessee are classified "B."
(c) The French Broad River Basin Schedule of Classifications and Water Quality Standards was amended effective:

(1) September 22, 1976;
(2) March 1, 1977;
(3) August 12, 1979;
(4) April 1, 1983;
(5) August 1, 1984;
(6) August 1, 1985;
(7) February 1, 1986;
(8) May 1, 1987;
(9) March 1, 1989;
(10) October 1, 1989;
(11) January 1, 1990;
(12) August 1, 1990;
(13) August 3, 1992;
(14) October 1, 1993;
(15) July 1, 1995;
(16) November 1, 1995;
(17) January 1, 1996;
(18) April 1, 1996;
(19) August 1, 1998;
(20) August 1 2000;
(21) August 1, 2002;
(22) September 1, 2004;
(23) November 1, 2007;
(24) September 1, 2009.

(d) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective March 1, 1989 as follows:

(1) Cataloochee Creek (Index No. 5-41) and all tributary waters were reclassified from Class C-trout and Class C to Class C-trout ORW and Class C ORW.
(2) South Fork Mills River (Index No. 6-54-3) down to Queen Creek and all tributaries were reclassified from Class WS-I and Class WS-III-trout to Class WS-I ORW and Class WS-III-trout ORW.

(e) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective October 1, 1989 as follows: Cane River (Index No. 7-3) from source to Bowlens Creek and all tributaries were reclassified from Class C trout and Class C to Class WS-III trout and Class WS-III.
(f) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective January 1, 1990 as follows: North Toe River (Index No. 7-2) from source to Cathis Creek (Christ Branch) and all tributaries were reclassified from Class C trout and Class C to Class WS-III trout and Class WS-III.
(g) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.
(h) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective October 1, 1993 as follows: Reasonover Creek [Index No. 6-38-14-(1)] from source to Reasonover Lake Dam and all tributaries were reclassified from Class B Trout to Class WS-V and B Trout, and Reasonover Creek [Index No. 6-38-14-(4)] from Reasonover Lake Dam to Lake Julia Dam and all

tributaries were reclassified from Class C Trout to Class WS-V Trout.

(i) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective July 1, 1995 with the reclassification of Cane Creek [Index Nos. 6-57-(1) and 6-57-(9)] from its source to the French Broad River from Classes WS-IV and WS-IV Tr to Classes WS-V, WS-V Tr and WS-IV.

(j) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective November 1, 1995 as follows: North Toe River [Index Numbers 7-2-(0.5) and 7-2-(37.5)] from source to a point 0.2 miles downstream of Banjo Branch, including tributaries, has been reclassified from Class WS-III, WS-III Trout and WS-III Trout CA (critical area) to Class WS-IV Trout, WS-IV, WS-IV Trout CA, and C Trout.

(k) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective January 1, 1996 as follows: Stokely Hollow [Index Numbers 6-121.5-(1) and 6-121.5-(2)] from source to mouth of French Broad River has been reclassified from Class WS-II and Class WS-II CA to Class C.

(l) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended April 1, 1996 with the reclassification of the French Broad River [Index No. 6-(1)] from a point 0.5 miles downstream of Little River to Mill Pond Creek to Class WS-IV; French Broad River [Index No. 6-(51.5)] from a point 0.6 miles upstream of Mills River to Mills River to Class WS-IV CA (Critical Area), from Mills River to a point 0.1 miles upstream of Boring Mill Branch to Class C; and the Mills River [Index No. 6-54-(5)] was reclassified from City of Hendersonville water supply intake to a point 0.7 miles upstream of mouth of Mills River to Class WS-III, and from a point 0.7 miles upstream of mouth of Mills River to French Broad River to Class WS- III CA (Critical Area).

(m) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended August 1, 1998 with the revision to the primary classification for portions of the French Broad River [Index No. 6-(38.5)] and the North Toe River 7-2-(10.5) from Class IV to Class C.

(n) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended August 1, 1998 with the reclassification of Clear Creek [Index No. 6-55-(1)] from its source to Lewis Creek from Class C Tr to Class B Tr.

(o) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended August 1, 2000 with the reclassification of Rough Creek [Index No. 5-8-4-(1)], including all tributaries, from its source to the Canton Reservoir from Class WS-I to Class WS-I Tr ORW.

(p) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended August 1, 2002 with the revision to the primary classification for the French Broad River [Index No. 6-(1), 6-(27), 6-(47.5), 6-(52.5), and 6-(54.5)] including its four headwater forks' mainstems, watershed of tributary Davidson River, and watershed of tributary Bent Creek below Powhatan Dam, and the Nolichucky River [Index No. 7] including a lower portion of the North Toe River from Class C and Class WS-IV to Class B.

(q) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended August 1, 2002 with the reclassification of the North Toe River [Index No. 7-2-(0.5)], including all tributaries, from source to a point 0.2 mile upstream of Pyatt Creek, from Class C Tr to Class WS-V Tr.

(r) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended September 1, 2004 with the reclassification of a portion of Richland Creek [Index No. 5-16(1)], from source to a point approximately 11.2 miles from source (Boyd Avenue), from Class B to Class B Tr, and all tributaries to the portion of the creek referenced in this Paragraph from C, C HQW, and WS-I HQW, and WS-I HQW to C Tr, C HQW Tr, and WS-I HQW Tr, respectively, except Hyatt Creek [Index No. 5-16-6], Farmer Branch [Index No. 5-16-11], and tributaries already classified as Tr.

(s) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective November 1, 2007 with the reclassification of McClure's Bog near Gash Creek [Index No. 6-47] to Class WL UWL as defined in 15A NCAC 02B .0101. The North Carolina Division of Water Quality maintains a Geographic Information Systems data layer of the UWL.

(t) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective September 1, 2009 with the reclassification of the entire watershed of Big Laurel Creek (Index No. 6-112) from source to the French Broad River from Class C Tr to Class C ORW Tr.

(u) The Schedule of Classifications and Water Quality Standards for the French Broad River Basin was amended effective September 1, 2009 with the reclassification of the entire watershed of Spring Creek [Index No. 6-118-(1) and 6-118-(27)] from source to the French Broad River from Class C Tr and Class C to Class C ORW Tr and Class C ORW.

History Note: Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1);
Eff. February 1, 1976;
Amended Eff. September 1, 2009; November 1, 2007; September 1, 2004; August 1, 2002; August 1, 2000; August 1, 1998; April 1, 1996; January 1, 1996; November 1, 1995; July 1, 1995.

15A NCAC 02B .0311 CAPE FEAR RIVER BASIN

(a) The Cape Fear River Basin Schedule of Classifications and Water Quality Standards may be inspected at the following places:

(1) the Internet at http://h2o.enr.state.nc.us/csu/; and

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

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

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

(C) Raleigh Regional Office
3800 Barrett Drive

Raleigh, North Carolina
(D) Washington Regional Office
943 Washington Square Mall
Washington, North Carolina
(E) Wilmington Regional Office
127 Cardinal Drive Extension
Wilmington, North Carolina
(F) Division of Water Quality
Central Office
512 North Salisbury Street
Raleigh, North Carolina.

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

(1) March 1, 1977;
(2) December 13, 1979;
(3) December 14, 1980;
(4) August 9, 1981;
(5) April 1, 1982;
(6) December 1, 1983;
(7) January 1, 1985;
(8) August 1, 1985;
(9) December 1, 1985;
(10) February 1, 1986;
(11) July 1, 1987;
(12) October 1, 1987;
(13) March 1, 1988;
(14) June 1, 1988;
(15) July 1, 1988;
(16) January 1, 1990;
(17) August 1, 1990;
(18) August 3, 1992;
(19) September 1, 1994;
(20) August 1, 1998;
(21) April 1, 1999;
(22) August 1, 2002;
(23) November 1, 2004;
(24) November 1, 2007;
(25) January 1, 2009;
(26) August 11, 2009;
(27) September 1, 2009.

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

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

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

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

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

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

(g) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 02B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

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

(1) The Black River from its source to the Cape Fear River [Index Nos. 18-68-(0.5), 18-68-(3.5) and 18-65-(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.

(2) The South River from Big Swamp to the Black River [Index Nos. 18-68-12-(0.5) and 18-68-12(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.

(3) Six Runs Creek from Quewhiffle Swamp to the Black River [Index No. 18-68-2] was reclassified from Class C Sw to Class C Sw ORW.

(i) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective September 1, 1994 with the reclassification of the Deep River [Index No. 17-(36.5)] from the Town of Gulf-Goldston water supply intake to US highway 421 including associated tributaries from Class C to Classes C, WS-IV and WS-IV CA.

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

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

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

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

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

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

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

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

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

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

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

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

(o) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective November 1, 2007 with the reclassifications listed below, and the North Carolina Division of Water Quality maintains a Geographic Information Systems data layer of these UWLs.

(1) Military Ocean Terminal Sunny Point Pools, all on the eastern shore of the Cape Fear River [Index No. 18-(71)] were reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(2) Salters Lake Bay near Salters Lake [Index No. 18-44-4] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(3) Jones Lake Bay near Jones Lake [Index No. 18-46-7-1] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(4) Weymouth Woods Sandhill Seep near Mill Creek [18-23-11-(1)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(5) Fly Trap Savanna near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(6) Lily Pond near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(7) Grassy Pond near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(8) The Neck Savanna near Sandy Run Swamp [Index No. 18-74-33-2] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(9) Bower's Bog near Mill Creek [Index No. 18-23-11-(1)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(10) Bushy Lake near Turnbull Creek [Index No. 18-46] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(p) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective January 1, 2009 as follows:

(1) a portion of Cape Fear River [Index No. 18-(26)] (including tributaries) from Smithfield Packing Company's intake, located approximately 2 miles upstream of County Road 1316, to a point approximately 0.5 miles upstream of Smithfield Packing Company's intake from Class C to Class WS-IV CA.

(2) a portion of Cape Fear River [Index No.18-(26)] (including tributaries) from a point approximately 0.5 miles upstream of Smithfield Packing Company's intake to a point approximately 1 mile upstream of Grays Creek from Class C to Class WS-IV.

(q) The schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 11, 2009 with the reclassification of all Class C NSW waters and all Class B NSW waters upstream of the dam at B. Everett Jordan Reservoir from Class C NSW and Class B NSW to Class WS-V NSW and Class WS-V & B NSW, respectively. All waters within the B. Everett Jordan Reservoir Watershed are within a designated Critical Water Supply Watershed and are subject to a special management strategy specified in 15A NCAC 02B .0262 through .0272.

(r) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective September 1, 2009 with the reclassification of a portion of the Haw River [Index No. 16-(28.5)] from the Town of Pittsboro water supply intake, which is located approximately 0.15 mile west of U.S. 15/501, to a point 0.5 mile upstream of the Town of Pittsboro water supply intake from Class WS-IV to Class WS-IV CA.

History Note: Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1);
Eff. February 1, 1976;
Amended Eff. September 1, 2009; August 11, 2009; January 1, 2009; November 1, 2007; November 1, 2004; August 1, 2002; April 1, 1999; August 1, 1998; September 1, 1994; June 1, 1994; August 3, 1992; August 1, 1990.

15A NCAC 02C .0102 DEFINITIONS

The terms used in this Subchapter shall be as defined in G.S. 87-85 and as follows, unless the context otherwise requires:

(1) "Abandon" means to discontinue the use of and to seal a well according to the requirements of 15A NCAC 02C .0113 of this Section.

(2) "Access port" means an opening in the well casing or well head installed for the primary purpose of determining the position of the water level in the well or to facilitate disinfection.

(3) "Agent" means any person who by mutual and legal agreement with a well owner has authority to act in his behalf in executing applications for permits. The agent may be either general agent or a limited agent authorized to do one particular act.

(4) "Annular Space" means the space between the casing and the walls of the borehole or outer casing, or the space between a liner pipe and well casing.

(5) "Artesian flowing well" means any well in which groundwater flows above the land surface without the use of a pump; where the static water level or hydraulic head elevation is greater than the land surface under natural conditions.

(6) "ASTM" means the American Society for Testing and Materials.

(7) "Casing" means pipe or tubing constructed of materials and having dimensions and weights as specified in the rules of this Subchapter, that is installed in a borehole, during or after completion of the borehole, to support the side of the hole and thereby prevent caving, to allow completion of a well, to prevent formation material from entering the well, to prevent the loss of drilling fluids into permeable formations, and to prevent entry of contamination.

(8) "Clay" means a substance comprised of natural, inorganic, fine-grained crystalline mineral fragments which, when mixed with water, forms a pasty, moldable mass that preserves its shape when air dried.

(9) "Commission" means the North Carolina Environmental Management Commission or its successor, unless otherwise indicated.

(10) "Consolidated rock" means rock that is firm and coherent, solidified or cemented, such as granite, gneiss, limestone, slate or sandstone, that has not been decomposed by weathering.

(11) "Contaminate" or "Contamination" means the introduction of foreign materials of such nature, quality, and quantity into the groundwaters as to exceed the groundwater quality standards specified in 15A NCAC 02L (Classifications and Water Quality Standards

Applicable to the Groundwaters of North Carolina).

[Note: 15A NCAC 02L .0202(b)(3) addresses where naturally occurring substances exceed the established standard.]

(12) "Department" is as defined in G.S. 87-85(5a).

(13) "Designed capacity" means that capacity that is equal to the yield that is specified by the well owner or his agent prior to construction of the well.

(14) "Director" means the Director of the Division of Water Quality or the Director's delegate.

(15) "Division" means the Division of Water Quality.

(16) "Domestic use" means water used for drinking, bathing, or other household purposes, livestock, or gardens.

(17) "Formation Material" means naturally occurring material generated during the drilling process that is composed of sands, silts, clays or fragments of rock and which is not in a dissolved state.

(18) "GPM" and "GPD" mean gallons per minute and gallons per day, respectively.

(19) "Grout" means a material approved in accordance with Rule .0107(e) of this Section for use in sealing the annular space of a well or liner or for sealing a well during abandonment.

(20) "Liner pipe" means pipe that is installed inside a completed and cased well for the purpose of preventing the entrance of contamination into the well or for repairing ruptured, corroded or punctured casing or screens.

(21) "Monitoring well" means any well constructed for the primary purpose of obtaining samples of groundwater or other liquids for examination or testing, or for the observation or measurement of groundwater levels. This definition excludes lysimeters, tensiometers, and other devices used to investigate the characteristics of the unsaturated zone but includes piezometers, a type of monitoring well constructed solely for the purpose of determining groundwater levels.

(22) "Owner" means any person who holds the fee or other property rights in the well being constructed.

[Note: Absent a contrary agreement in writing, the Department will presume that the well owner and the land owner are the same person.]

(23) "Pitless adapters" or "pitless units" are devices manufactured to the standards specified under 15A NCAC 02C .0107(j)(5) for the purpose of allowing a subsurface lateral connection between a well and plumbing appurtenances.

(24) "Public water system" means a water system as defined in 15A NCAC 18C (Rules Governing Public Water Supplies).

(25) "Recovery well" means any well constructed for the purpose of removing contaminated groundwater or other liquids from the subsurface.

(26) "Saline" means having a chloride concentration of more than 250 milligrams per liter.

(27) "Secretary" means the Secretary of the Department of Environment and Natural Resources or the Secretary's delegate.

(28) "Settleable solids" means the volume of solid particles in a well-mixed one liter sample which will settle out of suspension, in the bottom of an Imhoff Cone, after one hour.

(29) "Site" means the land or water area where any facility, activity or situation is physically located, including adjacent or other land used in connection with the facility, activity or situation.

(30) "Specific capacity" means the yield of the well expressed in gallons per minute per foot of draw-down of the water level (gpm/ft.-dd).

(31) "Static water level" means the level at which the water stands in the well when the well is not being pumped and is expressed as the distance from a fixed reference point to the water level in the well.

(32) "Suspended solids" means the weight of those solid particles in a sample which are retained by a standard glass microfiber filter, with pore openings of one and one-half microns, when dried at a temperature between 103 and 105 degrees Fahrenheit.

(33) "Temporary well" means a well that is constructed to determine aquifer characteristics, and which will be permanently abandoned or converted to a permanent well within seven days (168 hours) of the completion of drilling of the borehole.

(34) "Turbidity" means the cloudiness in water, due to the presence of suspended particles such as clay and silt, that may create esthetic problems or analytical difficulties for determining contamination.

(35) "Vent" means a permanent opening in the well casing or well head, installed for the purpose of allowing changes in the water level in a well due to natural atmospheric changes or to pumping. A vent may also serve as an access port.

(36) "Well" is as defined in G.S. 87-85(14).

(37) "Well capacity" means the maximum quantity of water that a well will yield continuously as determined by methods outlined in 15A NCAC 02C .0110.

(38) "Well head" means the upper terminal of the well including adapters, ports, valves, seals, and other attachments.

(39) "Well system" means two or more wells connected to the same distribution or collection system or, if not connected to a distribution or collection system, two or more wells serving the same site.

(40) "Yield" means the volume of water or other fluid per time that can be discharged from a well under a given set of circumstances.

History Note: Authority G.S. 87-85; 87-87; 143-214.2; 143-215.3;
Eff. February 1, 1976;
Amended Eff. September 1, 2009; April 1, 2001; December 1, 1992; July 1, 1988; March 1, 1985; September 1, 1984.

15A NCAC 02C .0103 REGISTRATION

History Note: Authority G.S. 87-87; 143-215.3(a)(1a); 143-355(e);
Eff. February 1, 1976;
Amended Eff. April 1, 2001; December 1, 1992; July 1, 1988; April 20, 1978;
Repealed Eff. September 1, 2009.

15A NCAC 02C .0105 PERMITS

(a) It is the finding of the Commission that the entire geographical area of the state is vulnerable to groundwater pollution from improperly located, constructed, operated, altered, or abandoned wells. Therefore, in order to ensure reasonable protection of the groundwater resources, prior permission from the Department shall be obtained for the construction of the types of wells enumerated in Paragraph (b) of this Rule.

(b) No person shall locate or construct any of the following wells until a permit has been issued by the Department:

(1) any water-well or well system with a designed capacity of 100,000 gallons per day (gpd) or greater;

(2) any well added to an existing system where the total designed capacity of such existing well system and added well will equal or exceed 100,000 gpd;

(3) any monitoring well or monitoring well system, constructed to assess hydrogeologic conditions on property not owned by the well owner;

(4) any recovery well;

(5) any well with a design deviation from the standards specified under the rules of this Subchapter, including wells for which a variance is required.

(c) The Department shall issue permits for wells used for recharge or injection purposes in accordance with 15A NCAC 02C .0200.

(d) The Department shall issue permits for private drinking water wells in accordance with 15A NCAC 02C .0300, including private drinking water wells with a designed capacity greater than 100,000 gallons per day and private drinking water wells for which a variance is required.

(e) An application for any well requiring a permit pursuant to Paragraph (b) of this Rule shall be submitted by the owner or his agent. In the event that the permit applicant is not the owner of the property on which the well or well system is to be constructed, the permit application shall contain written approval from the property owner and a statement that the applicant assumes total responsibility for ensuring that the well(s) will be located, constructed, maintained and abandoned in accordance with the requirements of this Subchapter.

(f) The application shall be submitted to the Department on forms furnished by the Department, and shall include the following:

(1) the owner's name;

(2) the owner's mailing address and proposed well site address;

(3) description of the well type and activity requiring a permit;

(4) site location (map);

(5) a map of the site, to scale, showing the locations of:

(A) all property boundaries, at least one of which is referenced to a minimum of two landmarks such as identified roads, intersections, streams or lakes within 500 feet of proposed well or well system;

(B) all existing wells, identified by type of use, within 500 feet of proposed well or well system;

(C) the proposed well or well system;

(D) any test borings within 500 feet of proposed well or well system; and

(E) all sources of known or potential groundwater contamination (such as septic tank systems; pesticide, chemical or fuel storage areas; animal feedlots, as defined by G.S. 143-215.10B(5); landfills or other waste disposal areas) within 500 feet of the proposed well.

(6) the well contractor's name and state certification number, if known; and

(7) construction diagram of the proposed well(s) including specifications describing all materials to be used, methods of construction and means for assuring the integrity and quality of the finished well(s).

(g) For water supply wells or well systems with a designed capacity of 100,000 gpd or greater the application shall include, in addition to the information required in Paragraph (f) of this Rule:

(1) the number, yield and location of existing wells in the system;

(2) the designed capacity of the proposed well(s);

(3) for wells to be screened in multiple zones or aquifers, representative data on the static water level and pH, specific conductance, and concentrations of sodium, potassium, calcium, magnesium, sulfate, chloride, and carbonates

from each aquifer or zone from which water is proposed to be withdrawn. The data submitted shall be sufficient to demonstrate that construction of the proposed well will satisfy the requirements of 15A NCAC 02C .0107(h)(2);

(4) a copy of any water use permit required pursuant to G.S. 143-215.15; and

(5) any other well construction information or site specific information deemed necessary by the Department for the protection of human health and the environment.

(h) For those monitoring wells with a design deviation from the specifications of 15A NCAC 02C .0108 of this Section, in addition to the information required in Paragraph (f) of this Rule, the application shall include:

(1) a description of the subsurface conditions sufficient to evaluate the site. Data from test borings, wells, and pumping tests may be necessary;

(2) a description of the quantity, character and origin of the contamination;

(3) justification for the necessity of the design deviation; and

(4) any other well construction information or site specific information deemed necessary by the Department for the protection of human health and the environment.

(i) For those recovery wells with a design deviation from the specifications in 15A NCAC 02C .0108 of this Section, in addition to the information required in Paragraphs (f) and (h) of this Rule, the application shall describe the disposition of any fluids recovered if the disposal of those fluids will have an impact on any existing wells other than those installed for the express purpose of measuring the effectiveness of the recovery well(s).

(j) In the event of an emergency, any well listed in Subparagraph (b)(1) through (b)(4) of this Rule may be constructed after verbal approval is provided by the Department. After-the-fact applications shall be submitted by the person responsible for drilling or owner within ten days after construction begins. The application shall include construction details of the well(s) and include the name of the person who gave verbal approval and the time and date that approval was given.

(k) The well owner or his agent shall see that a permit is secured prior to the beginning of construction of any well for which a permit is required under the rules of this Subchapter.

History Note: Authority G.S. 87-87; 143-215.1;
Eff. February 1, 1976;
Amended Eff. September 1, 2009; April 1, 2001; December 1, 1992; March 1, 1985; September 1, 1984; April 20, 1978.

15A NCAC 02C .0107 STANDARDS OF CONSTRUCTION: WATER SUPPLY WELLS

(a) Location.

(1) A water supply well shall not be located in any area where surface water or runoff will accumulate around the well due to depressions, drainage ways, and other landscapes that will concentrate water around the well.

(2) The minimum horizontal separation between a water supply well and potential sources of groundwater contamination, which exist at the time the well is constructed, is as follows unless otherwise specified:

(A) Septic tank and drainfield, including drainfield repair area 100 feet

(B) Other subsurface ground absorption waste disposal system 100 feet

(C) Industrial or municipal residuals disposal or wastewater-irrigation sites 100 feet

(D) Sewage or liquid-waste collection or transfer facility constructed to water main standards in accordance with 15A NCAC 02T .0305(g)(2) or 15A NCAC 18A .1950(e), as applicable 50 feet

(E) Other sewage and liquid-waste collection or transfer facility 100 feet

(F) Cesspools and privies 100 feet

(G) Animal feedlots, as defined by G.S. 143-215.10B(5), or manure piles 100 feet

(H) Fertilizer, pesticide, herbicide or other chemical storage areas 100 feet

(I) Non-hazardous waste storage, treatment or disposal lagoons 100 feet

(J) Sanitary landfills, municipal solid waste landfill facilities, incinerators, construction and demolition (C&D) landfills and other disposal sites except Land Clearing and Inert Debris landfills 500 feet

(K) Land Clearing and Inert Debris (LCID) landfills 100 feet

(L) Animal barns 100 feet

(M) Building perimeters, including any attached structures 25 feet

(N) Surface water bodies which act as sources of groundwater recharge, such as ponds, lakes and reservoirs 50 feet

(O) All other surface water bodies, such as brooks, creeks, streams, rivers, sounds, bays and tidal estuaries 25 feet

(P) Chemical or petroleum fuel underground storage tank systems regulated under 15A NCAC 02N:

(i) with secondary containment 50 feet

(ii) without secondary containment 100 feet

(Q) Above ground or underground storage tanks which contain petroleum fuels used for heating equipment, boilers or furnaces, with the exception of tanks used solely for storage of propane, natural gas, or liquefied petroleum gas 50 feet

(R) All other petroleum or chemical storage tank systems 100 feet

(S) Gravesites 50 feet

(T) All other potential sources of groundwater contamination 50 feet

(3) For a water supply well [as defined in G.S. 87-85(13)] on a lot serving a single-family dwelling and intended for domestic use, where lot size or other fixed conditions preclude the separation distances specified in Subparagraph (a)(2) of this Rule, the required horizontal separation distances shall be the maximum possible but shall in no case be less than the following:

(A) Septic tank and drainfield, including drainfield repair areas, except saprolite systems as defined in 15A NCAC 18A .1956(6) 50 feet

(B) Sewage or liquid-waste collection or transfer facility constructed to water main standards in accordance with 15A NCAC 02T .0305(g)(2) or 15A NCAC 18A .1950(e), as applicable 25 feet

(C) Animal barns 50 feet

Minimum separation distances for all other potential sources of groundwater contamination shall be those specified in Subparagraph (a)(2) of this Rule.

(4) In addition to the minimum separation distances specified in Subparagraph (a)(2) of this Rule, a well or well system with a designed capacity of 100,000 gpd or greater shall be located a sufficient distance from known or anticipated sources of groundwater contamination so as to prevent a violation of applicable groundwater quality standards, resulting from the movement of contaminants, in response to the operation of the well or well system at the proposed rate and schedule of pumping.

(5) Wells drilled for public water supply systems regulated by the Division of Environmental Health shall meet the requirements of 15A NCAC 18C.

(b) Source of water.

(1) The source of water for any water supply well shall not be from a water bearing zone or aquifer that is contaminated;

(2) In designated areas described in 15A NCAC 02C .0117 of this Section, the source shall be greater than 35 feet below land surface;

(3) In designated areas described in 15A NCAC 02C .0116 of this Section, the source may be less than 20 feet below land surface, but in no case less than 10 feet below land surface;

(4) For wells constructed with separation distances less than those specified in Subparagraph (a)(2) of this Rule based on lot size or other fixed conditions as specified in Subparagraph (a)(3) of this Rule, the source shall be greater than 35 feet below land surface except in areas described in Rule .0116 of this Section; and

(5) In all other areas the source shall be at least 20 feet below land surface.

(c) Drilling Fluids and Additives. Drilling Fluids and Additives shall not contain organic or toxic substances or include water obtained from surface water bodies or water from a non-potable supply and may be comprised only of:

(1) the formational material encountered during drilling; or

(2) materials manufactured specifically for the purpose of borehole conditioning or water well construction.

(d) Casing.

(1) If steel casing is used:

(A) The casing shall be new, seamless or electric-resistance welded galvanized or black steel pipe. Galvanizing shall be done in accordance with requirements of ASTM A53/A53M-07, which is hereby incorporated by reference, including subsequent amendments and editions, and can be obtained from ASTM International, 100 Barr Harbor Drive, PO Box C 700, West Conshohocken, PA, 19428-2959 at a cost of fifty-one dollars ($51.00);

(B) The casing, threads and couplings shall meet or exceed the specifications of ASTM A53/A53M-07 or A589/589M-06, which is hereby incorporated by reference, including subsequent amendments and editions, and can be obtained from ASTM International, 100 Barr Harbor Drive, PO Box C 700, West Conshohocken, PA, 19428-2959 at a cost of $ fifty-one dollars ($51.00) and forty-three dollars ($43.00), respectively;

(C) The wall thickness for a given diameter shall equal or exceed that specified in Table 1;

TABLE 1: MINIMUM WALL THICKNESS FOR STEEL CASING:

Nominal Diameter (inches)	Wall Thickness (inches)
For 3.5 inch or smaller pipe, schedule 40 is required	
4	0.142
5	0.156
5.5	0.164
6	0.185
8	0.250
10	0.279
12	0.330
14 and larger	0.375

(D) Stainless steel casing, threads, and couplings shall conform in specifications to the general requirements in ASTM A530/A530M-04a, which is hereby incorporated by reference, including subsequent amendments and editions, and can be obtained from ASTM International, 100 Barr Harbor Drive, PO Box C 700, West Conshohocken, PA, 19428-2959 at a cost of thirty-seven dollars ($37.00), and also shall conform to the specific requirements in the ASTM standard that best describes the chemical makeup of the stainless steel casing that is intended for use in the construction of the well;

(E) Stainless steel casing shall have a minimum wall thickness that is equivalent to standard schedule number 10S; and

(F) Steel casing shall be equipped with a drive shoe if the casing is driven in a consolidated rock formation. The drive shoe shall be made of forged, high carbon, tempered seamless steel and shall have a beveled, hardened cutting edge.

(2) If Thermoplastic Casing is used:

(A) The casing shall be new;

(B) The casing and joints shall meet or exceed all the specifications of ASTM F480-06b, except that the outside diameters shall not be restricted to those listed in ASTM F480-06b, which is hereby incorporated by reference, including subsequent amendments and editions, and can be obtained from ASTM International, 100 Barr Harbor Drive, PO Box C 700, West Conshohocken, PA, 19428-2959 at a cost of fifty-one dollars ($51.00);

(C) The depth of installation for a given SDR or Schedule number shall not exceed that listed in Table 2 unless, upon request of the Department, written documentation from the manufacturer of the casing stating that the casing may safely be used at

the depth at which it is to be installed is provided.

TABLE 2: Maximum allowable depths (in feet) of Installation of Thermoplastic Water Well Casing

Nominal Diameter (inches)	Maximum Depth (in feet) for Schedule 40	Maximum Depth (in feet) for Schedule 80
2	485	1460
3	415	1170
3.5	315	920
4	253	755
5	180	550
6	130	495
8	85	340
10	65	290
12	65	270
14	50	265
16	50	255

	Maximum Depth (in feet) for SDR 21	Maximum Depth (in feet) for SDR 17	Maximum Depth (in feet) for SDR 13.5
All Diameters	185	355	735

(D) Thermoplastic casing with wall thickness less than that corresponding to SDR 21 or Schedule 40 shall not be used;

(E) For wells in which the casing will extend into consolidated rock, thermoplastic casing shall be equipped with a coupling, or other device approved by the manufacturer of the casing, that is sufficient to protect the physical integrity of the thermoplastic casing during the processes of seating and grouting the casing and subsequent drilling operations; and

(F) Thermoplastic casing shall not be driven by impact, but may be pushed.

(3) In constructing any well, all water-bearing zones that contain contaminated, saline, or other non-potable water shall be cased and grouted so that contamination of overlying and underlying groundwater zones shall not occur.

(4) Every well shall be cased so that the bottom of the casing extends to a minimum depth as follows:

(A) Wells located within the area described in Rule .0117 of this Section shall be cased from land surface to a depth of at least 35 feet.

(B) Wells located within the area described in Rule .0116 of this Section shall be cased from land surface to a depth of at least 10 feet.

(C) Wells constructed with separation distances less than those specified in Subparagraph (a)(2) of this Rule based on lot size or other fixed conditions as specified in

Subparagraph (a)(3) of this Rule shall be cased from land surface to a depth of at least 35 feet except in areas described in Rule .0116 of this Section.

(D) Wells located in any other area shall be cased from land surface to a depth of at least 20 feet.

(5) The top of the casing shall be terminated at least 12 inches above land surface, regardless of the method of well construction and type of pump to be installed.

(6) The casing in wells constructed to obtain water from a consolidated rock formation shall meet the requirements specified in Subparagraphs (d)(1) through (d)(5) of this Rule and shall be:

(A) adequate to prevent any formational material from entering the well in excess of the levels specified in Paragraph (h) of this Rule; and

(B) firmly seated at least five feet into the rock.

(7) The casing in wells constructed to obtain water from an unconsolidated rock formation (such as gravel, sand or shells) shall extend at least one foot into the top of the water-bearing formation.

(8) Upon completion of the well, the well shall be sufficiently free of obstacles including formation material as necessary to allow for the installation and proper operation of pumps and associated equipment.

(9) Prior to removing equipment from the site, the top of the casing shall be sealed with a water-tight cap or well seal, as defined in G.S. 87-85(16), to preclude the entrance of contaminants into the well.

(e) Allowable Grouts.

(1) One of the following grouts shall be used wherever grout is required by a rule of this Section. Where a particular type of grout is specified by a Rule of this Section, no other type of grout shall be used.

(A) Neat cement grout shall consist of a mixture of not more than six gallons of clear, potable water to one 94 pound bag of Portland cement. Up to five percent, by weight, of bentonite may be used to improve flow and reduce shrinkage. If bentonite is used, additional water may be added at a rate not to exceed 0.6 gallons of water for each pound of bentonite.

(B) Sand cement grout shall consist of a mixture of not more than two parts sand and one part cement and not more than six gallons of clear, potable water per 94 pound bag of Portland cement.

(C) Concrete grout shall consist of a mixture of not more than two parts gravel or rock cuttings to one part cement and not more than six gallons of clear, potable water per 94 pound bag of Portland cement. One hundred percent of the gravel or rock cuttings must be able to pass through a one-half inch mesh screen.

(D) Bentonite slurry grout shall consist of a mixture of not more than 24 gallons of clear, potable water to one 50 pound bag of commercial sodium bentonite. Non-organic, non-toxic substances may be added to bentonite slurry grout mixtures to improve particle distribution and pumpability. Bentonite slurry grout may only be used in accordance with the manufacturer's written instructions.

(E) Bentonite chips or pellets shall consist of pre-screened sodium bentonite chips or compressed sodium bentonite pellets with largest dimension of at least one-fourth inch but not greater than one-fifth of the width of the annular space into which they are to be placed. Bentonite chips or pellets shall be hydrated in place. Bentonite chips or pellets may only be used in accordance with the manufacturer's written instructions.

(F) Specialty grout shall consist of a mixture of non-organic, non-toxic materials with characteristics of expansion, chemical-resistance, rate or heat of hydration, viscosity, density or temperature-sensitivity applicable to specific grouting requirements. Specialty grouts may not be used without prior approval by the Secretary. Approval of the use of specialty grouts shall be based on a demonstration that the finished grout has a permeability less than 10^{-6} centimeters per second and will not adversely impact human health or the environment.

(2) With the exception of bentonite chips or pellets, the liquid and solid components of all grout mixtures shall be blended prior to emplacement below land surface.

(3) No fly ash, other coal combustion byproducts, or other wastes may be used in any grout.

(f) Grout emplacement.

(1) Casing shall be grouted to a minimum depth of twenty feet below land surface except that:

(A) In those areas designated by the Director to meet the criteria of Rule

.0116 of this Section, grout shall extend to a depth of two feet above the screen or, for open end wells, to the bottom of the casing, but in no case less than 10 feet.

(B) In those areas designated in Rule .0117 of this Section, grout shall extend to a minimum of 35 feet below land surface.

(2) In addition to the grouting required by Subparagraph (f)(1) of this Rule, the casing shall be grouted as necessary to seal off all aquifers or zones that contain contaminated, saline, or other non-potable water so that contamination of overlying and underlying aquifers or zones shall not occur.

(3) Bentonite slurry grout may be used in that portion of the borehole that is at least three feet below land surface. That portion of the borehole from land surface to at least three feet below land surface shall be filled with a concrete or cement-type grout or bentonite chips or pellets that are hydrated in place.

(4) Grout shall be placed around the casing by one of the following methods:

(A) Pressure. Grout shall be pumped or forced under pressure through the bottom of the casing until it fills the annular space around the casing and overflows at the surface;

(B) Pumping. Grout shall be pumped into place through a hose or pipe extended to the bottom of the annular space which can be raised as the grout is applied. The grout hose or pipe shall remain submerged in grout during the entire application; or

(C) Other. Grout may be emplaced in the annular space by gravity flow in such a way to ensure complete filling of the space. Gravity flow shall not be used if water or any visible obstruction is present in the annular space within the applicable minimum grout depth specified in Subparagraph (f)(1) of this Rule at the time of grouting, with the exception that bentonite chips or pellets may be used if water is present, if designed for that purpose.

(5) If a Rule of this Section requires grouting of the casing to a depth greater than 20 feet below land surface, the pumping or pressure method shall be used to grout that portion of the borehole deeper than 20 feet below land surface, with the exception of bentonite chips and pellets, used in accordance with Part (f)(4)(C) of this Rule.

(6) If an outer casing is installed, it shall be grouted by either the pumping or pressure method.

(7) Bentonite chips or pellets shall be used in compliance with all manufacturer's instructions including pre-screening the material to eliminate fine-grained particles, installation rates, hydration methods, tamping, and other measures to prevent bridging.

(8) Bentonite grout shall not be used to seal zones of water with a chloride concentration of 1,500 milligrams per liter or greater.

(9) The well shall be grouted within seven days after the casing is set.

(10) No additives which will accelerate the process of hydration shall be used in grout for thermoplastic well casing.

(11) Where grouting is required by the provisions of this Section, the grout shall extend outward in all directions from the casing wall to a minimum thickness equal to either one-third of the diameter of the outside dimension of the casing or two inches, whichever is greater; but in no case shall a well be required to have an annular grout seal thickness greater than four inches.

(12) For wells constructed in locations where flowing artesian conditions are encountered or expected to occur, the well shall be adequately grouted to protect the artesian aquifer, prevent erosion of overlying material and confine the flow within the casing.

(g) Well Screens.

(1) The well, if constructed to obtain water from an unconsolidated rock formation, shall be equipped with a screen that will prevent the entrance of formation material into the well after the well has been developed and completed.

(2) The well screen shall be of a design to permit the optimum development of the aquifer with minimum head loss consistent with the intended use of the well. The openings shall be designed to prevent clogging and shall be free of rough edges, irregularities or other defects that may accelerate or contribute to corrosion or clogging.

(3) Multi-screen wells shall not connect aquifers or zones which have differences in water quality which would result in contamination of any aquifer or zone.

(h) Gravel-and Sand-Packed Wells.

(1) In constructing a gravel-or sand-packed well:

(A) The packing material shall be composed of quartz, granite, or similar mineral or rock material and shall be clean, of uniform size, water-washed and free from clay, silt, or other deleterious material.

(B) The size of the packing material shall be determined from a grain size analysis of the formation material and shall be of a size sufficient to prohibit the entrance of formation material into the well in concentrations above those permitted by Paragraph (i) of this Rule.

(C) The packing material shall be placed in the annular space around the screens and casing by a fluid circulation method to ensure accurate placement and avoid bridging.

(D) The packing material shall be disinfected.

(2) The packing material shall not connect aquifers or zones which have differences in water quality that would result in contamination of any aquifer or zone.

(i) All water supply wells shall be developed by the well contractor. Development shall include removal of formation materials, mud, drilling fluids and additives such that the water contains no more than:

(1) five milliliters per liter of settleable solids; and

(2) 10 NTUs of turbidity as suspended solids.

Development does not require efforts to reduce or eliminate the presence of dissolved constituents which are indigenous to the ground water quality in that area.

(j) Well Head Completion.

(1) Access Port. Every water supply well shall be equipped with a usable access port or air line, except those with a multi-pipe deep well jet pump or adapter mounted on the well casing or well head, and wells with casing two inches or less in diameter where a suction pipe is connected to a suction lift pump. The access port shall be at least one half inch inside diameter opening so that the position of the water level can be determined at any time. The port shall be installed and maintained in such manner as to prevent entrance of water or foreign material.

(2) Well Contractor Identification Plate.

(A) An identification plate, showing the well contractor and certification number and the information specified in Part (j)(2)(E) of this Rule, shall be installed on the well within 72 hours after completion of the drilling.

(B) The identification plate shall be constructed of a durable weatherproof, rustproof metal, or other material approved by the Department as equivalent.

(C) The identification plate shall be permanently attached to either the aboveground portion of the well casing, surface grout pad or enclosure floor around the casing where it is readily visible and in a manner that does not obscure the information on the identification plate.

(D) The identification plate shall not be removed by any person.

(E) The identification plate shall be stamped to show the:

(i) total depth of well;

(ii) casing depth (feet) and inside diameter (inches);

(iii) screened intervals of screened wells;

(iv) packing interval of gravel-or sand-packed wells;

(v) yield, in gallons per minute (gpm), or specific capacity in gallons per minute per foot of drawdown (gpm/ft.-dd);

(vi) static water level and date measured;

(vii) date well completed; and

(viii) the well construction permit number or numbers, if such a permit is required.

(3) Pump Installation Information Plate.

(A) An information plate, showing the well contractor and certification number of the person installing the pump, and the information specified in Part (j)(3)(D) of this Rule, shall be permanently attached to either the aboveground portion of the well casing, surface grout pad or the enclosure floor, if present, where it is readily visible and in a manner that does not obscure the information on the identification plate within 72 hours after completion of the pump installation;

(B) The information plate shall be constructed of a durable waterproof, rustproof metal, or other material approved by the Department as equivalent;

(C) The information plate shall not be removed by any person; and

(D) The information plate shall be stamped or engraved to show the:

(i) date the pump was installed;

(ii) the depth of the pump intake; and

(iii) the horsepower rating of the pump.

(4) Controlled flow. Every artesian flowing well shall be constructed, equipped and operated to prevent the unnecessary discharge of water. Flow shall be completely stopped unless the discharge is for beneficial use and only for the

duration of that beneficial use. Flow discharge control shall be provided to conserve the groundwater resource and prevent or reduce the loss of artesian hydraulic head. Flow control may consist of valved pipe connections, watertight pump connections, receiving tank, flowing well pitless adapter, packer or other methods approved by the Department to prevent the loss of artesian hydraulic head and stop the flow of water as referenced in G.S. 87-88(d). Well owners are responsible for the operation and maintenance of the valve.

(5) Pitless adapters or pitless units are allowed as a method of well head completion under the following conditions:

(A) Design, installation and performance standards are those specified in PAS-97(04), which is hereby incorporated by reference, including subsequent amendments and editions, and can be obtained from the Water System Council National Programs Office, 1101 30th Street, N.W., Suite 500, Washington, DC 20007 at no cost;

(B) The pitless device is compatible with the well casing;

(C) The top of the pitless unit extends at least 12 inches above land surface;

(D) The excavation surrounding the casing and pitless device is filled with grout from the top of the casing grout to the land surface; and

(E) The pitless device has an access port.

(6) All openings for piping, wiring, and vents shall enter into the well at least 12 inches above land surface, except where pitless adapters or pitless units are used, and shall be adequately sealed to preclude the entrance of contaminants into the well.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. May 14, 2001; December 1, 1992; March 1, 1985;
Temporary Amendment Eff. August 3, 2001; September 1, 1984;
April 20, 1978;
Amended Eff. September 1, 2009; August 1, 2003.

15A NCAC 02C .0108 STANDARDS OF CONSTRUCTION: WELLS OTHER THAN WATER SUPPLY

(a) No well shall be located, constructed, operated, or repaired in any manner that may adversely impact the quality of groundwater.

(b) Injection wells shall conform to the standards set forth in Section .0200 of this Subchapter.

(c) Monitoring wells and recovery wells shall be located, designed, constructed, operated and abandoned with materials and by methods which are compatible with the chemical and physical properties of the contaminants involved, specific site conditions and specific subsurface conditions.

(d) Monitoring well and recovery well boreholes shall not penetrate to a depth greater than the depth to be monitored or the depth from which contaminants are to be recovered. Any portion of the borehole that extends to a depth greater than the depth to be monitored or the depth from which contaminants are to be recovered shall be grouted completely to prevent vertical migration of contaminants.

(e) The well shall not hydraulically connect:

(1) separate aquifers; or

(2) those portions of a single aquifer where contamination occurs in separate and definable layers within the aquifer.

(f) The well construction materials shall be compatible with the depth of the well and any contaminants to be monitored or recovered.

(g) The well shall be constructed in such a manner that water or contaminants from the land surface cannot migrate along the borehole annulus into any packing material or well screen area.

(h) In non-water supply wells, packing material placed around the screen shall extend at least one foot above the top of the screen. Unless the depth of the screen necessitates a thinner seal, a one foot thick seal, comprised of chip or pellet bentonite or other material approved by the Department as equivalent, shall be emplaced directly above and in contact with the packing material.

(i) In non-water supply wells, grout shall be placed in the annular space between the outermost casing and the borehole wall from the land surface to the top of the bentonite seal above any well screen or to the bottom of the casing for open end wells. The grout shall comply with Paragraph (e) of Rule .0107 of this Section except that the upper three feet of grout shall be concrete or cement grout.

(j) All wells shall be grouted within seven days after the casing is set. If the well penetrates any water-bearing zone that contains contaminated or saline water, the well shall be grouted within one day after the casing is set.

(k) All non-water supply wells, including temporary wells, shall be secured with a locking well cap to ensure against unauthorized access and use.

(l) All non-water supply wells shall be equipped with a steel outer well casing or flush-mount cover, set in concrete, and other measures sufficient to protect the well from damage by normal site activities.

(m) Any well that would flow under natural artesian conditions shall be valved so that the flow can be regulated.

(n) In non-water supply wells, the well casing shall be terminated no less than 12 inches above land surface unless all of the following conditions are met:

(1) site-specific conditions directly related to business activities, such as vehicle traffic, would endanger the physical integrity of the well; and

(2) the well head is completed in such a manner so as to preclude surficial contaminants from entering the well.

(o) Each non-water supply well shall have permanently affixed an identification plate. The identification plate shall be

constructed of a durable, waterproof, rustproof metal or other material approved by the Department as equivalent and shall contain the following information:

(1) well contractor name and certification number;
(2) date well completed;
(3) total depth of well;
(4) a warning that the well is not for water supply and that the groundwater may contain hazardous materials;
(5) depth(s) to the top(s) and bottom(s) of the screen(s); and
(6) the well identification number or name assigned by the well owner.

(p) Each non-water supply well shall be developed such that the level of turbidity or settleable solids does not preclude accurate chemical analyses of any fluid samples collected or adversely affect the operation of any pumps or pumping equipment.

(q) Wells constructed for the purpose of monitoring or testing for the presence of liquids associated with tanks regulated under 15A NCAC 02N (Criteria and Standards Applicable to Underground Storage Tanks) shall be constructed in accordance with 15A NCAC 02N .0504.

(r) Wells constructed for the purpose of monitoring for the presence of vapors associated with tanks regulated under 15A NCAC 02N shall:

(1) be constructed in such a manner as to prevent the entrance of surficial contaminants or water into or alongside the well casing; and
(2) be provided with a lockable cap in order to reasonably ensure against unauthorized access and use.

(s) Temporary wells and all other non-water supply wells shall be constructed in such a manner as to preclude the vertical migration of contaminants within and along the borehole channel.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. September 1, 2009, April 1, 2001; December 1, 1992; September 1, 1984; April 20, 1978.

15A NCAC 02C .0109 PUMPS AND PUMPING EQUIPMENT

(a) The pumping capacity of the pump shall be consistent with the intended use and yield characteristics of the well.

(b) The pump and related equipment for the well shall be located to permit easy access and removal for repair and maintenance.

(c) The base plate of a pump placed directly over the well shall be designed to form a watertight seal with the well casing or pump foundation.

(d) In installations where the pump is not located directly over the well, the annular space between the casing and pump intake or discharge piping shall be closed with a watertight seal. .

(e) The well head shall be equipped with a screened vent to allow for the pressure changes within the well except if a suction lift pump or single-pipe jet pump is used or artesian, flowing well conditions are encountered.

(f) The person installing the pump in any water supply well shall install a threadless sampling tap at the wellhead for obtaining water samples except:

(1) In the case of suction pump or offset jet pump installations the threadless sampling tap shall be installed on the return (pressure) side of the pump piping, and
(2) In the case of pitless adapter installations, the threadless sampling tap shall be located immediately upstream of the water storage tank.
(3) If the wellhead is also equipped with a threaded hose bibb in addition to the threadless sampling tap, the hose bibb shall be fitted with a backflow preventer or vacuum breaker.

The threadless sampling tap shall be turned downward, located a minimum of 12 inches above land surface, floor, or well pad, and positioned such that a water sample can be obtained without interference from any part of the wellhead.

(g) A priming tee shall be installed at the well head in conjunction with offset jet pump installations.

(h) Joints of any suction line installed underground between the well and pump shall be tight under system pressure.

(i) The drop piping and electrical wiring used in connection with the pump shall meet all applicable underwriters specifications.

(j) Only potable water shall be used for priming the pump.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. September 1, 2009, December 1, 1992; April 20, 1978.

15A NCAC 02C .0110 WELL TESTS FOR YIELD

(a) Every domestic well shall be tested for capacity by one of the following methods:

(1) Pump Method
  (A) select a permanent measuring point, such as the top of the casing;
  (B) measure and record the static water level below or above the measuring point prior to starting the pump;
  (C) measure and record the discharge rate at intervals of 10 minutes or less;
  (D) measure and record water levels using a steel or electric tape at intervals of 10 minutes or less;
  (E) continue the test for a period of at least one hour; and
  (F) make measurements within an accuracy of plus or minus one inch.
(2) Bailer Method
  (A) select a permanent measuring point, such as the top of the casing;
  (B) measure and record the static water level below or above the measuring point prior to starting the bailing procedure;

(C) bail the water out of the well as rapidly as possible for a period of at least one hour; determine and record the bailing rate in gallons per minute at the end of the bailing period; and

(D) measure and record the water level immediately after stopping bailing process.

(3) Air Rotary Drill Method

(A) measure and record the amount of water being injected into the well during drilling operations;

(B) measure and record the discharge rate in gallons per minute at intervals of one hour or less during drilling operations;

(C) after completion of the drilling, continue to blow the water out of the well for at least 30 minutes and measure and record the discharge rate in gallons per minute at intervals of 10 minutes or less during the period; and

(D) measure and record the water level immediately after discharge ceases.

(4) Air Lift Method. Measurements shall be made through a pipe placed in the well. The pipe shall have a minimum inside diameter of at least five-tenths of an inch and shall extend from top of the well head to a point inside the well that is below the bottom of the air line.

(A) Measure and record the static water level prior to starting the air compressor;

(B) Measure and record the discharge rate at intervals of 10 minutes or less;

(C) Measure and record the pumping level using a steel or electric tape at intervals of 10 minutes or less; and

(D) Continue the test for a period of at least one hour.

(b) Public, Industrial and Irrigation Wells. Every industrial or irrigation well and, if required by rule adopted by the Commission for Public Health, every well serving a public water supply system upon completion, shall be tested for capacity by the following or equivalent method:

(1) The water level in the well to be pumped and any observation wells shall be measured and recorded prior to starting the test.

(2) The well shall be tested by a pump of sufficient size and lift capacity to test the yield of the well, consistent with the well diameter and purpose.

(3) The pump shall be equipped with sufficient throttling devices to reduce the discharge rate to approximately 25 percent of the maximum capacity of the pump.

(4) The test shall be conducted for a period of at least 24 hours without interruption and, except for wells constructed in Coastal Plain aquifers, shall be continued for a period of at least four hours after the pumping water level stabilizes (ceases to decline). If the total water requirements for wells not serving a public water supply system are less than 100,000 gpd, the well shall be tested for a period and in a manner to show the capacity of the well, or that the capacity of the well is sufficient to meet the intended purpose.

(5) The pump discharge shall be set at a constant rate or rates that can be maintained throughout the testing period. If the well is tested at two or more pumping rates (a step-drawdown test), pumping at each pumping rate shall continue to the point that the pumping water level declines no more than 0.1 feet per hour for a period of at least four hours for each pumping rate, except for wells constructed to Coastal Plain aquifers. In wells constructed in Coastal Plain aquifers, pumping at each pumping rate shall continue for at least four hours.

(6) The pump discharge rate shall be measured by an orifice meter, flowmeter, weir, or equivalent metering device. The metering device shall have an accuracy within plus or minus five percent.

(7) The discharge rate of the pump and time shall be measured and recorded at intervals of 10 minutes or less during the first two hours of the pumping period for each pumping rate. If the pumping rate is relatively constant after the first two hours of pumping, discharge measurements and recording may be made at longer time intervals but not to exceed one hour.

(8) The water level in each well and time shall be measured and recorded at intervals of five minutes or less during the first hour of pumping and at intervals of 10 minutes or less during the second hour of pumping. After the second hour of pumping, the water level in each well shall be measured at such intervals that the lowering of the pumping water level does not exceed three inches between measurements.

(9) A reference point for water level measurements (preferably the top of the casing) shall be selected and recorded for the pumping well and each observation well to be measured during the test. All water level measurements shall be made from the selected reference points.

(10) All water level measurements shall be made with a steel or electric tape or equivalent measuring device.

(11) All water level measurements shall be made within an accuracy of plus or minus one inch.

(12) After the completion of the pumping period, measurements of the water level recovery rate in the pumped well shall be made for a period of at least two hours in the same manner as the drawdown.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. 1, 2009, April 1, 2001; December 1, 1992; September 1, 1984; April 20, 1978.

15A NCAC 02C .0111 DISINFECTION OF WATER SUPPLY WELLS

(a) Any person constructing, repairing, testing, or performing maintenance, or installing a pump in a water supply well shall disinfect the well upon completion of construction, repairs, testing, maintenance, or pump installation.

(b) Any person disinfecting a well shall perform disinfection in accordance with the following procedures:

(1) Chlorination.

(A) Hypochlorite shall be placed in the well in sufficient quantities to produce a chlorine residual of at least 100 parts per million (ppm) in the well. Stabilized chlorine tablets or hypochlorite products containing fungicides, algaecides, or other disinfectants shall not be used. Chlorine test strips or other quantitative test methods shall be used to confirm the concentration of the chlorine residual.

[Note: About three ounces of hypochlorite containing 65 percent to 75 percent available chlorine is needed per 100 gallons of water for at least a 100 ppm chlorine residual. As an example, a well having a diameter of six inches, has a volume of about 1.5 gallons per foot. If the well has 200 feet of water, the minimum amount of hypochlorite required would be 9 ounces. (1.5 gallons/foot x 200 feet = 300 gallons at 3 ounces per 100 gallons; 3 ounces x 3 = 9 ounces.)]

(B) The hypochlorite shall be placed in the well by one of the following or equivalent methods:

(i) Granular hypochlorite may be dropped in the top of the well and allowed to settle to the bottom; or

(ii) Hypochlorite solutions shall be placed in the bottom of the well by using a bailer or by pouring the solution through the drill rod, hose, or pipe placed in the bottom of the well. The solution shall be flushed out of the drill rod, hose, or pipe by using water or air.

(C) The water in the well shall be agitated or circulated to ensure thorough dispersion of the chlorine.

(D) The well casing, pump column and any other equipment above the water level in the well shall be rinsed with the chlorine solution as a part of the disinfecting process.

(E) The chlorine solution shall stand in the well for a period of at least 24 hours.

(F) The well shall be pumped until there is no detectable total chlorine residual in water pumped from the well before the well is placed in use.

(2) Other materials and methods of disinfection, at least as effective as those in Subparagraph (1) of this Paragraph, may be used upon prior approval by the Department.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. September 1, 2009, April 1, 2001; December 1, 1992; July 1, 1988; September 1, 1984.

15A NCAC 02C .0112 WELL MAINTENANCE: REPAIR: GROUNDWATER RESOURCES

(a) Every well shall be maintained by the owner in a condition whereby it will conserve and protect the groundwater resources, and whereby it will not be a source or channel of contamination or pollution to the water supply or any aquifer, or the well shall be permanently abandoned in accordance with the requirements of 15A NCAC 02C .0113(b).

(b) Dewatering wells shall be permanently abandoned in accordance with the requirements of 15A NCAC 02C .0113(b) within 30 days of completion of the dewatering activity.

(c) All materials used in the maintenance, replacement, or repair of any well shall meet the requirements for new installation.

(d) Broken, punctured or otherwise defective or unserviceable casing, screens, fixtures, seals, or any part of the well head shall be repaired or replaced, or the well shall be permanently abandoned pursuant to the requirements of Rule .0113(b) of this Section.

(e) NSF International (NSF) approved PVC pipe rated at 160 PSI may be used for liner pipe. The annular space around the liner casing shall be at least five-eighths inches and shall be completely filled with neat-cement grout or sand cement grout. The well liner shall be completely grouted within 10 working days after collection of water samples or completion of other testing to confirm proper placement of the liner or within 10 working days after the liner has been installed if no sampling or testing is performed.

(f) No well shall be repaired or altered such that the outer casing is completed less than 12 inches above land surface. Any grout

excavated or removed as a result of the well repair shall be replaced in accordance with Rule .0107(f) of this Section.

(g) Well rehabilitation by noncontinuous chemical treatment shall be conducted using methods and materials approved by the Department based on a demonstration that the materials and methods used will not create a violation of groundwater standards in 15A NCAC 02L or otherwise render the groundwater unsuitable for its intended best usage after completion of the rehabilitation.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. September 1, 2009, August 1, 2002; April 1, 2001; December 1, 1992; September 1, 1984.

15A NCAC 02C .0113 ABANDONMENT OF WELLS

(a) Any well which is temporarily removed from service shall be temporarily abandoned in accordance with the following procedures:

(1) The well shall be sealed with a water-tight cap or well seal, as defined in G.S. 87-85 (16), compatible with the casing and installed so that it cannot be removed without the use of hand tools or power tools.

(2) The well shall be maintained whereby it is not a source or channel of contamination during temporary abandonment.

(b) Permanent abandonment of water supply wells other than bored or hand dug wells shall be performed in accordance with the following procedures:

(1) All casing and screen materials may be removed prior to initiation of abandonment procedures if such removal will not cause or contribute to contamination of the groundwaters. Any casing not grouted in accordance with 15A NCAC 02C .0107(f) shall be removed or grouted in accordance with 15A NCAC 02C .0107(f).

(2) The entire depth of the well shall be sounded before it is sealed to ensure freedom from obstructions that may interfere with sealing operations.

(3) Except in the case of temporary wells and monitoring wells, the well shall be disinfected in accordance with Rule .0111(b)(1)(A) through .0111(b)(1)(C) of this Section.

(4) In the case of gravel-packed wells in which the casing and screens have not been removed, neat-cement, or bentonite slurry grout shall be injected into the well completely filling it from the bottom of the casing to the top.

(5) Wells constructed in unconsolidated formations shall be completely filled with grout by introducing it through a pipe extending to the bottom of the well which can be raised as the well is filled.

(6) Wells constructed in consolidated rock formations or that penetrate zones of consolidated rock may be filled with grout, sand, gravel or drill cuttings opposite the zones of consolidated rock. The top of any sand, gravel or cutting fill shall terminate at least 10 feet below the top of the consolidated rock or five feet below the bottom of casing. Grout shall be placed beginning 10 feet below the top of the consolidated rock or five feet below the bottom of casing in a manner to ensure complete filling of the casing, and extend up to land surface. For any well in which the depth of casing or the depth of the bedrock is not known or cannot be confirmed, the entire length of the well shall be filled with grout up to land surface.

(c) For bored wells or hand dug water supply wells, constructed into unconsolidated material:

(1) The well shall be disinfected in accordance with Rule .0111(b)(1)(A) through .0111(b)(1)(C) of this [Section.

(2) All plumbing or piping in the well and any other obstructions inside the well shall be removed from the well.

(3) The uppermost three feet of well casing shall be removed from the well.

(4) All soil or other subsurface material present down to the top of the remaining well casing shall be removed, including the material extending to a width of at least 12 inches outside of the well casing;

(5) The well shall be filled to the top of the remaining casing with grout, dry clay, or material excavated during construction of the well. If dry clay or material excavated during construction of the well is used, it shall be emplaced in lifts no more than five feet thick, each compacted in place prior to emplacement of the next lift.

(6) A six-inch thick concrete grout plug shall be placed on top of the remaining casing such that it covers the entire excavated area above the top of the casing, including the area extending to a width of at least 12 inches outside the well casing.

(7) The remainder of the well above the concrete plug shall be filled with grout or soil.

(d) All wells other than water supply wells, including temporary wells, monitoring wells or test borings:

(1) less than 20 feet in depth and which do not penetrate the water table shall be abandoned by filling the entire well up to land surface with grout, dry clay, or material excavated during drilling of the well and then compacted in place; and

(2) greater than 20 feet in depth or that penetrate the water table shall be abandoned by completely filling with a bentonite or cement - type grout.

(e) Any well which acts as a source or channel of contamination shall be repaired or permanently abandoned within 30 days of receipt of notice from the Department.
(f) All wells shall be permanently abandoned in which the casing has not been installed or from which the casing has been removed, prior to removing drilling equipment from the site.
(g) The owner is responsible for permanent abandonment of a well except that:

(1) the well contractor is responsible for well abandonment if abandonment is required because the well contractor improperly locates, constructs, repairs or completes the well;
(2) the person who installs, repairs or removes the well pump is responsible for well abandonment if that abandonment is required because of improper well pump installation, repair or removal; or
(3) the well contractor (or individual) who conducts a test boring is responsible for its abandonment at the time the test boring is completed and has fulfilled its useful purpose.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. September 1, 2009, April 1, 2001; December 1, 1992; September 1, 1984; April 20, 1978.

15A NCAC 02C .0114 DATA AND RECORDS REQUIRED

(a) Well Cuttings.

(1) The well contractor shall collect and furnish samples of formation cuttings to the Division from a well the well contractor has drilled when such samples are requested by the Division prior to completion of the drilling or boring activities.
(2) The well contractor shall obtain samples or representative cuttings for depth intervals not exceeding 10 feet. The well contractor shall also collect representative cuttings at depths of each change in formation.
(3) The well contractor shall place samples of cuttings in containers furnished by the Division and such containers shall be filled, sealed and labeled with indelible-type markers, showing the well owner, well number if applicable, and depth interval the sample represents.
(4) The well contractor shall place each set of samples in a container(s) showing the location, owner, well number if applicable, the well contractor's name, depth interval, and date.
(5) The well contractor shall retain samples until delivery instructions are received from the Division or for a period of at least 60 days after the well record form (GW-1), indicating said samples are available, has been received by the Division.
(6) If the well contractor furnishes samples to any person or agency other than the Division, this does not constitute compliance with the department's request and shall not relieve the well contractor of his or her obligation to the Division.

(b) Reports.

(1) Any person completing or abandoning any well shall submit to the Division a record of the construction or abandonment. For water supply wells, a copy of each completion or abandonment record shall also be submitted to the health department responsible for the county in which the well is located. The record shall be on forms provided by the Division and shall include certification that construction or abandonment was completed as required by this Section, the owner's name and address, latitude and longitude of the well with a position accuracy of 100 feet or less, diameter, depth, yield, and any other information the Division may require as necessary to depict the location and construction details of the well.
(2) The certified record of completion or abandonment shall be submitted within a period of thirty days after completion or abandonment.
(3) The furnishing of records to any person or agency other than the Division does not constitute compliance with the reporting requirement and shall not relieve the well contractor of his or her obligation to the Division.

History Note: Authority G.S. 87-87; 87-88;
Eff. February 1, 1976;
Amended Eff. September 1, 2009; April 1, 2001; December 1, 1992; September 1, 1984; April 20, 1978.

15A NCAC 02C .0116 DESIGNATED AREAS: WATER SUPPLY WELLS CASED TO LESS THAN 20 FEET

(a) In some areas the best or only source of potable water supply exists between ten and twenty feet below the surface of the land. In consideration of this, water supply wells may be cased to a depth less than twenty feet in the following areas:

(1) in Currituck County in an area between the sound and a line beginning at the end of SR 1130 near Currituck Sound, thence north to the end of SR 1133, thence north to the end of NC 136 at the intersection with the sound;
(2) on the Outer Banks from the northern corporate limit of Nags Head, south to Ocracoke Inlet;
(3) all areas lying between the Intracoastal Waterway and the ocean from New River Inlet south to New Topsail Inlet; and

(4) all areas lying between the Intracoastal Waterway and the ocean from the Cape Fear River south to the South Carolina line.

(b) The Director may designate additional areas of the state where water supply wells may be cased to a depth less than twenty feet. To designate such areas, the Director shall find:

(1) that the only or best source of drinking water in the area exists between a depth of 10 and 20 feet below the surface of the land; and

(2) at utilization of this source of water in the area is in the best interest of the public.

(c) In all other areas, the source of water shall be at least 20 feet below land surface, except when adequate quantities of potable water cannot be obtained below a depth of twenty feet, the source of water may be obtained from unconsolidated rock formations at depths less than twenty feet provided that:

(1) sufficient water of acceptable quality for the intended use can be shown, to the satisfaction of the Department that it is not available to a minimum depth of fifty feet;

(2) the proposed source of water is the maximum feasible depth above 20 feet, but in no case less than ten feet; and

(3) the regional office of the Department is notified prior to the construction of a well obtaining water from a depth between 10 and 20 feet below land surface.

History Note: Authority G.S. 87-87;
Eff. April 20, 1978;
Amended Eff. September 1, 2009, December 1, 1992; July 1, 1988; September 1, 1984.

15A NCAC 02C .0117 DESIGNATED AREAS: WATER SUPPLY WELLS CASED TO MINIMUM DEPTH OF 35 FEET

Water supply wells constructed in the following areas or within 400 feet of the following areas shall be cased to a minimum depth of 35 feet:

(1) Anson County generally west of a line beginning at the intersection of the runs of the Pee Dee River and Buffalo Creek, thence generally northeast to SR 1627, thence generally south along SR 1627 to the intersection with SR 1632, thence generally west along SR 1632 to the intersection with US 52, thence generally south along US 52 to the intersection with SR 1418, thence generally southwest along SR 1418 to the intersection of NC 218, thence south along NC 218 to the intersection with US 74, thence generally west along US 74 to the intersection of SR 1251, thence generally southwest along SR 1251 to the intersection with SR 1240, thence generally southeast along SR 1240 to the intersection with SR 1252, thence generally south along SR 1252 to the intersection with SR 1003, thence generally west along SR 1003 to the Union County line;

(2) Cabarrus County generally east of a line beginning at the intersection of SR 1113 and the Union County line, thence generally northeast along SR 1113 to the intersection with SR 1114, thence generally east along SR 1114 to the Stanly County line, thence generally northeast along the county line to the intersection with SR 1100, thence generally northeast along SR 1100 to the intersection of with SR 2622, thence generally southeast along SR 2622 to the intersection with SR 2617, thence generally northeast along SR 2617 to the intersection with SR 2611, thence generally north along SR 2611 to the intersection with NC 73, thence generally east along NC 73 to the intersection with SR 2453, thence generally northeast along SR 2453 to the intersection with SR 2444, thence generally northeast along SR 2444 to the Rowan County line;

(3) Davidson County generally east of a line starting at the intersection of the runs of Abbotts Creek and the Yadkin River in High Rock Lake, thence generally north along Abbotts Creek to NC 8 bridge, thence generally north along NC 8 to the intersection with Interstate 85, thence generally northeast along Interstate 85 to the intersection with US 64, thence generally southeast along US 64 to the Randolph County line;

(4) Montgomery County generally west of a line beginning at the intersection of SR 1134 with the Randolph County line, thence generally south along SR 1134 to the intersection with SR 1303, thence generally south along SR 1303 to the intersection with NC 109, thence generally southeast along NC 109 to the intersection with SR 1150, thence generally south along SR 1150 to the intersection with NC 73, thence generally southeast along NC 73 to the intersection with SR 1227, thence generally east along SR 1227 to the intersection with SR 1130, thence generally northeast along SR 1130 to the intersection with SR 1132, thence generally southeast along SR 1132 to the intersection with SR 1174, thence generally east along SR 1174 to the intersection with NC 109, thence generally north along NC 109 to the intersection with SR 1546, generally southeast along SR 1546 to the intersection of SR 1543, thence generally south along SR 1543 to the intersection with NC 731, thence generally west along NC 731 to the intersection with SR 1118, thence generally southwest along SR 1118 to the intersection with SR 1116, thence generally west along SR 1116 to the intersection with NC 109, thence generally south along NC 109

to the intersection with the Richmond County line;

(5) Randolph County generally west of a line beginning at the intersection of US 64 with the Davidson County line, thence generally east along US 64 to the intersection with NC 49, thence generally southwest along NC 49 to the intersection with SR 1107, thence generally south along SR 1107 to the intersection with SR 1105, thence southeast along SR 1105 to the intersection with the Montgomery County line;

(6) Rowan County generally east of a line beginning at the intersection of SR 2352 with the Cabarrus County line, thence generally northeast along SR 2352 to the intersection with SR 2353, thence generally north along SR 2353 to the intersection with SR 2259, thence generally northeast along SR 2259 to the intersection with SR 2142, thence north along SR 2142 to the intersection with SR 2162, thence generally northeast along SR 2162 to the intersection with the run of the Yadkin River in High Rock Lake;

(7) Union County generally east of a line beginning at the intersection of SR 1117 with the South Carolina-North Carolina State line, thence generally north along SR 1117 to the intersection with SR 1111, thence generally northwest along SR 1111 to the intersection with NC 75, thence generally northwest along NC 75 to the intersection with NC 16, thence generally north along NC 16 to the intersection with SR 1008, thence generally northeast along SR 1008 to the intersection with SR 1520, thence generally northeast along SR 1520 to the intersection with NC 218, thence generally east along NC 218 to the intersection with US 601, thence generally north along US 601 to the intersection with SR 1600, thence generally northeast along SR 1600 to the intersection with the Cabarrus County line;

(8) Stanly County -- all.

History Note: Authority G.S. 87-87;
Eff. April 20, 1978;
Amended Eff. September 1, 2009, April 1, 2001.

15A NCAC 02C .0118 VARIANCE

(a) The Secretary may grant a variance from any construction standard under the rules of this Section. Any variance shall be in writing, and shall be granted upon oral or written application to the Secretary, by the person responsible for the construction of the well for which the variance is sought, if the Secretary finds facts to support the following conclusions:

(1) that the use of the well will not endanger human health and welfare or the groundwater;

(2) that construction in accordance with the standards was not technically feasible in such a manner as to afford a reasonable water supply at a reasonable cost.

(b) The Secretary may require the variance applicant to submit such information as the Secretary deems necessary to make a decision to grant or deny the variance. The Secretary may impose such conditions on a variance or the use of a well for which a variance is granted as he deems necessary to protect human health and welfare and the groundwater resources. The findings of fact supporting any variance under this Rule shall be in writing and made part of the variance.

(c) The Secretary shall respond in writing to a request for a variance within 30 days from the receipt of the variance request.

(d) A variance applicant who is dissatisfied with the decision of the Secretary may commence a contested case by filing a petition under G.S. 150B-23 within 60 days after receipt of the decision.

History Note: Authority G.S. 87-87; 87-88; 150B-23
Eff. April 20, 1978;
Amended Eff. September 1, 2009, April 1, 2001; December 1, 1992; September 1, 1988; September 1, 1984.

15A NCAC 02D .1010 HEAVY-DUTY VEHICLE IDLING RESTRICTIONS

(a) Applicability. The requirements of this rule apply to on-road heavy-duty vehicles powered in-part or entirely by an internal combustion engine.

(b) Definitions. For the purposes of this Rule, the following definitions apply:

(1) "Auxiliary power unit" means a mechanical or electrical device affixed to a vehicle that is designed to be used to generate an alternative source of power for any of the vehicle's systems other than the primary propulsion engine;

(2) "Congestion" means a situation that occurs when the volume of traffic exceeds the capacity of a roadway;

(3) "Emergency" means a situation that poses an immediate risk to health, life, property, or environment;

(4) "Emergency vehicle" means any vehicle that responds to or supports an emergency. These vehicles are operated by part of the government, charities, non-governmental organizations, and commercial companies;

(5) "Gross vehicle weight rating" means the weight specified by the manufacturer as the loaded weight of a single vehicle;

(6) "Farm vehicle" means a vehicle used exclusively for farm use and operated within 150 miles of the farmer's farm by the farmer or the farmer's employee to transport either agricultural product, farm machinery, or farm supplies. It is not used in the operations of a for-hire motor carrier.

(7) "Heavy-duty vehicle" means a motor vehicle (excluding trailer(s)) with a gross vehicle

weight rating of 10,001 pounds or greater for the purpose of this Rule;

(8) "Idling" means the operation of a motor vehicle's propulsion engine while the vehicle is stationary;

(9) "Military vehicle" means a motor vehicle owned by the U.S. Department of Defense;

(10) "Motor vehicle" means any self-propelled vehicle used for transporting property or persons;

(11) "On-road vehicle" means a self-propelled vehicle that is designed for use on a highway.

(12) "Passenger bus" means any bus, including school buses, which is designed to carry sixteen or more passengers;

(13) "Power take off" means a device used to transfer mechanical energy from a heavy-duty vehicle's propulsion engine to equipment that supplies mechanical, pneumatic, hydraulic, or electric power to non-vehicular mechanical, pneumatic, hydraulic, or electrically operated devices; and

(14) "Queue area" means an area used by heavy-duty vehicles waiting to provide or receive services.

(c) Exemptions. The following exemptions to idle restrictions apply to this rule:

(1) Heavy-duty vehicles may idle if they remain motionless due to traffic conditions, traffic control devices or signals, congestion, or at the direction of law enforcement officials;

(2) Emergency vehicles may idle while performing an emergency or training function. This exemption does not apply when idling only for driver comfort;

(3) Military vehicles;

(4) Heavy-duty vehicles may idle main propulsion engines to operate power take offs to perform the heavy-duty vehicle's designed functions (e.g., refrigeration of cargo, processing of cargo, dumping, lifting, hoisting, drilling, mixing, loading, unloading, other operations requiring the use of power take offs). This exemption does not apply when idling only for driver comfort;

(5) Heavy-duty vehicles may idle if following manufacturer's recommendations for cold engine startup and engine cool-down, maintenance, inspection, servicing, repairing, or diagnostic purposes, if idling is required for such activity;

(6) Heavy-duty vehicles with an occupied sleeper berth compartment may idle for the purposes of air conditioning or heating during federally mandated rest or sleep periods. This exemption shall expire on May 1, 2011;

(7) Auxiliary power units;

(8) Heavy-duty vehicles with a primary diesel engine meeting the nitrogen oxide idling emission standard in Title 13, of the California Code of Regulations, Section 1956.8(a)(6)(C);

(9) A passenger bus when non-driver passengers are on board the vehicle and up to 20 minutes prior to passengers boarding;

(10) Heavy-duty vehicles may idle to provide customer climate controlled comfort during periods of providing customer services (e.g., library bookmobile, blood mobile, safety shoe and safety glasses vendors). This exemption does not apply when idling only for driver comfort; and

(11) Heavy-duty vehicles may idle if defrosters, heaters, air conditioners, or other equipment are operating solely to prevent a safety or health emergency.

(12) Heavy-duty farm vehicles.

(d) Requirements.

(1) No person who operates a heavy-duty vehicle shall cause, let, permit, suffer or allow idling for a period of time in excess of 5 consecutive minutes in any 60 minute period.

(2) Heavy-duty vehicles located in a queue area are not exempted from this Rule.

History Note: Authority: G.S. 143-215.3(a)(1); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.107(b);
Eff. Pending Legislative Review.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 06 – BOARD OF BARBER EXAMINERS

21 NCAC 06F .0104 INSTRUCTORS

(a) Each barber school required by G.S. 86A-22(2) to employ at least two instructors shall have at least two instructors present at all times during instructional hours.

(b) At least one barber instructor shall monitor students engaged in barbering activities at all times.

(c) While present on the premises of the barber school, barber instructors shall not barber for compensation and shall barber only for the purpose of instruction or demonstration.

(d) All course work as outlined under 21 NCAC 06F .0120, must be taught by a licensed barber instructor.

History Note: Authority G.S. 86A-22;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. September 1, 2009; June 1, 2008; May 1, 1989.

21 NCAC 06F .0110 ROSTER AND STUDENT RECORDS

Each barber school shall:

(1) maintain an up-to-date written roster system which shall be used to ensure that each student serves substantially equal numbers of patrons;

(2) maintain a complete record consisting of all documents required by the Board's statutes and administrative rules of each student including a weekly record of the number of days and hours the student attended classes in practical work and theory;
(3) maintain a separate daily record of the number of patrons the student served for haircuts, shaves and other barber services;
(4) maintain a weekly record of the subject matter taught the student in theory classes;
(5) provide the list of students required by G.S. 86A-22(5) by the 15th day of each month;
(6) maintain a daily attendance log book recording each student entering the school premises with the time of entry and time of departure in addition to the time cards required in accordance with 21 NCAC 06F .0123; and
(7) submit a monthly report to the Board for each student containing the total instructional hours attended, days absent, textbook subjects emphasized, the number of services and types of services performed by the student, and a copy of the student's electronic time card for the most recent month.

History Note: Authority G.S. 86A-22;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. September 1, 2009; June 1, 2008; May 1, 1989; March 1, 1983.

21 NCAC 06F .0111 COPIES OF BARBER SCHOOL RECORDS
Barber schools shall furnish to the Board upon request copies of all records or reports required to be kept by barber schools, either by the North Carolina General Statutes or by the rules of the Board, including time sheets for instructors to verify compliance with 21 NCAC 06F .0104, and time cards for students to verify compliance with 21 NCAC 06F .0123. A school shall not refuse to submit any records or reports required due to a dispute or unfulfilled obligation with a student, instructor or third party.

History Note: Authority G.S. 86A-22;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. September 1, 2009; June 1, 2008; May 1, 1989.

21 NCAC 06F .0122 UNIFORMS AND IDENTIFICATION
All students must wear a clean, washable uniform, smock, or similar professional attire along with a self-identifying nametag or pin at all times during instructional hours.

History Note: Authority G.S. 86A-22;
Eff. September 1, 2009.

21 NCAC 06F .0123 TIME CLOCK AND RECORDATION OF STUDENT HOURS
Each student shall use an electronic time card for the recordation of instructional hours pursuant to 21 NCAC 06F .0124. The school shall maintain originals of each student time card for at least one year following graduation of the individual student. Individual student time cards shall be available for review by the Board.

History Note: Authority G.S. 86A-22;
Eff. September 1, 2009.

21 NCAC 06F .0124 STUDENT HOURS
(a) No student shall be given credit for more than eight total hours during any instruction day.
(b) Students shall punch their individual time cards upon entering the school for practical or theory hours and shall clock-out for any period of break from instruction, even if remaining on school premises.
(c) In meeting the minimum course work and designated barber school curricula, no student shall be given credit for more than 40 total hours or 8 total hours per month that were obtained by instruction or demonstration off school premises or from a field trip.

History Note: Authority G.S. 86A-22;
Eff. September 1, 2009.

21 NCAC 06F .0125 SCHOOL HANDBOOKS AND ENROLLMENT AGREEMENTS
(a) Every school shall provide a school handbook to its students upon enrollment containing the enrollment agreement, tuition fee schedule, reimbursement policies, school rules and regulations, tardiness and absenteeism policies, a syllabus or list of the school curricula containing the minimum hours for each subject matter to be taught in accordance with 21 NCAC 06F .0120 and the grading system for said curricula.
(b) A copy of the school handbook shall be submitted to the Board. An updated copy of the handbook shall be re-submitted to the Board should the handbook be amended or revised.

History Note: Authority G.S. 86A-22;
Eff. September 1, 2009.

21 NCAC 06J .0110 NOTIFICATION OF ADDRESS CHANGE
All apprentice barbers and student barbers with permission to work shall notify the Board within 60 days of any change in their permanent mailing address.

History Note: Authority G.S. 86A-11; 86A-24;
Eff. September 1, 2009.

21 NCAC 06K .0111 NOTIFICATION OF CHANGE OF ADDRESS
All registered barbers shall notify the Board within 60 days of any change in their permanent mailing address.

History Note: Authority G.S. 86A-3;

Eff. September 1, 2009.

21 NCAC 06L .0102 MEASUREMENTS OF BARBER SHOP

(a) Each barber shop shall be a minimum of 196 square feet measured from the inside walls of the shop, not including common areas shared with other businesses or residents. In addition, each chair shall be located in an area where there is no less than 12 linear feet from front wall to back wall, measured through the center of the chair, with the back wall being the wall or plain to which the backstand is affixed. There shall be a minimum of five linear feet of space between each barber chair, from center to center of each chair and there shall be no less than three linear feet from the center of any chair to any side wall. There shall be an unobstructed aisle in front of each chair of no less than four feet. This Paragraph applies to barber shops which are permitted on or after December 1, 1994 or which undergo modification or structural renovations on or after that date.

(b) Barber shops permitted prior to February 1, 1976, must be a minimum of 12 feet in width and 14 feet in length.

(c) Barber shops permitted between February 1, 1976 and November 30, 1994, must be a minimum of 14 feet in width and 14 feet in length.

(d) Barber shops permitted within the Division of Prisons prior to July 1, 2010, are exempt from the requirements of this Rule.

History Note: Authority G.S. 86A-15;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. September 1, 2009; June 1, 2008; December 1, 1994; May 1, 1989.

21 NCAC 06L .0103 EQUIPMENT

(a) Each barber shall have a cabinet for barbering equipment. The cabinets shall be constructed of material that may be easily cleaned.

(b) Each shop shall have smooth finished walls, ceilings and floors, and no exposed pipes.

(c) Each barber chair shall be covered with a smooth, non-porous surface, such as vinyl or leather, which is easily cleaned.

(d) Each shop shall have within the shop or building functioning toilet facilities for employees and patrons.

(e) Each barber shop shall have a cabinet, or other method of storage, such that clean towels are stored separate from used towels.

(f) In addition to the requirements of Paragraph (d) of this Rule, barber shops which are permitted on or after January 1, 1995 or which undergo modifications or structural renovations after that date must have within the shop or building a hand-washing sink or lavatory for patrons with hot and cold water, soap and disposable towels.

(g) Where a barber shop is located within a shop licensed by the North Carolina Board of Cosmetic Art Examiners, the toilet facility and sink may be shared with the cosmetology shop.

(h) Paragraphs (a), (d) and (f) of this Rule do not apply to barber shops operated by the Division of Prisons.

History Note: Authority G.S. 86A-15;
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. September 1, 2009; June 1, 2008; January 1, 1995; May 1, 1989; March 1, 1983.

21 NCAC 06L .0108 MOVED SHOP

When a shop is moving from one location to another, the manager shall notify the Board within two weeks of the planned date for said move and the anticipated new physical and mailing address of the new shop. A moved shop shall not be opened for business to the public until a new application for a shop permit and inspection are performed in accordance with 21 NCAC 06L .0104.

History Note: Authority G.S. 86A-1; 86A-15;
Eff. March 1, 1983;
Amended Eff. September 1, 2009.

21 NCAC 06L .0120 NOTIFICATION OF CHANGE OF ADDRESS

In all instances where a barber shop experiences a change in its mailing address or physical address, excluding those outlined under 21 NCAC 06L .0108 for a moved shop, the barber shop owners and barber shop manager shall notify the Board within five business days of any change in said address.

History Note: Authority G.S. 86A-1;
Eff. September 1, 2009.

21 NCAC 06N .0101 FEES

The Board charges the following amounts for the fees authorized by G.S. 86A-25:

(1)	Certificate of registration or renewal as a barber	$ 50.00
(2)	Certificate of registration or renewal as an apprentice barber	$ 50.00
(3)	Barbershop permit or renewal	$ 50.00
(4)	Examination to become a registered barber	$ 85.00
(5)	Examination to become a registered apprentice barber	$ 85.00
(6)	Late fee for restoration of an expired barber certificate within first year after expiration	$ 35.00
(7)	Late fee for restoration of an expired barber certificate after first year after expiration but within five years after expiration	$ 70.00
(8)	Late fee for restoration of an expired apprentice certificate within the first year after expiration	$ 35.00
(9)	Late fee for restoration of an expired apprentice certificate after first year after expiration but within three years of first issuance of the certificate	$ 45.00

(10)	Late fee for restoration of an expired barber shop certificate	$ 45.00
(11)	Examination to become a barber school instructor	$165.00
(12)	Student permit	$ 25.00
(13)	Issuance of any duplicate copy of a license, certificate or permit	$ 10.00
(14)	Barber school permit or renewal	$130.00
(15)	Late fee for restoration of an expired barber school certificate	$ 85.00
(16)	Barber school instructor certificate or renewal	$ 85.00
(17)	Late fee for restoration of an expired barber school instructor certificate within first year after expiration	$ 45.00
(18)	Late fee for restoration of an expired barber school instructor certificate after first year after expiration but within three years after expiration	$ 85.00
(19)	Inspection of newly established barbershop	$120.00
(20)	Inspection of newly established barber school	$220.00
(21)	Issuance of a registered barber or apprentice certificate by certification	$120.00
(22)	Charge for certified copies of public documents $10.00 for first page, $0.25 per page thereafter	
(23)	Charge for duplication services and material $5.00 for first page, $0.25 for each page thereafter	
(24)	Certificate of registration or renewal as a barber for barbers over 70 years of age	$ 0.00
(25)	Administrative fee for paying any required fee for renewal or restoration, or a civil penalty and attorney fee, where the licensee or Registered Barber is subject to a pick-up order issued to an inspector.	$ 70.00

History Note: Authority G.S. 86A-25; 86A-27(d);
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. September 1, 2009; June 1, 2008; April 1, 2005; May 1, 1989; March 1, 1983.

21 NCAC 06O .0104 UNSUPERVISED APPRENTICE

(a) The presumptive civil penalty for a barber shop allowing an apprentice or holder of permission to work to engage in barbering without supervision as required by G.S 86A-24(b):

(1)	1st offense	$250.00
(2)	2nd offense	$350.00

(b) The presumptive civil penalty for an apprentice or holder of permission to work engaging in barbering without supervision as required by G.S. 86A-24(b):

(1)	1st offense	$150.00
(2)	2nd offense	$250.00
(3)	3rd offense	$500.00

History Note: Authority G.S. 86A-5(a)(6); 86A-24; 86A-27;
Eff. April 1, 2005;
Amended Eff. September 1, 2009.

21 NCAC 06O .0112 IDENTIFICATION

(a) The presumptive civil penalty for a barber shop owner or manager failing to positively identify a Registered Barber, apprentice or holder of permission to work:

(1)	1st offense	$50.00
(2)	2nd offense	$100.00
(3)	3rd offense	$200.00

(b) The presumptive civil penalty for a Registered Barber, apprentice or holder of permission to work failing to maintain and produce a license or permit, including identification, as defined in 21 NCAC 06P .0103(7):

(1)	1st offense	$50.00
(2)	2nd offense	$100.00
(3)	3rd offense	$200.00

(c) The presumptive civil penalty for a student failing to wear identification as defined in 21 NCAC 06F .0122:

(1)	1st offense	$50.00
(2)	2nd offense	$100.00
(3)	3rd offense	$200.00

(d) The presumptive civil penalty for a barber school instructor or barber school manager failing to positively identify a student:

(1)	1st offense	$50.00
(2)	2nd offense	$100.00
(3)	3rd offense	$200.00

History Note: Authority G.S. 86A-1; 86A-10; 86A-11; 86A-27;
Eff. June 1, 2008;
Amended Eff. September 1, 2009.

21 NCAC 06O .0115 SCHOOL FAILING TO MAINTAIN, FALSIFYING, OR FAILING TO SUBMIT RECORDS

(a) The presumptive civil penalty for failing to maintain records by a barber school:

(1)	1st offense	$150.00
(2)	2nd offense	$200.00
(3)	3rd offense	$500.00

(b) The presumptive civil penalty for falsifying records by a barber school:

(1)	1st offense	$200.00
(2)	2nd offense	$350.00
(3)	3rd offense	$500.00

(c) The presumptive civil penalty for failing to submit required records by a barber school:

(1)	1st offense	$150.00
(2)	2nd offense	$300.00
(3)	3rd offense	$500.00

History Note: Authority G.S. 86A-22; 86A-27;
Eff. June 1, 2008;
Amended Eff. September 1, 2009.

21 NCAC 06O .0116 UNLICENSED SCHOOL INSTRUCTORS

(a) The presumptive civil penalty for a barber school allowing an individual to instruct without a license:

(1)	1st offense	$150.00
(2)	2nd offense	$250.00
(3)	3rd offense	$500.00

(b) The presumptive civil penalty for a licensed barber or apprentice barber engaging in instructing without a license:

(1)	1st offense	$100.00
(2)	2nd offense	$400.00
(3)	3rd offense	$500.00

History Note: Authority G.S. 86A-22; 86A-23; 86A-27;
Eff. September 1, 2009.

21 NCAC 06R .0101 DISPLAY OF SIGN OR BARBER POLE

Every establishment permitted to practice barbering shall display at its main entrance a sign which is visible from the street, and whose lettering is no smaller than three inches, stating "barber shop," "barber salon," "barber styling" or similar use of the designation, "shop, salon or styling" or shall display a "barber pole" as defined in 21 NCAC 06P .0103(e), recognizable as such from the street.

History Note: Authority G.S. 86A-1; 86A-2; 86A-13;
Eff. June 1, 2008;
Amended Eff. September 1, 2009.

21 NCAC 06S .0101 GENERAL EXAMINATION INSTRUCTIONS

(a) All candidates scheduled for an examination, conducted by the Board must bring:

(1) two forms of identification, one of which must be photo bearing;
(2) exam approval documentation;
(3) tools and supplies as required by the Board; and
(4) a hygienically clean model.

(b) No briefcases, bags, books, papers or study materials are allowed in the examination room. The exam facility is not responsible for lost or misplaced items.
(c) No cell phones, calculators or other electronic devices are permitted for use during the examination.
(d) No eating, drinking, smoking or gum-chewing is permitted during the examination.
(e) No visitors, children, pets or guests are allowed at the test center.
(f) No extra time for the examination will be permitted unless mandated by State and federal law such as the Americans with Disabilities Act.
(g) No leaving the test center during the examination. Candidates may visit the restroom with the test center manager's permission, but will not receive any additional time for the examination.
(h) No giving or receiving assistance during the examination. If a candidate gives or receives assistance during the examination, the test center manager will stop the examination and the candidate will be dismissed from the test center. The Board's approved test center manager will not score the examination and will report the candidate to the Board, which will make any decisions regarding discipline.
(i) Candidates must maintain silence during the examination, and shall not mention the name of the school attended or the names of instructors. Candidates shall not wear or carry any school identification on uniforms or equipment.

History Note: Authority G.S. 86A-8; 86A-9; 86A-10; 86A-24;
Eff. September 1, 2009.

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CHAPTER 12 – LICENSING BOARD FOR GENERAL CONTRACTORS

21 NCAC 12 .0202 CLASSIFICATION

(a) A general contractor must be certified in one of five classifications. These classifications are:

(1) Building Contractor. This classification covers all building construction activity including but not limited to: commercial, industrial, institutional, and all residential building construction; parking decks; all site work, grading and paving of parking lots, driveways, sidewalks, curbs, gutters, and water and wastewater systems which are ancillary to the aforementioned structures and improvements; and covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Marine Construction), S(Masonry Construction), S(Roofing), S(Metal Erection), S(Swimming Pools), and S(Asbestos).
(2) Residential Contractor. This classification covers all construction activity pertaining to the construction of residential units which are required to conform to the residential building code adopted by the Building Code Council pursuant to G.S. 143-138; all site work, driveways, sidewalks, and water and wastewater systems ancillary to the aforementioned structures and improvements; and the work done as part of such residential units under the specialty classifications of S(Insulation), S(Interior Construction),

S(Masonry Construction), S(Roofing), S(Swimming Pools), and S(Asbestos).

(3) Highway Contractor. This classification covers all highway construction activity including but not limited to: grading, paving of all types, installation of exterior artificial athletic surfaces, relocation of public and private utility lines ancillary to the principal project, bridge construction and repair, culvert construction and repair, parking decks, sidewalks, curbs, gutters and storm drainage. Includes installation and erection of guard rails, fencing, signage and ancillary highway hardware; covers paving and grading of airport and airfield runways, taxiways, and aprons, including the installation of fencing, signage, runway lighting and marking; and covers work done under the specialty classifications of S(Boring and Tunneling), S(Concrete Construction), S(Marine Construction), S(Railroad Construction), and H(Grading and Excavating).

(4) Public Utilities Contractor. This classification includes those whose operations are the performance of construction work on water and wastewater systems and on the subclassifications of facilities set forth in G.S. 87-10(b)(3). The Board may issue a license to a public utilities contractor that is limited to any of the subclassifications set forth in G.S. 87-10(b)(3) for which the contractor qualifies. A public utilities contractor license covers work done under the specialty classifications of S(Boring and Tunneling), PU(Communications), PU(Fuel Distribution), PU(Electrical-Ahead of Point of Delivery), PU(Water Lines and Sewer Lines), PU(Water Purification and Sewage Disposal), and S(Swimming Pools).

(5) Specialty Contractor. This classification covers all construction operation and performance of contract work outlined as follows:

(A) H(Grading and Excavating). Covers the digging, moving and placing of materials forming the surface of the earth, excluding air and water, in such a manner that the cut, fill, excavation, grade, trench, backfill, or any similar operation can be executed with the use of hand and power tools and machines commonly used for these types of digging, moving and material placing. Covers work on earthen dams and the use of explosives used in connection with all or any part of the activities described in this Subparagraph. Also includes clearing and grubbing, and erosion control activities.

(B) S(Boring and Tunneling). Covers the construction of underground or underwater passageways by digging or boring through and under the earth's surface including the bracing and compacting of such passageways to make them safe for the purpose intended. Includes preparation of the ground surfaces at points of ingress and egress.

(C) PU(Communications). Covers the installation of the following:

(i) All types of pole lines, and aerial and underground distribution cable for telephone systems;

(ii) Aerial and underground distribution cable for Cable TV and Master Antenna TV Systems capable of transmitting R.F. signals;

(iii) Underground conduit and communication cable including fiber optic cable; and

(iv) Microwave systems and towers, including foundations and excavations where required, when the microwave systems are being used for the purpose of transmitting R.F. signals; and installation of PCS or cellular telephone towers and sites.

(D) S(Concrete Construction). Covers the construction and installation of foundations, pre-cast silos and other concrete tanks or receptacles, prestressed components, and gunite applications, but excludes bridges, streets, sidewalks, curbs, gutters, driveways, parking lots and highways.

(E) PU(Electrical-Ahead of Point of Delivery). Covers the construction, installation, alteration, maintenance or repair of an electrical wiring system, including sub-stations or components thereof, which is or is intended to be owned, operated and maintained by an electric power supplier, such as a public or private utility, a utility cooperative, or any other properly franchised electric power supplier, for the purpose of

furnishing electrical services to one or more customers.

(F) PU(Fuel Distribution). Covers the construction, installation, alteration, maintenance or repair of systems for distribution of petroleum fuels, petroleum distillates, natural gas, chemicals and slurries through pipeline from one station to another. Includes all excavating, trenching and backfilling in connection therewith. Covers the installation, replacement and removal of above ground and below ground fuel storage tanks.

(G) PU(Water Lines and Sewer Lines). Covers construction work on water and sewer mains, water service lines, and house and building sewer lines as defined in the North Carolina State Building Code, and covers water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations and pumping stations. Includes pavement patching, backfill and erosion control as part of such construction.

(H) PU(Water Purification and Sewage Disposal). Covers the performance of construction work on water and wastewater systems, water and wastewater treatment facilities and all site work, grading, and paving of parking lots, driveways, sidewalks, and curbs and gutters which are ancillary to such construction of water and wastewater treatment facilities. Covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Masonry Construction), S(Roofing), and S(Metal Erection) as part of such work on water and wastewater treatment facilities.

(I) S(Insulation). Covers the installation, alteration or repair of materials classified as insulating media used for the non-mechanical control of temperatures in the construction of residential and commercial buildings. Does not include the insulation of mechanical equipment and ancillary lines and piping.

(J) S(Interior Construction). Covers the installation of acoustical ceiling systems and panels; drywall partitions (load bearing and non-load bearing), lathing and plastering, flooring and finishing, interior recreational surfaces, window and door installation, and installation of fixtures, cabinets and millwork. Includes the removal of asbestos and replacement with non-toxic substances.

(K) S(Marine Construction). Covers all marine construction and repair activities and all types of marine construction in deep-water installations and in harbors, inlets, sounds, bays, and channels; covers dredging, construction and installation of pilings, piers, decks, slips, docks, and bulkheads. Does not include structures required on docks, slips and piers.

(L) S(Masonry Construction). Covers the installation, with or without the use of mortar or adhesives, of the following:

(i) Brick, concrete block, gypsum partition tile, pumice block or other lightweight and facsimile units and products common to the masonry industry;

(ii) Installation of fire clay products and refractory construction; and

(iii) Installation of rough cut and dressed stone, marble panels and slate units, and installation of structural glazed tile or block, glass brick or block, and solar screen tile or block.

(M) S(Railroad Construction). Covers the building, construction and repair of railroad lines including:

(i) The clearing and filling of rights-of-way;

(ii) Shaping, compacting, setting and stabilizing of road beds;

(iii) Setting ties, tie plates, rails, rail connectors, frogs, switch plates, switches, signal markers, retaining walls, dikes, fences and gates; and

(iv) Construction and repair of tool sheds and platforms.

(N) S(Roofing). Covers the installation and repair of roofs and decks on residential, commercial, industrial, and institutional structures requiring materials that form a water-tight and weather-resistant surface. The term "materials" shall be defined for purposes of this Subparagraph to

include, among other things, cedar, cement, asbestos, clay tile and composition shingles, all types of metal coverings, wood shakes, single ply and built-up roofing, protective and reflective roof and deck coatings, sheet metal valleys, flashings, gravel stops, gutters and downspouts, and bituminous waterproofing.

(O) S(Metal Erection). Covers:

(i) The field fabrication, erection, repair and alteration of architectural and structural shapes, plates, tubing, pipe and bars, not limited to steel or aluminum, that are or may be used as structural members for buildings, equipment and structure; and

(ii) The layout, assembly and erection by welding, bolting or riveting such metal products as, but not limited to, curtain walls, tanks of all types, hoppers, structural members for buildings, towers, stairs, conveyor frames, cranes and crane runways, canopies, carports, guard rails, signs, steel scaffolding as a permanent structure, rigging, flagpoles, fences, steel and aluminum siding, bleachers, fire escapes, and seating for stadiums, arenas, and auditoriums.

(P) S(Swimming Pools). Covers the construction, service and repair of all swimming pools. Includes:

(i) Excavation and grading;

(ii) Construction of concrete, gunite, and plastic-type pools, pool decks, and walkways, and tiling and coping; and

(iii) Installation of all equipment including pumps, filters and chemical feeders. Does not include direct connections to a sanitary sewer system or to portable water lines, nor the grounding and bonding of any metal surfaces or the making of any electrical connections.

(Q) S(Asbestos). This classification covers renovation or demolition activities involving the repair, maintenance, removal, isolation, encapsulation, or enclosure of Regulated Asbestos Containing Materials (RACM) for any commercial, industrial, or institutional building, whether public or private. It also covers all types of residential building construction involving RACM during renovation or demolition activities.

(b) An applicant may be licensed in more than one classification of general contracting provided the applicant meets the qualifications for the classifications, which includes passing the examination for the classifications in question. The license granted to an applicant who meets the qualifications for all classifications will carry with it a designation of "unclassified."

History Note: Authority G.S. 87-1; 87-4; 87-10;
Eff. February 1, 1976;
Readopted Eff. September 26, 1977;
Amended Eff. June 1, 1994; June 1, 1992; May 1, 1989; January 1, 1983;
Temporary Amendment Eff. February 18, 1997;
Amended Eff. September 1, 2009; April 1, 2004; April 1, 2003; August 1, 2002; April 1, 2001; August 1, 2000; August 1, 1998.

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CHAPTER 16 – BOARD OF DENTAL EXAMINERS

21 NCAC 16D .0201 CLINICAL EXAMINATION

History Note: Authority G.S. 90-28; 90-29.5; 90-48;
Eff. January 1, 1983;
Repealed Eff. September 1, 2009.

21 NCAC 16H .0203 PERMITTED FUNCTIONS OF DENTAL ASSISTANT II

(a) A Dental Assistant II may perform all acts or procedures which may be performed by a Dental Assistant I. In addition, a Dental Assistant II may be delegated the following functions to be performed under the direct control and supervision of a dentist who shall be personally and professionally responsible and liable for any and all consequences or results arising from the performance of such acts and functions:

(1) Take impressions for study models and opposing casts which will not be used for construction of dental appliances, but which may be used for the fabrication of adjustable orthodontic appliances, nightguards and the repair of dentures or partials;

(2) Apply sealants to teeth that do not require mechanical alteration prior to the application of such sealants, provided a dentist has examined the patient and prescribed the procedure;

(3) Insert matrix bands and wedges;

(4) Place cavity bases and liners;

(5) Place and remove rubber dams;
(6) Cement temporary restorations using temporary cement;
(7) Apply acid etch materials/rinses;
(8) Apply bonding agents;
(9) Remove periodontal dressings;
(10) Remove sutures;
(11) Place gingival retraction cord;
(12) Remove excess cement;
(13) Flush, dry and temporarily close root canals;
(14) Place and remove temporary restorations;
(15) Place and tie in or untie and remove orthodontic arch wires;
(16) Insert interdental spacers;
(17) Fit (size) orthodontic bands or brackets;
(18) Apply dentin desensitizing solutions;
(19) Perform extra-oral adjustments which affect function, fit or occlusion of any temporary restoration or appliance;
(20) Initially form and size orthodontic arch wires and place arch wires after final adjustment and approval by the dentist; and
(21) Polish the clinical crown using only;
(A) a hand-held brush and appropriate polishing agents; or
(B) a combination of a slow speed handpiece (not to exceed 10,000 rpm) with attached rubber cup or bristle brush, and appropriate polishing agents.

(b) A Dental Assistant II must complete a course in coronal polishing consisting of at least seven hours before using a slow speed handpiece with rubber cup or bristle brush attachment. A polishing procedure shall not be represented to the patient as a prophylaxis and no specific charge shall be made for such unless the dentist has performed an evaluation for calculus, deposits, or accretions and a dentist or dental hygienist has removed any substances detected.

History Note: Authority G.S. 90-29(c)(9); 90-48;
Eff. September 3, 1976;
Readopted Eff. September 26, 1977;
Amended Eff. September 1, 2009; September 1, 2008; August 1, 2000; October 1, 1996; January 1, 1994; May 1, 1989; October 1, 1985; March 1, 1985.

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CHAPTER 32 – NORTH CAROLINA MEDICAL BOARD

21 NCAC 32O .0118 LOCUM TENENS PERMIT
21 NCAC 32O .0119 TITLE AND PRACTICE PROTECTION
21 NCAC 32O .0120 IDENTIFICATION REQUIREMENTS
21 NCAC 32O .0121 FEES

History Note: Authority G.S. 90-18(13); 90-18.1;
Eff. June 1, 1994;
Repealed Eff. September 1, 2009.

21 NCAC 32S .0101 DEFINITIONS
21 NCAC 32S .0102 QUALIFICATIONS FOR LICENSE

History Note: Authority G.S. 90-11; 90-18(c)(13); 90-18.1;
Eff. May 1, 1999;
Amended Eff. June 1, 2006;
Repealed Eff. September 1, 2009.

21 NCAC 32S .0104 INACTIVE LICENSE STATUS
21 NCAC 32S .0105 ANNUAL REGISTRATION
21 NCAC 32S .0106 CONTINUING MEDICAL EDUCATION
21 NCAC 32S .0107 EXEMPTION FROM LICENSE
21 NCAC 32S .0108 SCOPE OF PRACTICE
21 NCAC 32S .0109 PRESCRIPTIVE AUTHORITY
21 NCAC 32S .0110 SUPERVISION OF PHYSICIAN ASSISTANTS
21 NCAC 32S .0111 SUPERVISING PHYSICIANS
21 NCAC 32S .0112 NOTIFICATION OF INTENT TO PRACTICE
21 NCAC 32S .0113 VIOLATIONS

History Note: Authority G.S. 90-13(c)(13); 90-14; 90-14(a)(11); 90-14.2; 90-15; 90-18(c)(13); 90-18.1; 90-171.23(14); 58 Fed. Reg. 31,171(1993) (to be codified at 21 C.F.R. 301);
Eff. May 1, 1999;
Amended Eff. July 1, 2006; June 1, 2006; April 1, 2006; April 1, 2005; May 1, 2004; April 1, 2004;
Repealed Eff. September 1, 2009.

21 NCAC 32S .0115 TITLE AND PRACTICE PROTECTION
21 NCAC 32S .0116 IDENTIFICATION REQUIREMENTS
21 NCAC 32S .0117 FEES
21 NCAC 32S .0118 PRACTICE DURING A DISASTER

History Note: Authority G.S. 90-12.1; 90-12.2; 90-15; 90-18(c)(13); 90-18.1; 166A-6;
Eff. May 1, 1999;
Amended Eff. April 1, 2006; April 1, 2005;
Repealed Eff. September 1, 2009.

21 NCAC 32S .0201 DEFINITIONS

The following definitions apply to this Subchapter:

(1) "Board" means the North Carolina Medical Board.
(2) "Examination" means the Physician Assistant National Certifying Examination.
(3) "Family member" means a spouse, parent, grandparent, child, grandchild, sibling, aunt, uncle or first cousin, or persons to the same degree by marriage.

(4) "Physician Assistant" means a person licensed by the Board under the provisions of G.S. 90-9.3.

(5) "Physician Assistant License" means approval for the physician assistant to perform medical acts, tasks, or functions under North Carolina law.

(6) "Physician Assistant Educational Program" is the educational program set out in G.S. 90-9.3(a)(1).

(7) "License Renewal" means paying the annual fee and providing the information requested by the Board as outlined in this Subchapter.

(8) "Supervising" means overseeing the activities of, and accepting the responsibility for, the medical services rendered by a physician assistant.

(9) "Supervisory Arrangement" is the written statement that describes the medical acts, tasks and functions delegated to the physician assistant by the primary supervising physician appropriate to the physician assistant's education, qualification, training, skill and competence.

(10) "Supervising Physician" means a physician who is licensed by the Board and who is not prohibited by the Board from supervising physician assistants. The physician may serve as a primary supervising physician or as a back-up supervising physician.

(a) "Primary Supervising Physician" is the physician who accepts full responsibility for the physician assistant's medical activities and professional conduct at all times, whether the physician personally is providing supervision or the supervision is being provided by a Back-up Supervising Physician. The Primary Supervising Physician shall assure the Board that the physician assistant is qualified by education, training and competence to perform all medical acts required of the physician assistant and is responsible for the physician assistant's performance in the particular field or fields in which the physician assistant is expected to perform medical acts.

(b) "Back-up Supervising Physician" means the physician who is responsible for supervision of the physician assistant's activities in the absence of the Primary Supervising Physician and while actively supervising the physician assistant.

(11) "Volunteer practice" means performance of medical acts, tasks, or functions without expectation of any form of payment or compensation.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0202 QUALIFICATIONS AND REQUIREMENTS FOR LICENSE

(a) Except as otherwise provided in this Subchapter, an individual must obtain a license from the Board before practicing as a physician assistant. The Board may grant a physician assistant license to an applicant who:

(1) submits a completed application to the Board;

(2) meets the requirements set forth in G.S. 90-9.3 and has not committed any of the acts listed in G.S. 90-14;

(3) submits to the Board proof that the applicant has completed an accredited Physician Assistant Educational Program; if a physician assistant was licensed in North Carolina after June 1, 1994, he/she must also show successful completion of the Physician Assistant National Certifying Examination;

(4) pays to the Board a non-refundable fee of two hundred dollars ($200.00) plus the cost of a criminal background check. There is no fee to apply for a physician assistant limited volunteer license;

(5) submits National Practitioner Data Bank (NPDB) and Healthcare Integrity and Protection Data Bank (HIPDB) reports. These reports must be requested by the Applicant and submitted to the Board within 60 days of the request.

(6) submits a Board Action Data Bank Inquiry from the Federation of State Medical Boards (FSMB). This report must be requested by the Applicant and submitted to the Board within 60 days of the request.

(7) submits to the Board two complete original fingerprint record cards, on fingerprint record cards supplied by the Board;

(8) submits to the Board a signed consent form allowing a search of local, state, and national files to disclose any criminal record;

(9) discloses whether he/she has ever been suspended from, placed on academic probation, expelled or required to resign from any school, including a PA educational program;

(10) attests that he/she has no license, certificate, or registration as a physician assistant currently under discipline, revocation, suspension or probation or any other adverse action resulting from a health care licensing board;

(11) certifies that he or she is mentally and physically able to safely practice as a physician assistant and is of good moral character;

(12) provides the Board with three original recommendation forms dated within six months of the application. These recommendations shall come from persons under whom the applicant has worked or trained who are familiar with the applicant's academic competence or clinical skills. At least one reference form must be from a physician and two reference forms must be from peers under whom the applicant has worked or trained. References must be able to evaluate the applicant's academic competence, clinical skills and character as a physician assistant. References shall not be from any family member or in the case of new graduate applicants, references shall not be from fellow students of the applicant's Educational Program;

(13) if two years or more have passed since graduation from a Physician Assistant Educational Program, documents that he/she has successfully completed at least 100 hours of continuing medical education (CME) during the preceding two years, at least 40 hours of which must be American Academy of Physician Assistants Category I CME; and

(14) supplies any other information the Board deems necessary to evaluate the applicant's qualifications.

(b) An applicant may be required to appear in person for an interview with the Board.

History Note: Authority G.S. 90-3; 90-9.3; 90-11; 90-18(c)(13); 90-18.1;
Eff. September 1, 2009.

21 NCAC 32S .0203 MANDATORY NOTIFICATION OF INTENT TO PRACTICE

(a) Prior to the performance of any medical acts, tasks, or functions under the supervision of a primary supervising physician, a physician assistant shall submit notification of such intent using the Board's Intent to Practice form located on the Board's website. The notification of intent to practice shall include:

(1) the name, practice addresses, and telephone number of the physician assistant; and

(2) the name, practice addresses, and telephone number of the primary supervising physician(s).

(b) The physician assistant shall not commence practice until he/she receives acknowledgment from the Board that the Board has received and processed the Intent to Practice Form. By checking the Board's website, the physician assistant can confirm that the primary supervising physician has been added to the physician assistant's personal information page on the Board's website.

(c) The physician assistant shall notify the Board of any changes to the information required in Paragraph (a) of this Rule within 15 days of the occurrence.

History Note: Authority G.S. 90-9.3; 90-14(a)(11); 90-18(c)(13); 90-18.1;
Eff. September 1, 2009.

21 NCAC 32S .0204 ANNUAL RENEWAL

(a) A physician assistant shall renew his/her license each year no later than 30 days after his/her birthday by:

(1) completing the Board's renewal form; and

(2) submitting a nonrefundable fee of one hundred twenty dollars ($120.00), except that a physician assistant who renews not later than 30 days after his/her birthday shall pay an annual renewal fee of one hundred dollars ($100.00);

(b) If a physician assistant fails to renew his/her license, the Board shall send a certified notice, return receipt requested. If the physician assistant does not renew his/her license within 30 days of the date of the mailing of that notice, his/her license automatically becomes inactive.

History Note: Authority G.S. 90-9.3(c);
Eff. September 1, 2009.

21 NCAC 32S .0205 INACTIVE LICENSE STATUS

By notifying the board in writing, a physician assistant may elect to place his/her license on inactive status. A physician assistant with an inactive license shall not practice as a physician assistant. A physician assistant who engages in practice while his/her license is inactive is practicing without a license and is subject to discipline by the Board as well as criminal penalties.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1;
Eff. September 1, 2009.

21 NCAC 32S .0206 LICENSE REACTIVATION

(a) A physician assistant may apply to reactivate his/her license if:

(1) he/she had a license in North Carolina;

(2) the license was placed on inactive status within the past calendar year; and

(3) the licensee did not become inactive as a result of disciplinary action or to avoid disciplinary action.

(b) A physician assistant requesting reactivation shall:

(1) complete the board's reactivation application;

(2) pay to the board a nonrefundable fee of one hundred twenty dollars ($120), plus the cost of a criminal background check;

(3) submit to the board two completed original fingerprint record cards, on fingerprint record cards provided by the Board;

(4) submit to the board a completed signed and dated original Authority for Release of Information Form allowing a search of local, state, and national files to disclose any criminal record;

(5) submit National Practitioner Data Bank (NPDB) and Healthcare Integrity and

Protection Data Bank (HIPDB) reports, dated within 60 days of their submission to the board;

(6) submit a board action data bank inquiry from the Federation of State Medical Boards (FSMB), dated within 60 days of its submission to the board;

(7) provide documentation to the board verifying completion of 100 hours of continuing medical education during the preceding two years; and

(8) supply any other information the board deems necessary to evaluate the applicant's qualifications.

(c) An applicant may be required to appear in person for an interview.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0207 LICENSE REINSTATEMENT

(a) A physician assistant may apply to reinstate his/her license if the license has been inactive for more than one calendar year, or if the inactive status resulted from disciplinary action or was taken to avoid disciplinary action.

(b) A physician assistant requesting reinstatement shall satisfy all the requirements set forth in 21 NCAC 32S .0202.

(c) An applicant may be required to appear in person for an interview with the Board.

History Note: Authority G.S. 90-9.3; 90-13(c)(13); 90-18.8; Eff. September 1, 2009.

21 NCAC 32S .0208 LIMITED VOLUNTEER LICENSE

(a) A physician assistant who holds a regular license may convert that license to a limited volunteer license by notifying the Board in writing. A physician assistant practicing under a limited volunteer license shall practice with no expectation of payment or compensation whatsoever for any medical services rendered. A physician assistant holding a limited volunteer license may not accept any compensation, either directly or indirectly, whether monetary, in-kind, or otherwise, for the provision of medical services.

(b) A physician assistant with an inactive license who wishes to return to practice on a volunteer basis must first reinstate or reactivate his/her license, whichever applies, by complying with 21 NCAC 32S .0206 or 21 NCAC 32S .0207. Once reinstated or reactivated, a physician assistant may convert that license to a limited volunteer license pursuant to Paragraph (a) of this Rule without paying an additional fee.

(c) There is an annual renewal fee of twenty-five dollars ($25.00).

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0209 NON APPLICABILITY

This Subchapter does not apply to:

(1) a student enrolled in a Physician Assistant Educational Program accredited by the Commission on Accreditation of Allied Health Education Programs or its successor organizations;

(2) a physician assistant employed by the federal government while performing duties incident to that employment; or

(3) an agent or employee of a physician who performs delegated tasks in the office of a physician but who is not rendering services as a physician assistant and identifying him/herself as a physician assistant.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0210 IDENTIFICATION REQUIREMENTS

A physician assistant shall keep proof of current licensure and renewal available for inspection at the primary place of practice and shall, when engaged in professional activities, wear a name tag consistent with G.S. 90-640.

History Note: Authority G.S.90-9.3; 90-18(c)(13); 90-640; Eff. September 1, 2009.

21 NCAC 32S .0211 AGENCY

Physician assistants are the agents of their supervising physicians in the performance of all medical practice-related activities, including the ordering of diagnostic, therapeutic and other medical services.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0212 PRESCRIPTIVE AUTHORITY

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

(1) the physician assistant complies with all state and federal laws regarding prescribing including G.S. 90-18.1(b);

(2) each supervising physician and physician assistant incorporates within their written supervisory arrangements, as defined in Rule .0201(8) of this Subchapter, instructions for prescribing, ordering, and administering drugs and medical devices and a policy for periodic review by the physician of these instructions and policy;

(3) In order to compound and dispense drugs, the physician assistant complies with G.S. 90-18.1(c);

(4) in order to prescribe controlled substances,

(a) the physician assistant must have a valid Drug Enforcement Administration (DEA) registration

and prescribe in accordance with DEA rules;

(b) All prescriptions for substances falling within schedules II, IIN, III, and IIIN, as defined in the federal Controlled Substances Act, shall not exceed a legitimate 30 day supply;

(c) the supervising physician must possess the same schedule(s) of controlled substances as the physician assistant's DEA registration;

(5) each prescription issued by the physician assistant contains, in addition to other information required by law, the following:

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

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

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

(6) the physician assistant documents prescriptions in writing on the patient's record, including the medication name and dosage, amount prescribed, directions for use, and number of refills; and

(7) a physician assistant who requests, receives, and dispenses medication samples to patients complies with all applicable state and federal regulations.

History Note: Authority G.S. 90-18(c)(13); 90-18.1; 90-18.2A; 90-171.23(14); 21 C.F.R. 301;
Eff. September 1, 2009.

21 NCAC 32S .0213 SUPERVISION OF PHYSICIAN ASSISTANTS

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

(b) Each team of physician(s) and physician assistant(s) shall ensure that the physician assistant's scope of practice is identified; that delegation of medical tasks is appropriate to the skills of the supervising physician(s) as well as the physician assistant's level of competence; that the relationship of, and access to, each supervising physician is defined; and that a process for evaluation of the physician assistant's performance is established.

(c) Each supervising physician and physician assistant shall sign a statement, as defined in Rule .0201(8) of this Subchapter, that describes the supervisory arrangements in all settings. Written prescribing instructions are required for each approved site. This statement shall be kept on file at all practice sites, and must be available upon request by the Board.

(d) A primary supervising physician and a physician assistant in a new practice arrangement shall meet monthly for the first six months to discuss practice relevant clinical issues and quality improvement measures. Thereafter, the primary supervising physician and the physician assistant shall meet at least once every six months. A written record of these meetings shall be signed and dated by both the supervising physician and the physician assistant, and shall be available for inspection upon request by the Board agent. The written record shall include a description of the relevant clinical issues discussed and the quality improvement measures taken.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0214 SUPERVISING PHYSICIAN

A physician wishing to serve as a primary supervising physician must exercise supervision of the physician assistant in accordance with rules adopted by the Board. The physician shall retain professional responsibility for the care rendered by the physician assistant within the scope of the supervisory arrangement.

History note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0215 RESPONSIBILITIES OF PRIMARY SUPERVISING PHYSICIANS IN REGARD TO BACK-UP SUPERVISING PHYSICIANS

(a) The primary supervising physician shall ensure that a supervising physician, either primary or back-up, is readily accessible for the physician assistant to consult whenever the physician assistant is performing medical acts, tasks, or functions.

(b) A back-up supervising physician must be licensed to practice medicine by the Board, not prohibited by the Board from supervising a physician assistant, and approved by the primary supervising physician as a person willing and qualified to assume responsibility for the care rendered by the physician assistant in the absence of the primary supervising physician. An ongoing list of all approved back-up supervising physicians, signed and dated by each back-up supervising physician, the primary supervising physician, and the physician assistant, must be retained as part of the Supervisory Arrangement.

History Note: Authority G.S. 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0216 CONTINUING MEDICAL EDUCATION

A physician assistant must complete at least 100 hours of continuing medical education (CME) every two years, at least 40 hours of which must be American Academy of Physician Assistants Category I CME. CME documentation must be available for inspection by the board or its agent upon request. The two year period shall run from the physician assistant's

birthday, beginning in the year 1999, or the first birthday following initial licensure, whichever occurs later.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0217 VIOLATIONS

The Board may take disciplinary action against a supervising physician or a physician assistant, pursuant to G.S. 90-14. It is unprofessional or dishonorable conduct for a physician assistant to violate the rules of this Subchapter, or to represent him/herself as a physician.

History Note: Authority G.S. 90-9.3; 90-14; 90-14.2; Eff. September 1, 2009.

21 NCAC 32S .0218 TITLE AND PRACTICE PROTECTION

(a) Any person not licensed by the Board violates G.S. 90-18.1 if he or she:

(1) falsely identifies him/herself as a physician assistant;

(2) uses any combination or abbreviation of the term "physician assistant" to indicate or imply that he or she is a physician assistant; or

(3) acts as a physician assistant without being licensed by the Board.

(b) An unlicensed physician may not use the title of "physician assistant" or practice as a physician assistant unless he/she fulfills the requirements of this Subchapter.

History Note: Authority G.S. 90-9.3; 90-18(c)(13); 90-18.1; Eff. September 1, 2009.

21 NCAC 32S .0219 PRACTICE DURING A DISASTER

A physician assistant licensed in this State or in any other state may perform acts, tasks, or functions as a physician assistant under the supervision of a physician licensed to practice medicine in North Carolina during a disaster within a county in which a state of disaster has been declared or counties contiguous to a county in which a state of disaster has been declared (in accordance with G.S.166A-6). A team of physician(s) and physician assistant(s) practicing pursuant to this Rule is not required to maintain on-site documentation describing supervisory arrangements and instructions for prescriptive authority as otherwise required by 21 NCAC 32S .0212. The Board may waive other regulatory requirements regarding licensure and practice to facilitate a physician assistant practicing during a disaster consistent with G.S. 90-12.5.

History Note: Authority G.S. 90-9.3; 90-12.5; 90-18(c)(13); 166A-6;
Eff. September 1, 2009.

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CHAPTER 34 – BOARD OF FUNERAL SERVICE

21 NCAC 34B .0413 ACCREDITATION OF PRERECORDED PROGRAMS AND LIVE PROGRAMS BROADCAST TO REMOTE LOCATIONS BY TELEPHONE, SATELLITE, OR VIDEO CONFERENCING EQUIPMENT

(a) A licensee may receive up to two hours of CE credit each year for attendance at, or participation in, a presentation where prerecorded material is used.

(b) A licensee may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, or video conferencing equipment. The licensee may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast.

(c) A licensee attending a prerecorded presentation is entitled to credit hours if:

(1) the presentation from which the program is recorded would, if attended by an active licensee, be an accredited course; and

(2) all other conditions imposed by the rules in this Subchapter are met.

(d) A licensee attending a presentation broadcast by telephone, satellite, or video conferencing equipment is entitled to credit if:

(1) the live presentation of the program would, if attended by a licensee, be an accredited course;

(2) there is a question and answer session with the presenter or presenters subject to the limitations set forth in 21 NCAC 34B .0415(b)(5); and

(3) all other conditions imposed by the rules in this Subchapter are met.

(e) To receive approval for attendance at programs described in Paragraphs (a) and (b) of this Rule, the following conditions must be met:

(1) Unless the entire program was produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the Board;

(2) The person or organization sponsoring the program must have a method for recording and verifying attendance. Attendance at a telephone broadcast may be verified by assigning a personal identification number to a licensee. The person or organization sponsoring the program must forward a copy of the record of attendance of active licensees to the Board within 30 days after the presentation of the program is completed. Proof of attendance may be made by the verifying person on a form provided by the Board;

(3) Unless inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which only pertain to the subject matter of the program. Any materials made available to persons attending the original or live program must be made

available to those persons attending the prerecorded or broadcast program who desire to receive credit under the rules in this Section; and

(4) A room suitable for viewing the program and taking notes must be available.

(f) A minimum of five licensees must physically attend the presentation of a prerecorded program in the same location. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(g) EXAMPLES:

EXAMPLE (1): Licensee X attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Licensee X is also entitled to receive credit, if the additional conditions under this Rule are also met.

EXAMPLE (2): Licensee Y desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the Board. Licensee Y shall not receive any credit hours for attending that videotape presentation.

EXAMPLE (3): Licensee Z attends a videotape program. The presentation of the program from which the videotape was made has already been held and approved by the Board for credit. However, no person is present at the videotape program to record attendance. Licensee Z shall not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Licensee Z and of other licensees at the program. All other conditions of this Rule must also be met.

EXAMPLE (4): Licensee A listens to a live telephone seminar using the telephone in the conference room of her funeral establishment. To record her attendance, Licensee A was assigned a person identification number (PIN) by the seminar sponsor. Once connected, Licensee A punched in the PIN number on her touch tone phone and her attendance was recorded. The seminar received individual course approval from the Board. Licensee A shall receive credit if the additional conditions under this Rule are also met.

History Note: Authority G.S. 90-210.23(a); 90-210.25(a)(5); Eff. July 1, 2005;
Amended Eff. September 1, 2009; March 1, 2008.

21 NCAC 34B .0616 BODY IDENTIFICATION TAGS

Unused body identification tags shall be kept on the premises of each funeral establishment at all times and are subject to inspection by the Board and its authorized agents.

History Note: Authority G.S. 90-210.23(a), (e); 90-210.29A; Eff. September 1, 2009.

21 NCAC 34B .0706 REGISTRATION OF EMBALMING FACILITY LOCATED OUTSIDE OF A FUNERAL ESTABLISHMENT

(a) An embalming facility located outside a funeral establishment shall comply with the requirements of G.S. 90-210.27A(a)(1) through (8) and all other applicable federal, state, or local laws and regulations.

(b) An embalming facility located outside a funeral establishment shall be registered either to a funeral establishment holding a permit from the Board or to a funeral service or embalmer licensee of the Board. Each embalming facility must be managed by an embalmer or funeral service licensee. A person managing an embalming facility may also manage the funeral establishment location registering the facility.

(c) Applications to register an embalming facility located outside a funeral establishment shall be made on forms provided by the Board. The applicant shall furnish the address and telephone number of the facility; a description of the preparation room; the names and license numbers of all part-time and full-time licensees employed by the facility; the person or business entity owning the facility; the person managing the facility; a certification that the facility will not be used for any other purpose other than embalming or used for activities requiring a funeral establishment permit; and any other information the Board deems necessary as required by law. The applicant shall verify the contents of the application before a notary public.

(d) Upon Board approval of the registration, the embalming facility may be used to embalm dead human bodies and shall not be used as a public accommodation. The owner of the facility must obtain a funeral establishment permit under G.S. 90-210.25(d) if the facility is to be held out to the public, used as a public accommodation, or used to engage in any other activity defined as the practice of funeral service under G.S. 90-210.20(k) other than embalming.

History Note: Authority G.S. 90-210.20(f), (h), (k); 90-210.23(a), (e); 90-210.25(d1); 90-210.27A;
Eff. September 1, 2009.

21 NCAC 34C .0303 RECORDS OF CREMATION AND DELIVERY

(a) All crematory licensees shall complete receipts for human remains on Board forms. The crematory licensee shall furnish the name of the crematory licensee, full name of the decedent, date and time of death, date and time the human remains was delivered to the crematory licensee, any affiliation by the person delivering remains with a funeral establishment or crematory, the name and signature of the employee or agent of the crematory who received the human remains, and any other information the Board deems necessary as required by law. Every crematory licensee shall furnish this receipt to the person who delivers the human remains to the crematory licensee.

(b) All records documenting the release of human remains from a crematory licensee to the person who receives the cremated remains shall be completed on Board forms. The crematory licensee shall furnish the name of the crematory licensee, the full name of the decedent, the date and time of release, the name of the person who received the cremated remains, the place where

cremated remains were received, any affiliation by the person receiving remains with a funeral establishment or other entity, the signatures of the person delivering the remains and the recipient of remains, any mailing or handling instructions, and any other information the Board deems necessary as required by law. Crematory licensees must provide evidence by signature, postal receipt or its equivalent, of the receipt of the cremated remains.

(c) All records documenting the release of human remains from a funeral establishment to the person who receives the cremated remains shall be completed on Board forms. The funeral establishment shall furnish the name of the funeral establishment, the full name of the decedent, the date and time of release, the person to whom the remains were released, the type of container in which the remains were released, the signatures of the parties delivering and receiving remains, any shipping or special handling instructions, and any other information the Board deems necessary as required by law. Funeral establishments must provide evidence by signature, postal receipt or its equivalent, of the receipt of the cremated remains.

(d) In order to track the human remains through the cremation process from the time the remains are received at the crematory until the cremated remains are delivered, all crematory licensees shall keep records on Board forms. The crematory licensee shall furnish the name of the crematory licensee, full name of the decedent, description of the cremation container used, time and date the decedent was placed into the crematory, person who placed the deceased in the crematory, time and date the cremated remains were removed from the crematory, type of container in which the cremated remains were placed, time and date the cremated remains were processed, the name and signature of the person who processed the cremated remains and placed them into a container, and any other information the Board deems necessary as required by law.

(e) In lieu of the separate forms required by Paragraphs (a), (b), and (d) of this Rule, a crematory licensee may use a form prescribed by the Board that combines all information required by Paragraphs (a), (b), and (d) of this Rule.

(f) The crematory licensee shall retain the completed forms required by this Rule and shall produce all crematory forms for inspection or copying by the Board or its agents upon request. The funeral establishment shall retain the completed form required by Paragraph (c) of this Rule and shall produce the form for inspection or copying to the Board or its agents upon request.

History Note: Authority G.S. 90-210.127; 90-210.134(a);
Eff. July 1, 1991;
Amended Eff. September 1, 2009; August 1, 2004.

21 NCAC 34D .0302 ANNUAL REPORT

Each preneed funeral establishment licensee shall file an annual report with the Board. The report shall include the following:

(1) the total number of standard and inflation-proof trust-funded and insurance-funded preneed funeral contracts maintained by the licensee;
(2) the number of contracts sold in the reporting period;
(3) the number of contracts which expired, including contracts performed, revoked and transferred, in the reporting period;
(4) the total year-end balance of all preneed trust accounts maintained at each financial institution;
(5) the total year-end balance of all insurance-funded preneed contracts written with each insurance company;
(6) for each preneed contract sold, whether the preneed contract is active, performed, cancelled, or lapsed; and
(7) for each active preneed contract, the current insurance policy value or trust account balance.

The annual report shall be verified as correct before a notary public by the location manager registered under G.S. 90-210.25(d)(2)a. or by a corporate officer of the preneed establishment licensee. The annual report shall be filed not later than March 31 each year by each firm holding a preneed establishment license at any time during the preceding year ending December 31.

History Note: Authority G.S. 90-210.69(a); 90-210.68(a);
Eff. May 1, 1993;
Amended Eff. September 1, 2009.

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CHAPTER 56 – BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS

21 NCAC 56 .0103 ORGANIZATION

(a) Board Committees. The Board shall be organized into an engineering committee, a land surveying committee and a continuing professional competency (CPC) committee. The engineering committee shall consist of the four engineer members and one public member. The land surveying committee shall consist of the three land surveyor members and one public member. The CPC committee shall consist of one engineer member, one land surveyor member and one public member. The Board chair shall appoint the chairs and members of each committee.

(b) Executive Director. The executive director may be authorized by the Board or the chair to represent the Board before professional or governmental organizations when such representation serves to further and support the purposes of the Board and is made within the expressed policies of the Board or these Rules.

(c) Actions by the Board. Actions taken by the Board shall be by majority vote of a quorum of the Board.

History Note: Authority G.S. 89C-4; 89C-8; 89C-9; 89C-10; 89C-11;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. September 1, 2009; August 1, 2000; August 1, 1998; April 1, 1989; January 1, 1982.

21 NCAC 56 .0503 EXAMINATIONS

(a) Fundamentals of Engineering. This eight-hour written examination is designed primarily to test the applicant's proficiency and knowledge of the fundamentals of engineering.

(b) Principles and Practice of Engineering. This eight-hour written examination is designed to test the applicant's proficiency and knowledge of engineering principles and practices.

(c) Examination Aids. Examinees may utilize examination aids as specified by the exam preparer.

(d) Preparation of Examination. The examinations in the fundamentals of engineering and in the principles and practice of engineering are national examinations provided by the National Council of Examiners for Engineering and Surveying (NCEES) of which the Board is a member.

(e) Examination Sequence. Before the applicant is permitted to be examined on the principles and practice of engineering, the applicant must pass the examination on the fundamentals of engineering, unless the applicant can evidence 20 years of progressive engineering experience to be exempt from taking the fundamentals of engineering exam. In no event is an applicant allowed to take both examinations at the same time or at the same scheduled examination date.

(f) Examination Filing Deadline. The applicant who wishes to take an examination must have the completed application (which includes all necessary references, transcripts, and verifications) in the Board office prior to August 1 for Fall examinations and January 2 for Spring examinations.

(g) Seating Notice. After approval of an application to take either the examination on the fundamentals of engineering or principles and practice, the applicant shall be sent a seating notice. This notice shall inform the applicant of the date, time and location of the examination and the seat number assigned.

(h) Unexcused Absences. After a seating notice has been issued for a scheduled examination by the Board, and the applicant fails to appear, that applicant's record shall reflect "unexcused absence" unless the absence was for official jury duty or the applicant was not physically able to be present, as indicated by a doctor's certificate. The examination fee is forfeited.

(i) Re-Examination. A person who has failed an examination may apply to take the examination again at the next regularly scheduled examination period by making written request and submitting the required exam fee. A person having a combined record of three failures or unexcused absences is only eligible after submitting a new application with appropriate application fee, and shall be considered by the Board for reexamination at the end of 12 months. After the end of the 12-month period, the applicant may take the examination no more than once every calendar year. The applicant must demonstrate to the Board that actions have been taken to improve the applicant's chances for passing the exam.

(j) Special Accommodation. An applicant may make a written request, before the application deadline, for special accommodation for the exam. Reasonable accommodation shall be granted based upon meeting the Guidelines for Requesting Religious and ADA Accommodations published by the National Council of Examiners for Engineering and Surveying (NCEES), which are hereby incorporated by reference, including subsequent amendments and editions. Copies are available at no cost at www.ncees.org.

(k) Exam Results. Exam results shall be supplied in writing as pass or fail. No results will be given in any other manner.

(l) Review of Failed Exams. An applicant who fails to make a passing score on an exam shall receive an exam analysis.

History Note: Authority G.S. 89C-10; 89C-13; 89C-14; 89C-15;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. September 1, 2009; May 1, 2009; April 1, 2001; August 1, 1998; November 2, 1992; April 1, 1989; January 1, 1982.

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CHAPTER 65 – BOARD OF RECREATIONAL THERAPY LICENSURE

21 NCAC 65 .0501 LICENSURE FEES

(a) A cashier's check, money order, certified check or an employer's check is acceptable for the initial application licensure fees.

(b) Fees are nonrefundable and payable to the North Carolina Board of Recreational Therapy Licensure. Personal checks shall be accepted for payment of renewal fee and record maintenance fee. Processing fee for returned checks shall be the maximum allowed by law.

(c) The Board shall collect the following fees:

(1)	Initial Application for Licensure Fee	
	(A) Licensed Recreational Therapist	($100.00)
	(B) Licensed Recreational Therapy Assistant	($ 50.00)
(2)	Licensure renewal fees (due every two years)	
	(A) Licensed Recreational Therapist	($ 75.00)
	(B) Licensed Recreational Therapy Assistant	($ 35.00)
(3)	Inactive status	($ 35.00)
(4)	Record Maintenance fee (due non-renewal yr)	
	(A) Licensed Recreational Therapist	($ 75.00)
	(B) Licensed Recreational Therapy Assistant	($ 35.00)
(5)	Purchase of mailing labels to promote continuing education	($ 50.00)

History Note: Authority G.S. 90C-24(a)(3); 90C-24(a)(10); 90C-28;
Temporary Adoption Eff. December 6, 2005;
Eff. December 1, 2006;
Amended Eff. September 1, 2009.

TITLE 23 – DEPARTMENT OF COMMUNITY COLLEGES

23 NCAC 02E .0402 WORK STATION OCCUPATIONAL SKILLS TRAINING

History Note: Authority G.S. 115D-5;
Eff. February 1, 1976;
Emergency Amendment Eff. August 6, 1976 For a Period of 120 days to Expire on December 4, 1976;
Made Permanent Eff. November 4, 1976;
Amended Eff. September 1, 1985; December 1, 1984;
Temporary Amendment Eff. October 15, 1992 For a Period of 180 days to Expire on April 15, 1993;
Amended Eff. September 1, 1993;
Temporary Amendment Eff. November 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Amended Eff. April 1, 2003; June 1, 1994;
Repealed Eff. September 1, 2009.

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) 431-3000. 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

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby
Randall May
A. B. Elkins II
Joe Webster

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
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NC Alcoholic Beverage Control Commission v. Ciro Maya Maya, T/A Carolina Sports Arena	08 ABC 2411	Overby	06/29/09	
N.C. Alcoholic Beverage Control Commission v. Du Cong Phan T/A Good Food Market	09 ABC 0565	May	05/18/09	
North Carolina Alcoholic Beverage Control Commission v. Mayra Leticia Rodriguez, T/A La Perla Del Pacifico	09 ABC 0975	Gray	07/28/09	
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Mary D. Malone v. State of North Carolina, Department of Crime Control., Victims Compensations Services	08 CPS 2463	Gray	07/09/09	
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A list of Child Support Decisions may be obtained by accessing the OAH Website: http://www.ncoah.com/hearings/decisions/

DEPARTMENT OF HEALTH AND HUMAN SERVICES				
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STATE OF NORTH CAROLINA

FORSYTH COUNTY

FILED IN THE OFFICE OF ADMINISTRATIVE HEARINGS
2009 MAY 20 PM 12:03
07 OSP 1514

OFFICE OF ADMIN HEARINGS

ALVITA C. BYERS **Petitioner,** **v.**	
ELIZABETH COX, THE OFFICE OF HUMAN RESOURCES AND THE NORTH CAROLINA SCHOOL OF THE ARTS, **Respondent.**	**PROPOSED DECISION**

The above-captioned case was heard before Selina M. Brooks, Administrative Law Judge, on 23-24 February 2009, in High Point, North Carolina. Prior to the presentation of evidence, the undersigned denied Respondent's Motion To Dismiss And/Or Motion In Limine. At the conclusion of the hearing, the undersigned asked the parties to each submit a proposed decision within thirty (30) days of receipt of the transcript. Both parties have filed proposed decisions.

APPEARANCES

For Petitioner: Geraldine Sumter, Esq.
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For Respondent: John P. Scherer II
Assistant Attorney General
N.C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

EXHIBITS

Admitted for Petitioner: Exhibits 1-4, 8, 9, 12-18, 20, 21, 25, 26

Admitted for Respondent: Exhibits 1-12, 14-26

WITNESSES

Called by Petitioner: Petitioner

Called by Respondent: George Burnette

Elizabeth Ann ("Beth") Cox

ISSUES

The issues for consideration as stated in the opening statements at this hearing were:

1. Whether the North Carolina School of the Arts discriminated against Petitioner based on her race when it terminated her based on unsatisfactory job performance?
2. Whether the North Carolina School of the Arts retaliated against Petitioner for using her leave under the Family Medical Leave Act?
3. Whether the North Carolina School of the Arts had just cause to terminate Petitioner for unsatisfactory job performance?

FINDINGS OF FACT

On the basis of careful consideration of the testimony presented at the hearing, the documents and exhibits received into evidence, and the entire record in this proceeding, the undersigned finds the following:

1. At the time of her separation, Petitioner was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act) and is a citizen and resident of Davidson County, North Carolina.

2. Respondent North Carolina School of the Arts (hereinafter "Respondent" or "NCSA") is subject to Chapter 126 and was the Petitioner's employer.

3. The NCSA hired Petitioner as a Personnel Technician in 2003. In December 2004, Beth Cox (Caucasian female) was hired as Director of Human Resources and became Petitioner's supervisor. Cox described the Human Resources Department ("HR") as in disarray upon her arrival, because all the employees in the section, except Petitioner and a temporary employee, had been removed in the wake of a negative financial audit of the school. At the time, Petitioner was responsible for handling employee benefits, recruitment, classification, and budget. During 2006-07, Cox supervised four employees (1 African American and 3 Caucasian). Presently, Cox supervises five employees (2 African American and 3 Caucasian), and Cox hired all of them for their present positions.

4. Cox first evaluated Petitioner's performance as a Personnel Technician II in May 2005 and gave Petitioner an overall rating of "Very Good." In her comments under the category of "Relationships with Others" Cox noted that Petitioner "struggled from time to time" with her campus relationships. Cox determined, however, that after receiving greater clarity of her expectations, Petitioner would alleviate any problems.

5. In the spring of 2005, Cox decided to establish a benefits coordinator position within the HR department. In consultation with Petitioner and another HR employee, Cox developed a

work plan, and subsequently advertised the position of benefits coordinator. This position was responsible for administering all employee benefits programs, including enrolling employees in core benefits programs (health, NC Flex), new employee orientations, Federal Medical Leave Act ("FMLA"), worker's compensation, unemployment, and voluntary shared leave. Petitioner applied for the position because it would be a promotion. After interviewing candidates, including Petitioner, Cox selected Petitioner for the position. Although Petitioner had not exclusively handled benefits issues, Cox believed that with proper training and effort Petitioner was the best candidate to perform the job.

6. After her hiring, Petitioner regularly attended training several times per year for benefits administrators, including State Health Plan benefit training, NC Flex training, and regular benefits administrators' meetings. Cox also conducted one-on-one meetings with Petitioner and other employees on nearly a weekly basis. In these meetings, Petitioner would bring questions or issues to Cox's attention for clarification or action, and Cox would delegate responsibilities, answer any questions, and discuss Petitioner's performance. During Petitioner's first year in the position, she had issues with overpayments to employees. Petitioner was responsible for completing a PD-105 form which indicated the vacation payout, and other benefit issues for departing employees. Although there were some errors, Cox did not hold Petitioner responsible because of potential confusion between the role of the payroll department versus Petitioner's role in the process. Cox hoped that everyone could work through the issues.

7. In May 2006, Cox completed Petitioner's annual evaluation and gave her an overall rating of "Very Good." According to Cox and the written evaluation, approximately 75% of Petitioner's job involved administering the benefits program for NCSA. Despite the overall evaluation, Cox believed that Petitioner sometimes struggled with relationships, especially with payroll, and with time management. Cox and Petitioner discussed possible approaches to these problems.

8. In the fall of 2006, Cox received an anonymous letter which complained about promotions and the lack of diversity at NCSA. Cox did not recall if there were specific complaints about her in the letter. Upon receipt of the letter, Cox held a staff meeting. She informed them of the NCSA discrimination/harassment policy and of what measures NCSA took to ensure equal opportunity. Cox also wanted to get staff input on how to address this complaint and on whether this was a common complaint on campus in their discussions with employees. Petitioner volunteered to take responsibility for promoting diversity on campus and for disseminating this information. To foster this effort, Cox sent Petitioner to diversity training, including conferences on diversity in campus communities. Cox asked Petitioner to present a project plan on the training, so Cox could recommend diversity training and plans for the campus. Since this was not Petitioner's foremost responsibility, Cox granted Petitioner extensions of any deadlines Petitioner set for the presentation of the plan.

9. In January 2007, Cox issued Petitioner a written warning. Cox issued this warning based on a complaint by an employee that Petitioner had discussed his confidential personnel information aloud in the office and conducted a discussion of his benefits with him outside of her office. When Cox issued the written warning, Petitioner apologized, and Cox agreed to remove the written warning if Petitioner's performance evaluation was overall "good." Cox has issued

written warnings to two Caucasian employees and has terminated a Caucasian employee. She stated that Petitioner's race played no role in her decision to issue a written warning.

10. In June 2007, Cox completed Petitioner's annual evaluation and gave her a "Good" overall performance rating. Cox noted in Principal Function #1 of Petitioner's work plan (Benefits Administration) several issues. For instance, Cox explained that Petitioner had trouble with disability benefits cases, especially regarding communication of necessary information. In addition, Cox noted that Petitioner continued to have difficulty in providing accurate information regarding vacation pay outs. This caused NCSA to have to review and reaudit the entering of this information. As to Principal Function #3 of Petitioner's work plan (Teamwork), Cox explained that she gave Petitioner a "good" rating due to the prior written warning, i.e., dealing with customers, and Petitioner's occasional reluctance to receive feedback. Cox did remove the written warning due to Petitioner's efforts to improve her customer service.

11. In late June 2007, Petitioner submitted a request for FMLA leave. Petitioner and her husband came into Cox's office and presented her with a note for the period 29 June 2007 through 6 August 2007. The doctor's note stated that Petitioner was suffering from stress and anxiety. Cox was surprised and she told Petitioner that she hoped she would take care of herself and asked Petitioner if there was any "hot topic" Cox needed to address during the leave period. Petitioner told her that she had gotten her office fairly well organized. Petitioner handled the administration of FMLA leave. Cox was unfamiliar with the program and its requirements so she consulted with NCSA legal counsel to determine if Petitioner's request met FMLA and NCSA requirements.

12. In early July 2007, Cox attempted to look through Petitioner's office to ensure that payroll deadlines and exits were in proper order. Petitioner's office was disorganized and as Cox reviewed the files she became greatly concerned about Petitioner's job performance. At the same time, Cox consulted with NCSA legal counsel and received an opinion that Petitioner's medical documentation was insufficient to approve her FMLA leave. Although she had orally approved of Petitioner's FMLA leave, Cox sent Petitioner a letter on 31 July 2007 that she would not approve Petitioner's request to extend FMLA leave to 22 August 2007. Petitioner replied by letter dated 5 August 2007. Petitioner disagreed with NCSA's review of FMLA policies and accused Cox of approving a Caucasian female's request with similar documentation. Petitioner also accused Cox of race discrimination and mentioned that she "hoped" she would not return to a "hostile work environment." Neither Petitioner nor anyone else had accused Cox of race discrimination prior to this letter. In addition, Cox noted that Petitioner approved the Caucasian female's FMLA leave request, and Cox was not involved in the actual review of her FMLA documents.

13. On 9 August 2007, Cox sent Petitioner another letter approving Petitioner's FMLA leave until 23 August 2007. Cox requested further medical documentation of a serious health condition. Cox, however, noted concern about Petitioner's behavior when she came into the office. Based on reports from co-workers, Cox stated that Petitioner had asked campus police for an escort to the office and had made comments to co-workers that Cox was "trying to fire me," and "your husband will be interested to read this case in two to three years." Cox considered this behavior unprofessional.

14. At the same time Cox sent the 31 July 2007 FMLA letter, she sent Petitioner another letter notifying her of a pre-disciplinary conference for grossly inefficient job performance. Cox decided to send this letter after reviewing Petitioner's files and consulting with legal counsel. Cox was concerned about several issues including: (1) the disarray and inaccuracy of short-term disability paperwork; (2) documentation issues with the shared leave program; and (3) improper handling of faculty pay and paperwork. Due to approval of Petitioner's FMLA leave, Cox delayed holding the pre-disciplinary conference until Petitioner's return. On 24 August 2007, Cox sent Petitioner a letter notifying her of a pre-disciplinary conference later that day. After her 31 July 2007 letter, Cox's review of Petitioner's files had revealed more performance issues.

15. Cox believed that several issues within the following programs constituted potential grossly inefficient job performance: (1) short- and long-term disability paperwork; (2) management of the shared leave program; (3) terminations in HRS and in PMIS of faculty on less than 12-month contracts; (4) administration of the FMLA program; (5) unordered employee appreciation gifts; (6) unfilled PD 105's since May 2007; (7) management of retirement benefits; (8) management of the on-line directory.

16. Regarding short- and long-term disability paperwork, Cox noticed that Petitioner failed to properly complete forms, had improperly made several copies of the same document, and had failed to properly terminate an employee from the PMIS system, preventing him from obtaining long-term disability benefits. R. Ex. 10A

17. Regarding shared leave, the school internal auditor had found errors in the shared leave program in May. Cox asked Petitioner to fix the issues, but Cox's review of the files revealed at least one employee, Bessie Hairston, had in error received double credit for donated leave from employees. R. Ex. 10B

18. As to terminations in HRS and in PMIS of faculty on less than 12-month contracts, Cox stated that Petitioner failed to accurately update the PMIS system files and had improperly terminated faculty members from the PMIS system, potentially causing no payments to these employees over the summer. R. Ex. 10C

19. Regarding administration of FMLA, Cox's review with the legal counsel revealed Petitioner may have approved FMLA leave without sufficient documentation. R. Ex. 10D

20. After receiving several employee complaints, Cox also found that Petitioner had failed to order or had ordered incorrect employee appreciation awards. R. Ex. 10E

21. Finally, through employee complaints, Cox learned of various document processing errors by Petitioner that impacted employees' medical and other benefits. R. Ex. 10F

22. After consulting with legal counsel and George Burnette, Chief Operating Officer of NCSA, Cox issued the 31 July 2007 letter. Burnette agreed with Cox's decision to issue the letter. Cox and Burnette then met with Petitioner for the pre-disciplinary conference on 24 August 2007. During the conference, Petitioner presented her responses to the issues Cox had raised. In essence, Petitioner admitted that some of the items were due to either mistakes or confusion regarding expectations. Based on their discussion, Cox decided that she would give

Petitioner a chance to improve her performance and that she would clarify her expectations for Petitioner in writing and by meeting on a regular basis. Burnette concurred with her decision. Cox notified Petitioner of her decision at the conference. R. Exs. 11 & 14

23. Soon after the conference, the Faculty Council at NCSA asked Petitioner to present an update to the faculty on changes or modifications to the benefit plans, including NC Flex. Although Cox was unsure if Petitioner had proper time to prepare for this presentation, she agreed to allow Petitioner to make the presentation based on Petitioner's assurances that she would be prepared. R. Ex. 12

24. On 7 September 2007, Cox presented Petitioner with a memorandum containing her performance expectations. Cox and Petitioner went over the expectations in a meeting and clarified any confusion. Cox asked Petitioner to present a timeline for accomplishing the assigned tasks. R. Ex. 14

25. Earlier in the year, in March 2007, Cox requested an in-range salary adjustment for Petitioner. Cox had decided to hire a recruiter to work in Human Resources. Although this person would occupy the same classification as Petitioner, the new employee would have a higher salary. This new employee had transferred from another department to HR, and Cox could not adjust her salary up or down because of department pay equity and Office of State Personnel Rules. As soon as Cox made this offer to the new employee, Cox requested the in-range salary adjustment from her allotted salary funds ($1,650) for Petitioner. According to Cox, this was all the salary dollars she had been allotted. R. Ex. 15A

26. On 5 September 2007, Petitioner sent Cox a letter requesting that she be paid as much as the other employee. R. Ex. 15B The next day, Cox responded by memorandum, and explained that the difference in salary between Petitioner and the other employee was in accordance with NCSA policy. Cox also provided Petitioner with a copy of the policy. The policy provided the difference in salary could not exceed 10%. The other Personnel Technician II made $43,724, while Petitioner made $40,421 (a difference of less than 10%). Cox testified that Petitioner's questions regarding her salary did not bother her. She simply did not have the salary money available and there was no inequity as defined by the policy. R. Exs. 15C-15E

27. On 4 September 2007, Cox observed Petitioner make a presentation on benefits to the faculty. When asked about whether there were required waiting periods for an employee who switches from a high dental option to a low dental option under the NC Flex plan, Petitioner gave inaccurate information to the employee, stating, "there are waiting periods either way, low to high or high to low."

28. On 7 September 2007, Cox issued Petitioner a written warning for unsatisfactory job performance, after consulting with Burnette, because Petitioner had attended training on the benefits and providing this information was one of the basic tasks of her position. Burnette concurred with her decision. Providing inaccurate information could cause faculty members to make uninformed decisions about their benefits. Cox asked Petitioner to send out an e-mail to faculty correcting the information, but Petitioner never did so. R. Exs. 17 & 21.

29. On 14 September 2007, Cox issued Petitioner a second written warning for unsatisfactory

job performance after consulting with Burnette. A faculty member had come into HR to complete his open enrollment form for the state health plan. Petitioner had assisted him with the form and indicated to him that there would be no employee deduction for insurance coverage of his spouse. Petitioner then sent the form to payroll for processing. The health plan employees called because they were confused by the form, since there should be an employee deduction for spousal coverage. Cox's office had to contact the employee to find out his preferences, causing him to end up with different coverage than he originally wanted. Cox decided to issue this warning because the accurate completion of these forms was a basic and simple part of Petitioner's position. Cox believed that this kind of error was not acceptable. Burnette concurred with her decision. She informed Petitioner that she needed to double check her work and make necessary improvements. R. Exs. 20 & 23

30. On 17 September 2007, Debra Gunter from payroll alerted Cox that she had a health plan enrollment form that looked strange. Gunter could not fix the form herself because she was not qualified to do so. Cox reviewed the form and noted several errors: the form incorrectly had the dependent's name, rather than the employee's name, listed at the top of the form; secondly, the form had the wrong social security number listed: and, finally, Petitioner had reviewed and certified the form, indicating no deductions for dependent coverage.

31. After discussing it with Burnette, Cox decided to issue Petitioner a Notice of Pre-Disciplinary Conference for 18 September 2007. Cox did so because she was considering dismissal for unsatisfactory job performance. According to Cox, she issued this letter because the errors on the health plan enrollment form were simple and it required extensive work to correct them.

32. Cox testified that Petitioner took no proactive action to make sure the forms, even ones she had completed, were correct after the second written warning on 14 September 2007. If Petitioner had contacted payroll after the first written warning and asked to review all her submitted forms to check for errors, Cox would not have initiated the pre- disciplinary action. R. Ex. 22

33. On 18 September 2007, Petitioner attended a pre-disciplinary conference with Cox and Burnette. Petitioner claimed that she had a lot of forms and admitted that she had submitted incorrect information to payroll. Petitioner minimized the importance of her errors, stating that the health plan could catch the errors. Cox was concerned because the errors on the health plan form involved the most basic elements of Petitioner's job. Cox did not believe that such elementary errors were acceptable and she lacked confidence in Petitioner's ability to accurately perform her job.

34. Besides Petitioner, Cox has terminated a Caucasian female and given that employee two written warnings. Petitioner has complained that a white male employee made errors causing overpayments. Cox, however, stated that the white male was not responsible for the errors, since the errors in his case resulted from bad information provided by other sources.

35. When she considered Petitioner's dismissal, Cox reviewed the school Discipline and Dismissal Policy. R. Ex. 26 Cox determined that the accuracy and quality of Petitioner's work did not warrant continued employment. Cox denied that Petitioner's race entered into her

decision to terminate her. Cox also denied that any complaints about pay or Petitioner's FMLA leave entered into her decision. Burnette testified that he saw no evidence in his discussions with Cox that race, pay issues, or Petitioner's FMLA leave entered into Cox's decision. During his career Burnette has supported the termination of Caucasian employees and has been involved in the hiring and promotion of African American employees.

36. Subsequent to the decision to terminate Petitioner, Cox discovered more errors. She discovered that two employees had never had their forms sent to the retirement system. Further, she found errors in disability and retirement cases. Cox and other employees had to spend significant time fixing these errors and correcting retirement and health benefit forms. Although Cox did not consider these errors in making her decision on termination, she would have terminated Petitioner for these errors, if she had discovered them before the termination action of 20 September 2007. Based on his review of this same information, Burnette agreed with Cox. R Exs. 24 & 25.

37. In her testimony, Petitioner testified about the amount of work she shouldered. She admitted, however, that she was unsure if she stayed later during the late August or early September time period in 2007. She also stated that she believed Cox scrutinized her more starting in 2006, and began to show a change in tone toward her.

38. Petitioner admitted that she praised Cox's leadership in her evaluation comments at that time. She also admitted that she did not raise a discrimination concern about Cox until Cox considered denying her FMLA extension in July 2007. Petitioner admitted that she, rather than Cox, primarily handled the approval of FMLA leave, including the approval of the FMLA request of the Caucasian employee she mentioned in her written responses to Cox's FMLA questions. Petitioner further testified that Cox boxed up her personal items while Petitioner was on FMLA leave and admitted that she asked campus police to escort her to the office because she felt threatened by Cox's notice of pre-disciplinary letter issued on 31 July 2007. Cox admits that she boxed up only Petitioner's personal items because a temporary employee needed to use Petitioner's office and Cox wanted to protect Petitioner's items.

39. As to the issue of Petitioner's salary, Petitioner does not deny the facts in Cox's letters, but claims that Cox "backdated" the request for pay increase form.

40. Regarding the incidents in September 2007, Petitioner asserts that she did not make errors in her presentation to the faculty in early September and that Cox informed her that there was no need for Petitioner to send out a memorandum to correct any errors. This testimony is contradicted by the e-mail sent to her by Cox. R. Ex. 21

41. As to the errors in the forms mentioned in the second written warning and the notice of termination letter, Petitioner did not deny that she made the errors. She testified that the first error occurred before her receipt of the second written warning. She further testified that the second error listed in the notice of termination letter, likely occurred before the issuing of the second written warning.

42. Petitioner admits that after the issuance of the second written warning, she did not check to see if she had made any other errors on forms submitted to payroll. She testified that there

was no need because there was a "back up" system in place to catch and correct any errors.

43. Cox's hearing testimony has mirrored the information in her letters to Petitioner, including the written warnings and dismissal letter.

44. Cox's testimony is consistent and credible.

45. Burnette's testimony is consistent and credible.

46. Petitioner's testimony is not consistent or credible, especially her accusations regarding Cox backdating a form and any animus she claims that Cox directed toward her.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapter 126 and 150B of the North Carolina General Statutes.

Race Discrimination Claim

2. Petitioner first alleged discriminatory termination on the basis of her race (African American). In reviewing discrimination allegations North Carolina courts look to federal decisions for guidance in establishing principles of law. *N.C. Dept. of Correction v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983). To establish a prima facie case of race discrimination, Petitioner must show that (1) she was a member of a protected class; (2) she was discharged, and (3) she was replaced by a person who was not a member of a minority group. *Id.* at 137, 301 S.E. 2d at 83. Petitioner may also show a prima facie case by showing a discharge of an African American employee and the retention of a white employee under similar circumstances. *Id.*

3. Once a prima facie case of discrimination has been established, Respondent has the burden of producing evidence of a non-discriminatory reason for its action. *Id.* at 138, 301 S.E. 2d at 83 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). Once Respondent has presented a non-discriminatory reason for its action, Petitioner must show that Respondent's reasons are in fact a pretext for intentional discrimination. *Gibson*, 308 N.C. at 139, 301 S.E.2d at 84; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Petitioner's showing of pretext must absolutely fail in this case, as proof of a discriminatory motive is critical to a Title VII disparate treatment claim, *see, e.g., St. Mary's*, 509 U.S. at 511; *Holder v. City of Raleigh*, 867 F.2d 823, 826 (4th Cir. 1989); and petitioner has no proof of discriminatory animus.

4. Petitioner is a member of a protected class and she was terminated from her employment. Petitioner has failed to prove that a similarly situated Caucasian was not terminated for the same performance issues. Petitioner has failed to present a prima facie case of race discrimination.

5. Petitioner has failed to present sufficient evidence to show that Respondent's reasons were pre-textual. Petitioner has failed to present any discriminatory animus toward African Americans.

6. Petitioner does not deny that she made the alleged errors. While she believes that her

performance did not merit termination, her subjective belief that her termination was motivated by discrimination is insufficient to establish pretext regarding Respondent's reasons for her termination. *Evans v. Technologies*, 80 F.3d 954, 960 (4th Cir. 1996). Petitioner's objections about the reasons for her termination amount to nothing more than questioning the fairness or wisdom of the decision. Such a claim fails to show evidence of discrimination. *E.g., Jiminez v. Mary Washington College*, 57 F.3d at 383 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Accordingly, Petitioner has failed to prove that Respondent discriminated against her on the basis of race when it terminated her for unsatisfactory job performance.

Retaliation Claim

7. "To establish a prima facie case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action." *Salter v. E & J Healthcare*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003).

8. Petitioner has failed to establish a prima facie case of retaliation, because she has failed to establish the third prong: a causal connection between the protected activity and the adverse action.

9. Petitioner has failed to establish any evidence of retaliatory intent.

10. Petitioner has presented no evidence that Cox or Burnette had any discriminatory intent.

11. Petitioner has failed to establish that Respondent's legitimate non-retaliatory reason was pre-textual, or that retaliation was the real reason for the action.

12. The evidence shows that the true cause for Petitioner's dismissal was her unsatisfactory job performance.

Just Cause Claim

13. The State Personnel Manual states that disciplinary actions for performance-based inadequacies "are intended to bring about a permanent improvement in job performance. Should . . . other inadequacies occur, the supervisor may deal with new unsatisfactory performance with further discipline." *See* NCAC 1J.0605(a). The State Personnel Manual further provides that State employees may be dismissed for a current incident of unsatisfactory job performance provided they have at least two active disciplinary actions. *See* NCAC 1J.0605(b).

14. The State Personnel Manual defines "unsatisfactory job performance" as: "Work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency." *See* NCAC 1J.0614(j).

15. Pursuant to N.C.G.S. sec. 126-35(d), the Respondent has the burden of proving that it had just cause for discharging the Petitioner from employment.

16. Petitioner made errors in the performance of her job duties.

17. Petitioner was given an opportunity to correct these errors, but did not.

18. Petitioner's job performance was not satisfactory.

19. Respondent had just cause to dismiss Petitioner for unsatisfactory job performance in accordance with N.C.G.S. sec. 126-35 and the relevant provisions of the State Personnel Manual of the North Carolina Office of State Personnel.

On the basis of the above Conclusions of Law, the undersigned issues the following:

DECISION

It is hereby determined that Petitioner has failed to prove that Respondent discriminated against her based on her race, that Petitioner has failed to prove that Respondent retaliated against her, that Respondent has proven just cause to terminate Petitioner for unsatisfactory job performance and, therefore, Respondent's decision to terminate Petitioner is **AFFIRMED**.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. sec. 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to Decision and to present written arguments to those in the agency who will consider this Decision. N.C.G.S. sec. 150B-36(a).

The agency is required by N.C.G.S. sec. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

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

This the 20th day of May, 2009.

Selina M. Brooks
Administrative Law Judge

A copy of the foregoing was sent to:

Geraldine Sumter, Esq.
Ferguson, Stein, Chambers, Gresham & Sumter, P.A.
P.O. Box 36486
Charlotte, NC 28236-6486
ATTORNEY FOR PETITIONER

John P. Scherer, II
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
ATTORNEY FOR RESPONDENT

This the 20th day of April, 2009.

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, N.C. 27699-6714
Phone: 919-431-3000
Fax: 919-431-3100

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF MOORE	08 DHR 1485
Cynthia Curtis, Petitioner, vs. Department of Health and Human Services, Division of Health Service Regulation, Respondent.	**DECISION**

THIS MATTER came on for hearing on April 13, 2009, before Administrative Law Judge Selina M. Brooks in Carthage, North Carolina.

APPEARANCES

For Petitioner: Thomas M. Van Camp, II, Esq.
Van Camp, Meacham & Newman, PLLC
Post Office Drawer 1389
Pinehurst, NC 28370

For Respondent: Bethany A. Burgon
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

ISSUE

Whether the Health Care Personnel Registry's denial of Petitioner's request to remove a finding of neglect by her name pursuant to N.C. Gen. Stat. § 131E-256(i) was arbitrary and capricious, a failure to use proper procedure, or in error of law?

APPLICABLE LAW

The statute establishing the Health Care Personnel Registry states, in pertinent part, that:

In the case of a finding of neglect under subdivision (1) of subsection (a) of this section, the Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that:

(1) The employment and personal history of the nurse aid does not reflect a pattern of abusive behavior or neglect;
(2) The neglect involved in the original finding was a singular occurrence; and
(3) The petition for removal is submitted after the expiration of the one-year period which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section.

N.C. Gen. Stat. § 131E-256 (i)

The applicable rule concerning Personnel Requirements states, in pertinent part, that:

(b) All facilities shall ensure that the director, each staff member or any other person who provides care or services to clients on behalf of the facility:
… (4) has no substantiated findings of abuse or neglect listed on the North Carolina Health Care Personnel Registry.

10A NCAC 27G .0202

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: Exhibits 1, 17, 22, 23, 29.

For Respondent: Exhibits 1 through 11.

WITNESSES

For Petitioner:
Monica Hawke
Rita Goodwin
Lauretta McFarland
Carol Hoffman
Lorraine Bilodeau
Bertram Hall
Cynthia Curtis, on her own behalf

For Respondent: Debra T. Hockaday

FINDINGS OF FACT

1. In March 2000, Petitioner was employed as a Habilitation Technician at Hoffman Group Home in Maxton, N.C. One of her duties was to dispense medication to residents.

2. Petitioner is an alcoholic with a several-year history of alcoholism. In March 2000, she was a patient in an outpatient treatment program for alcoholism and received prescription medication as part of her treatment program.

3. While working at Hoffman Group Home, Petitioner was physically injured by a resident. Her physician prescribed pain medication for her injury.

4. At that time, the medical profession was not aware that the prescribed pain medication was addictive and should not be given to a patient in an alcohol rehabilitation treatment program.

5. Petitioner took the pain medication as prescribed by her physician. The medication affected her ability to think clearly and rationally.

6. At some point in March 2000, Petitioner had taken all of the pills prescribed to her. She was not thinking clearly because of the combination of alcoholism, pain, and the prescription medication. Petitioner's mental confusion was continuous over the days of March 30, 2000 to March 31, 2000.

7. On March 30, 2000, Petitioner did not give resident DH one dose of his prescribed medication and ingested it herself.

8. On March 31, 2000, Petitioner did not give resident DH one dose of his prescribed medication and ingested it herself.

9. On March 31, 2000, resident DH had a seizure because he had not received his medication as prescribed and was admitted to the hospital.

10. After resident DH's seizure, Petitioner readily confessed that she had taken his medication.

11. The Health Care Personnel Registry conducted an investigation, after which findings of neglect for diversion of a resident's medication and for not administering a resident's medication were listed next to Petitioner's name.

12. Petitioner was notified of the entry of these findings on the Health Care Personnel Registry by letter on November 15, 2000. Petitioner did not contest these substantiated findings.

13. Criminal charges were brought again Petitioner for her actions.

14. Soon after the incident occurred, Petitioner became a resident at Bethany House, a group home for women who are recovering from alcohol addictions. She began a new intensive outpatient treatment program for alcohol and drug addiction.

15. Approximately seventeen months later, in 2001, Bethany House offered Petitioner a job as House Manager. Subsequently, Petitioner was promoted to her current position as Director.

16. Petitioner has worked at Bethany House continuously since 2001, assisting other women in their recovery from alcoholism.

17. In February 2009, Petitioner completed the process to obtain her certification as a substance abuse counselor.

18. Monica Hawke, President of Bethany House, has known Petitioner for 9 years and testified concerning Petitioner's conscientiousness and dedication to serving the residents of Bethany House.

19. Lorraine Bilodeau, a licensed clinical addictions specialist, has known Petitioner for 9 years and supervised her during the process to become a licensed clinical addiction specialist. She testified concerning Petitioner's successful recovery and Petitioner's desire to help others recover from their alcoholism.

20. Rita Goodwin, a former Bethany House resident, testified concerning the compassion and steadfastness with which Petitioner serves and counsels Bethany House residents.

21. Lauretta McFarland, another former Bethany House resident, testified concerning the compassion and steadfastness with which Petitioner serves and counsels Bethany House residents.

22. Carol Hoffman, a Bethany House Board Member, testified concerning the high quality of Petitioner's skills as Director of Bethany House and attributed Petitioner's success to Petitioner's application of her own experiences to help the residents.

23. Bertram Hall, a Bethany House Board Member, also testified concerning the high quality of Petitioner's skills as Director of Bethany House and attributed Petitioner's success to Petitioner's application of her own experiences to help the residents.

24. In October 2007, Petitioner petitioned pursuant to NCGS 131E-256(i) for the removal of the finding of neglect listed by her name in the Health Care Personnel Registry.

25. On May 1, 2008, Respondent denied the request on the grounds that: the "neglect involved occurred on two days" which "does not meet the requirement for a single occurrence"; and there was a "finding of diversion of resident's drugs."

26. Respondent's sole witness, Debra Hockaday, was the investigator for the Health Care Personnel Registry whose responsibilities were to investigate and report the results of the investigation. She does not have the authority to interpret statutes or make policy on behalf of Respondent.

27. Respondent's Policy states "[a]n individual with a neglect finding that involves … more than one occurrence will not be eligible for removal of the listed neglect finding." R. Exh. 9

28. The Health Care Personnel Registry considers the two separate acts of diversion of drugs to be evidence of a pattern of abuse.

29. The Health Care Personnel Registry does not look behind the bald facts of the findings to consider Petitioner's intent, mental condition, medical condition or the context in which the neglect occurred.

30. The Health Care Personnel Registry does not consider Petitioner's history after the events of March 2000—her subsequent successful treatment and recovery from alcoholism; her proven commitment to continued recovery from alcoholism; and her educational and vocational triumphs of being trained and employed to help others who suffer from alcoholism.

31. Respondent offered no evidence to show that Petitioner's neglect of resident DH was willful.

32. Respondent offered no evidence to dispute any of the facts presented by Petitioner or her multiple witnesses.

33. Respondent offered no evidence to question the veracity of Petitioner or any of her witnesses or their testimonials concerning the quality of Petitioner's service, dedication and commitment to Bethany House residents.

34. Petitioner has not had a single relapse in her alcohol or drug treatment in the nine years since March 2000.

35. Petitioner freely admits to what she did in March 2000 that caused harm to a resident.

36. Petitioner is remorseful for her actions.

37. Petitioner recognizes and acknowledges that she can never drink alcohol or take medication without a doctor's supervision.

38. Petitioner has taken her life experiences and uses them to help others. She is motivated and committed to helping other women overcome their alcohol addiction.

39. Petitioner has worked to undo the harm that she has done by learning from her own mistakes and devoting her energies to a vocation and employment of service to others.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. Chapters 131E and 150B.

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

3. N.C. Gen. Stat. sec. 131E-256(a)(1)(a) requires the Department of Health and Human Services ("Department") to maintain a registry containing the names of all health care personnel working in health care facilities in North Carolina who have been subject to findings of neglect of a resident.

4. After an entry of finding of neglect is entered on the Health Care Personnel Registry, it can be removed only by petitioning the Department pursuant to N.C. Gen. Stat. sec. 131E-256(i).

5. N.C. Gen. Stat. sec. 131E-256(i)(1) authorizes the Department to remove an entry of neglect when "[t]he employment and personal history of the nurse aide does not reflect a pattern of abusive behavior or neglect."

6. N.C. Gen. Stat. sec. 131E-256(i)(2) authorizes the Department to remove an entry of neglect when "[t]he neglect involved in the original finding was a singular occurrence."

7. The Health Care Personnel Registry provides a way to protect residents from abuse by preventing the future employment of personnel in health care facilities who are known to be abusive.

8. Respondent's Policy interprets the statute to allow no consideration of any mitigating facts or circumstances.

9. Respondent's Policy is an unnecessarily narrow and constrained interpretation of the statute.

10. A situation such as this, where the abuse clearly occurred during a singular time period of continuous illness and irrationality, and where the health care personnel has confessed her guilt, shown remorse, sought treatment, succeeded in treatment, worked to help others, achieved training and credentials, successfully directed a halfway house, gained the admiration and respect of many residents and community leaders alike for her recovery and service to others, is clearly one where an exception should be made.

11. To uphold Respondent's denial would result in the termination of Petitioner's employment at Bethany House and her ability to assist these women full-time.

12. It is unimaginable that the legislature would intend such a harsh, wasteful and unjust result as Respondent's Policy and denial suggests.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Respondent's refusal to remove a finding of neglect by Petitioner's name on the Health Care Personnel Registry should be DISALLOWED.

NOTICE

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

The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

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. 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 in not adopting the finding of fact. 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 in making the finding of fact. The party aggrieved by the agency's decision shall be entitled to immediate judicial review of the decision under Article 4 of this Chapter.

IT IS SO ORDERED.

This the 5th day of May, 2009.

Selina M. Brooks
Administrative Law Judge

A copy of the foregoing was sent to:

Thomas M. Van Camp, II, Esq.
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Pinehurst, NC 28370
ATTORNEY FOR PETITIONER

Bethany A. Burgon
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
ATTORNEY FOR RESPONDENT

This the 7th day of May, 2009.

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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF RICHMOND	08 DHR 2571
Pepper Dawn Kirk-McLendon Peppermint Daycare Petitioner vs. N. C. Department of Health and Human Services, Division of Child Development Respondent	**DECISION**

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on February 23 and 27, 2009 in the Guilford County Courthouse, High Point, North Carolina.

APPEARANCES

For Petitioner: Pepper Dawn Kirk-McLendon, *Pro se*
189 North Street
Hamlet, North Carolina 28345

For Respondent: Susannah B. Cox
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27699-0629

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. §§ 110-85, 105.2; Child Care Rules 10A N.C.A.C. §§ 09.1716, 09 .1718, 09 .1719, 09 .1722.

ISSUES

Whether Respondent prejudiced Petitioner's rights and failed to follow proper procedure when it issued a Special Provisional License to Petitioner.

EXHIBITS

For Petitioner: Exhibits 1 – 30 and 32 – 40.

For Respondent: Exhibits 2-7, 9-12 and 14.

WITNESSES

For Petitioner:	Roberta Gay Sealey Ronald Ross Kirk A.M. Pepper Dawn Kirk-McClendon, Petitioner
For Respondent:	Amy Michelle Griffin Courtney Mabe Christina Murray Bennett Shelby Lampley Johnson Pamela Cobb Dena Hoxworth Gamara Phony Barnes

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following Findings of Fact. In making these Findings of Fact, the undersigned has weighed the admissible evidence and has carefully 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 witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to directly observe, participate, 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 credible evidence in the case.

FINDINGS OF FACT

1. Respondent, Division of Child Development (the "Division"), is an administrative agency of North Carolina State Government operating under the laws of North Carolina and administering the licensing program for child care facilities in the State of North Carolina.

2. Respondent Division has a mandate to ensure that children in child care facilities are in phycially safe and healthy environments where the developmental needs of the children are met pursuant to N.C. Gen. Stat. §110-85.

3. Pamela Cobb is a child abuse and neglect consultant with Respondent Division and has held this position for over thirteen (13) years. (T. Vol. I, p. 166) Before joining the Division she was a child care director for a program within the Department of Defense and a middle school teacher. Id.

4. Shelby Johnson is a case manager with the Richmond County Department of Social Services. (T. Vol. I, p. 126) She has held this position for seven (7) years.

5. Amy Griffin and Courtney Mabe are sisters and are mothers of children who attended the Petitioner's day care family child day care home. (T. Vol. I, pp. 31, 59, 149)

6. Amy Griffin's three daughters attended Petitioner's family child day care home for several months until November 2007. (T. Vol. I, p. 37, Pet. Ex. 38)

7. Courtney Mabe's three children, including D.L., attended Petitioner's family child day care home for several years and were in Petitioner's vehicle on February 13, 2008. (T. Vol. 1, pp. 59-60)

8. Deanna Hoxworth is the supervisor for Respondent's Central Child Abuse and Neglect Team with prior experience as a child protective services investigator. (T. Vol. I, p. 201)

9. Tamara Rhoney Barnes is the Respondent's Licensing Enforcement Program Manager. (T. Vol. II, p. 244)

10. Respondent's Division licenses approximately eight thousand three hundred (8,300) child care facilities across the state. (T. Vol. II, p. 246)

11. Respondent's Division issued approximately twelve (12) Special Provisional licenses in the past year and, of those, two (2) were issued to Family Child Care Homes. (T. Vol. 2, p. 246)

12. Petitioner, Pepper Dawn Kirk-McLendon, owns and operates a one-star family child care home named, Peppermint Day Care, located at 189 North Street, Hamlet, Richmond County, North Carolina.

13. Petitioner received an Associates Degree and then took course work in early childhood education at University of North Carolina Pembroke. (T. Vol. II, pp. 345-46)

14. Roberta Sealy and Ronald Kirk are Petitioner's parents.

15. A.M. is the Petitioner's six-year old son.

16. Christina Bennett is the mother of two children who attend Petitioner's family child day care home.

17. Respondent's Division's abuse and neglect consultants investigate reports of child abuse and neglect in child care facilities. (T. Vol. I, p. 166)

18. When investigating a report of child abuse and neglect, an abuse/neglect consultant first receives a written report from the Respondent Division's intake office in Raleigh. (T. Vol. I, p. 167) The abuse/neglect consultlant then checks the Respondent Division's regulatory system to obtain a history of the facility, and contacts the local department of social services ("DSS") social worker to discuss the allegations of abuse and/or neglect. Id. The abuse/neglect consultant and social worker then generally attempt to make a joint visit to the

child care facility. Id. The abuse/neglect consultant also contacts the regular licensing child care consultant assigned to the facility in order to gather additional information regarding the facility. Id.

19. When DSS is involved in the invetigation, the Respondent's Division's consultant cannot directly interview the children and must rely on the DSS reports regarding what the children have said. (T. Vol. I, p. 176)

20. The Respondent's Division has specific procedures in place for issuing Special Provisional Licenses which involves multiple levels of investigation and scrutiny.

21. The Respondent's Division carefully documents the Special Provisional decision-making process.

22. When appropriate, the Respondent's Division's field staff and managers recommend the issuance of an administrative action and send a proposed action to the Respondent's Division's Raleigh office for review. (T. Vol. II, p. 250)

23. The Respondent Division employs an internal review process to review the issuance of a Special Provisional action. This process includes an initial review of the proposed action, time for the child care provider to respond to the prosed action, and a second review of the proposed action following the provider's response. The people who conduct the review have no prior knowledge about the facility in question and are not affiliated with the regulatory section of the Respondent's Division. (T. Vol. II, pp. 250-51)

24. The Respondent Division maintains a matrix of administrative actions throughout North Carolina, documenting the types of actions taken, as well as the reasons for the actions. Before issuing an administrative action, the Respondent Division consults the matrix to maintain consistency throughout the State and to ensure that child care providers are treated fairly. (T. Vol. II, p. 263)

25. The Respondent's Division may issue a Special Provisional License in cases where it determines that abuse or neglect has occurred in a child care center or home. (T. Vol. II, p. 246)

26. Respondent assigned Pamela Cobb to the investigation. She is a child abuse and neglect consultant and has held this position for approximately thirteen (13) years. She investigated the allegations against Petitioner by contacting DSS, the mother of the child, the Petitioner, another mother who had an earlier complaint and another mother who had no complaints. Ms. Cobb also went to Petitioner's family child day care home and made her own observations. (T. Vol. II, p. 126, 168-69)

27. On February 19, 2008, Ms. Cobb went to Petitioner's family child day care home and spoke with Petitioner.

28. Amy Griffin allegedly found her children alone in Petitioner's house in November, 2007, the last day that she used Petitioner's service and when Petitioner arrived at the

house she allegedly told Ms. Griffin she had been out searching for her lost goat. (T. Vol. I, pp. 34-5, p. 50, T. Vol. II, p. 355)

29. Petitioner testified that she lost a pet goat in the same time frame that Ms. Griffin testified she found her children alone in the house. (T. Vol. I, p. 34, Pet. Ex. 7)

30. The Respondent's representatives explained their concerns to Petitioner about Petitioner's family child day care home concerning allegations that a child was placed outside the vehicle beside Highway 74 and children were locked in the bathroom in addition to concerns about children being left in the residence unattended. T. Vol. I, pp. 203-4, 219-20)

31. Ms. Cobb and Ms. Hoxworth discussed the results of the investigation and reviewed the documentation then recommended that Respondent's Division issue a Special Provisional License to Petitioner. (T. Vol. I, pp. 177-210)

32. The specific rules violations cited to support the allegations in the administrative action were: 10A N.C.A.C. 09 .1718(10)(a) adequate supervision was not provided for children who were awake for requiring a child to get out of a vehicle alone beside a public road and for leaving children alone in the home; 10A N.C.A.C. 09 .1722(8) discipline not appropriate for the child's age for instructing a child to do push-ups outside vehicle beside a heavily-traveled highway; 10A N.C.A.C. 09 .1722(d) a person in the home place the child in a locked room in violation of discipline rules for at least two children being locked in the bathroom; 10A N.C.A.C. 09 .1719 the operator did not maintain a safe environment for requiring the child to get outside of the vehicle beside a heavily-traveled highway; and N.C.G.S. 110-105(2)(a) there was a substantiation of child abuse or neglect. (T. Vol. I, pp. 220-21, Resp. Ex. 11, p. 8)

33. The Respondent's Division determined that a Special Provisional license was appropriate based on the allegations which resulted in the substantiations of neglect and the violations of child care requirements. (T. Vol. I, pp. 210-11, T. Vol. II, p. 263)

34. On August 21, 2008, Respondent sent notice to Petitioner that it proposed to issue a Special Provisional License based on the investigation into Petitioner's alleged actions. (Resp. Ex. 9)

35. Petitioner submitted her response to the proposed action including letters of support from other parents (T. Vol. pp. 211, 213)

36. Ms. Cobb and Ms. Hoxworth submitted their response to Petitioner's submission with specific comments about Petitioner's documents and recommended that the Respondent's Division proceed with the Special Provisional License. (T. Vol. I, pp. 215-18)

37. On October 14, 2008, the Internal Review Panel at Respondent's Division considered all the submitted documents including all documents from the Petitioner and amended the action to allow enrollment of new children and to remove a violation regarding transportation of children. (T. Vol. II, p. 258, Resp. Ex. 10)

38. On October 23, 2008, the Respondent's Division issued the Administrative Action of a Special Provisional License. (Resp. Ex. 11)

39. Findings of Facts # 40-89 are facts found from the record primarily from credible witnesses who either directly observed or participated in the incidents that Respondent contends supports the imposition of disciplinary measures against Petitioner. These findings, at times, contain extensive quotations from the testimony, exhibits, or combination thereof.

40. D.L's disabilities included ADHD, ODD and deafness in his left ear.

Q. Now, you mentioned that your son (D.L.) has ADHD. Does he have any other kind of – any other physical or developmental impairments?

A. He's completely deaf in his left ear, and which when I found out from the doctor, I let Pepper know that he was completely deaf in his left ear. And he also has ODD, which is oppositional defiant disorder, so you do have problems with him. But when I put him in day care, I explained that to her to make sure she would be able to handle him. (Testimony of Courtney Mabe, T. Vol. I, p. 61-62)

41. D.L. routinely batters his sister, C.M., when riding with her in a family automobile.

Q. Now, do you ever have problems with him and his sisters when you're driving your car?

A. Of course.

Q. Do they fight in the car when you're ----

A. Yes, they do. (Testimony of Courtney Mabe, T. Vol. I, p. 62)

42. Ms. Mabe accepted D.L.'s conduct towards his sister at home and in the family car. She did not object to the conduct while in Petitioner's care.

"Ms. McLendon (Petitioner) was asked if she ever reported to their mother that D.L. was beating his sisters. She stated that she had but that the mother told her that he also did it at home. The mother also told her that if her children could fight at home, they could do it at the day care." (Resp. Exh. 7, p. 4).

43. D.L.'s oppositional and aggressive behavior became more pronounced in the weeks before February 13th.

…But, like I stated to Shelby Johnson and to Pamela Cobb, the last three weeks of them attending, something was going on because of their fighting was – D.L. would kind of – it was like he would try to hurt C.M., the littlest one. And even M.L., like I stated, how she was punching at him in the van – she would even get – it was something – for three weeks, something that I couldn't pinpoint.

I even questioned the children was things okay at home. I had questioned the mother regarding something that the little C.M. had said and things I had witnessed in regards to whether the children were being messed with by the boyfriend.

Q. Okay. So you're saying, then, that for a few weeks before February 13th, D.L. was getting more difficult, it is that right?

A. For three weeks, he was not more – he was just kind of fighting more – fighting not just wrestling. They'd pin each other to the ground playing before, but he would actually fight or he'd go to himself and I'd have to sit and talk with him. I'd ask him what was going on, was something going on at school, you know, is something bothering him at home, you know, at his home. (Petitioner's testimony, T. Vol. II, p. 358-359)

44. "Ms. McLendon was asked if she had received permission from the children's mother to take them to Maxton. She stated that she had not but the mother had told (her) before that she could take the children with her anywhere that she needed to go." (Resp. Exh. 7, p. 4).

45. The events of February 13, 2008 occurred shortly after 5:30 p.m. and before 6:00 p.m.

> … And then, again it shows the time on that receipt for Wal-Mart is four thirty-one. That's when we checked out. We sat in the parking lot and eat. I actually – you know, I actually had to feed a little one before I eat. So, you know, it takes a little bit of time. We we were eating fried chicken. Anyway, we sat and eat.
> Coming home – because on that receipt, you see there are no drinks. Coming home after we pulled over – seeing (sic) control after we pulled over, we got – went to Burger King, got something to drink. We were all thirsty. Everything's fine. Nothing out of the ordinary. We needed something to drink, though, because we were eating. The time stamped on that is five twenty-four … it was daylight. (Petitioner's testimony, T. Vol. II, p. 318-319) (Pet. Exh. 39)

46. Contrary to the statements of Ms. Mabe's live-in boyfriend, the events of February 13, 2008 occurred prior to 6:00 p.m and he indicated that the children were only "playing." "On the date above, I called the number provided for Courtney Mabe in reference to this case. At the time of the call, Kevin Andrews, Ms. Mabe's boyfriend, answered the telephone…. The children told them that they were playing but Ms. McLendon thought they were fighting. Because of what she thought was fighting, Mr. Andrews stated that Ms. McLendon made D. get out of her vehicle at between 6 p.m. and 7:30 p.m. and do push ups beside Highway 74." (Resp. Exh. 7, p. 1)

47. Petitioner provided the only eyewitness and credible account of the sudden emergency that occurred to her and between sibling in Petitioner's van on February 13, 2008.

> …Yes, I did pull over. I tried to control a scene. I had children in – one child in the back beating on another one, and the reason – and they say that they were play fighting. At least the mother does -- this child was not play fighting.
> When I pulled over, we were calm. I did try to get the child to come forward – C.M. She did not come forward. I – and I have told this to DSS. I have even told it to the Division of Child Development.

> The only reason I asked this child to step out is I felt that the younger one in the back, who was upset who was crying and, yes, had a red mark on her face that had been hit – I felt that she would be able to come forward without the brother beside her. And I was in the middle of my van. I have a '99 Pontiac Montana, and there's a front section, driver and passenger. There's a middle section, three children or three passengers sit, and a back three passengers can sit, and I was in the middle.
> And this is only after I had asked this child to come forward. When she did not, yes, I did ask the child to get out, but I was close to a building. And he did get out on the passenger side which was closer to the building than the road even with my van right there at the building. (Petitioner's testimony, T. Vol. II, p.319-320)

48. "Whenever I told him (D.L.) that he needed to calm down, he was kicking K.B's seat. Yes, he was, but he was not the loud arm swinging, feet swinging, what I was seeing in the rearview mirror moments – you know, minutes before actually." (Petitioner's testimony, T. Vol. II pp. 370-371)

49. "The younger one was crying. I had a little one upset in front of him, her seat being kicked, and the older sister fussing and hollering in a seat belt reaching back trying to punch her own brother. We had a situation." (Petitioner's testimony, T. Vol. II, p. 319-320)

50. "She (C.M.) would not answer. She sat crying, leaning up against the side of the car. I mean she was leaning on the side of it where the windshield is. She was crying. She never did even look at me. That's why I felt that she would come forward with D.L. not beside her. She was crying. She was hurt. There was a mark on her face. It was not play fighting. It was fighting. The child was hurt." (Petitioner's testimony, T. Vol. II, p.360)

> 51. … But I just felt that she would come forward without the brother beside her because, like I said, he was kicking his legs to the side. He was in a seat belt, yet he had – he was kicking. He took the middle seat belt which has a – you know, it straps across. You pull it tight. It's a buckle. He was actually slinging that and hitting it with her. I mean you could see it slinging through the rearview mirror.
>
> We had a fight going on. We pulled over. Everything was – you, know, once it calmed down, I did – I was right, "Listen. We're going to stop this right now." I had pulled over. The vehicle was stopped, and I was turned in the driver's seat at that moment when I did ask the child to come forward, yet whenever she did not come forward, I did – as my son stated, I did get in the middle of the van and asked D.L. to come forward." (Petitioner's testimony, T. Vol. II, pp. 361-362)

> 52. But C.M. – she way crying. She was the only one who was not even – I don't even know if she was – with her being upset the way she was, I didn't even know if she heard, you know all that was going except for the fact of me trying to get her to come forward, and she would not even – she wouldn't move. She was

hurt. And, you know, M.L. was like, "Momma's going to spank you. Momma's going to spank you …"

I said, "Let me stop." We sat there. I said, "All right," and then that's when I told D.L., I need him to get out. I wanted C.M. to feel safe. I wanted her to feel like she could come up to me. It was okay. Nothing is going to happen. And she still wouldn't move. But the scene had calmed down. (Petitioner's testimony, T. Vol. II, p. 369)

53. "…I said, 'D.L. I need you to get out of the van.' I don't think I said please... I did it as a command, D.L., get out of the van. I need you to get out of the van. … because the only way I felt that C.M. would come forward is because – she was scared. This child was crying." (Petitioner's testimony, T. Vol. II, p. 366-367)

54. When Petitioner pulled over during the incident, she was very close to the building, within five steps. "I could have gotten out and taken five steps to be at that building." (T. Vol. II, p. 320-321)

55. Q. … Could you tell us what happened, what you heard, seen? Could you just go through and tell us?"
A. Uh-huh.
Q. Okay.
A. When we pulled over, D. L. punched C.N. in the face.
Q. Okay. Is that why we pulled over?
A Uh-huh. (Testimony of A.M., T. Vol. II, p. 299-300)

56. Q. … could you tell us where we pulled over?
A. On the side of the road.
Q. Was anything around us?
A. A building.
Q. A building. Were we – were we close to the building, or were we close to the road?
A. We were close to the building. (Testimony of A.M., T. Vol. II, p. 300)

57. Q. … whenever he was standing outside the vehicle, could you see what he was doing?
A. Yeah.
Q. What was he doing?
A. He was holding M.L.'s hand.
Q. How could you see him holding M.L.'s hand from the front?
A. In that crack where you mash the button.
Q. Okay. Hold on. So from the seat to the wall of car where you mash a button to open the sliding door, you look through there?
A. Uh-huh. (Testimony A.M., T. Vol. II, p. 366-367)

58. On the day indicated above, I visited Peppermint Day Care to investigate a report alleging child neglect. During this site visit, Pepper Kirk-McLendon, the family

child care operator, was interviewed. She made the following statements during her interview:

- One afternoon, her mother, who was in Maxton, had locked her keys in HER. (sic) She took a set of keys to her mother.
- On the way, D. started to fight C., sister.
- For the past three weeks D. had been fighting more than normal. He actually beats his sister with his fists.
- When D. punched his sister in the face, she pulled her car over and told D. to get out of the car.
- According to Ms. McLendon, she was also getting ready to get out of the vehichle with him but was consoling C. who was crying. By the time C. stopped crying, D. had gotten back into the vehicle. He said that there was a big dog outside but Ms. McLendon stated that the dog was inside a fence.
- D. did not do push ups. She stated that she did not tell the mother this. According to Ms. McLendon she has never made any child do push ups. (Resp. Exh. 7, pp 3-4)

59. Ms. McLendon was asked to tell what happened from the time she pulled off the road on February 13th, until the time that the child got back in the van. She stated the following:

- She pulled off of Highway 74 after D. had hit his sister C.
- She asked him to get out so that she could rearrange their seating. She tried to get C. to come up closer to her in van so that D. would not hit her any more. She told D. to stand beside the van so that she could get C. to come up without D. hitting her.
- When C. refused to move, she asked D. to get back inside and told him that they would take care of it at home.
- When she got home she put, when she got home, she put D. in timeout. The timeout was done at the back door in a chair.
- This happened in the evening.
- According to Ms. McLendon, she did not tell D. to do push ups and has never had any of her children do push ups for punishment. (Resp. Exh. 7, p. 10).

60. Petitioner often takes those under her care on outings such as to fast food restaurants and to her church every Wednesday night. She also takes them on trips. (T. Vol. II, p. 289-290)

61. Petitioner maintained a close relationship with Ms. Mabe's children often outside her day care environment.

> As I was stating, I was told many times not to get involved with the children or not to get – you know, it's a business. And I did. I got very close to these kids in the time that I had them. And things we did with them, I treated them like my own. And I even tried to make things fun for them, doing special things for them, taking

them places, and you know, like Ms. Mabe even admitted these children went with me in 2006 to Tweetsie in Boone, Wilkesboro. (Petitioner's testimony, T.Vol. III, p. 328)

62. Courtney Mabe reposed special confidence in Petitioner's ability to care for her children at all times and even interrupted Petitioner's vacation to ask Petitioner to make a six hour round trip, and to care for her young children continuously for a 24 hour period.

On Exhibit #31 I just wanted to show you – all the relationship that me and Ms. Courtney Mabe had. There's a letter there from my aunt who lives in Wilkesboro. She wrote a letter. There's phone records. It shows when Ms. Mabe called my cell phone. Her cell phone number is on there. I think it's 206-9053 or something. Anyway, I've marked it. She called me while I was on vacation. I go to Boone every year. I've been doing it for – well, Wilkesboro every year for fourteen years.

October – this past October 2007, she called me while I was on vacation. It was a Saturday morning. I was at my aunt's house. Instead of camping out, we stayed with my aunt and uncle and my cousins. And she had taken her children to go to Ghost Town in the Sky.

She called me wanting me to come and meet her halfway, which my Uncle Rick said that it's three hours from where we were to where she was, I – and I even showed – I got receipts in there too showing where I was. I was in Tweetsie or Wilkesboro and then I was in Boone, and it even shows my car had broke down. I was in my little Miata. It couldn't hold all of us even if I had wanted to go get these children.

But, yet, she called me and my aunt told me, "No. Don't go get them kids. This is your vacation." (Petitioner's testimony, T. Vol. II, pp. 333-334) (Pet. Exh. 32)

63. In Pamela Cobb's visit/telephone documentation report, Respondent's Exhibt 7, in her interview with Shelby Johnson, CPS Social Worker with Richmond County Department of Social Services, Ms. Johnson had been visiting the McLendon home as often as weekly for almost a year. Most of her visits were unannounced. Ms. Cobb had not seen any problems at Ms. McLendon's day care home. If the children were outside, Ms. McLendon was outside with them. None of the other parents that Ms. Johnson interviewed had any concerns, presumably even Ms. Mabe's counsin, Angie Mayo. (Resp Exh. 7).

64. Q. Okay. Before this investigation, have you ever been in my home?
A. I have.
Q. How often would you say?
A. Every other week for about a year.
Q. In those visits, did you ever find anything of concern or problem?
A. No, ma'am, I did not. (Testimony of Shelby Johnson, T. Vol. I, p.150-151)

65. In Pamela Cobb's visit/telephone documentation report, Respondent's Exhibit 7, page 15, regarding the typewritten notes of a call to Christine Bennett, mother of D. (age 6) and C. (age 2) the following is quoted and found as a fact:

> During this telephone contact I spoke with Ms. Christine Bennett in reference to this case. I asked Ms. Bennett if she had any concerens regarding the way Ms. McLendon disciplined her son. She stated that she had no concerns at all and that her son loved going there. Ms. Bennett stated that after this report came about, she said she sat her son down and asked him a number of questions. She stated that she asked him about being locked in the bathroom. He told her that he had not been and not seen any other children locked in the bathroom either. She stated that she asked him if he had ever been made to do push-ups or if he had ever seen other other children made to do them. He told her that he had not. She stated that she asked him if he had ever been left alone in the home. He told her that he had not. Ms. Bennett stated that she felt that if her son had been treated this way or had seen other children treated this way, he would have told her.
>
> Ms. Bennett said that her son told her that he had never been put in to time-out but she stated that she was there one way (sic) and witnessed Ms. McLendon putting some other children in time-out. She stated that on that day, several of the children were being rowdy. She stated that one of the children was named D; she did not remember the names of the other children but remembered that there were two girls there and one other boy. She stated that she observed Ms. McLendon separate the children; she then had them all sit down separately for time-out. According to Ms. Bennett, the children were so rowdy that at the time she was a little uncomforable with her daughter being around them. She explained that her daughter had just started to walk and the children were running all over the house. (Pet. Exh. 7)

66.
Q. … Can you tell us whether your oldest son, D.B., has expressed any concerns?
A. No, he has never.
Q. Could tell us how old he is?
A. Right now, my son is seven years old.
Q. Okay. Whenever I spoke to you regarding the allegations that were being made against me, did you have any concerns?
A. No. In the order in which everything happened, I thought it was absurd, really.
Q. Okay. Did you question your oldest son regarding anything such as whether or not he had been or seen children locked in the bathroom?
A. Yes, I did.
Q. Okay. What was his point of view on that?
A. He said he had never seen or been there – nothing had ever happened to that effect.

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Q. Was he at the day care the same time that Mabe and Griffin children were there?
A. Yes, ma'am.
Q. Okay. And as to being left at the home, has he ever witnessed or seen any of that?
A. He's never been left at the home.
Q. Okay, so he's never stated to you any of these --
A. No, ma'am.
Q. Okay. Was he interviewed by Ms. Shelby Johnson?
A. No, ma'am.
Q. Were you interviewed by Ms. Shelby Johnson?
A. No, ma'am.
Q. What about Ms. Pamela Cobb? Ms. Shelby Johnson is with DSS. What about Pamela Cobb with the state?
A. No, ma'am.
Q. Okay. Are your children still attending at Peppermint Day Care?
A. Yes, ma'am.
Q. Okay. So to this day, you still have no concerns with the child care your children receive?
A. No, ma'am. (Testimony of Christina Murray Bennett, T. Vol. I, pp 115-116)

67. The DSS investigation initially determined Petitioner engage in inappropriate discipline but later removed this as a basis for disciplinary action.

Q. Okay. What was your finding in this case?
A. At first, it was found inappropriate supervision, inappropriate discipline and injurious environment. The next day, it was taken out – we staffed it with a program manager, and it was improper – excuse me, improper supervision and injurious environment. We took discipline out because the child said he never did the push-ups and so did everybody else. (Testimony Shelby Johnson, Vol. I, p. 139)

68. Respondent's Exhibit # 5 indicates two findings and a document entitled North Carolina Case Decision Summary/Initial Case Plan. These two identical documents indicate that the first three pages were received on 4-21-08 and the second set received 4-23-08 and marked second as number 2 in the Conclusion." The second set is marked with a check mark beside improper supervision and a check mark beside environment injurious. There is no check mark beside improper discipline. (Resp. Exh. #5).

69. Q. And you'll see there are six pages there. What are the first three pages and how are they different from the second three?
A. The first three pages, we had found improper discipline, and on the next three pages, we had taken that out.
Q. So which of these is the actual final decision?
A. The second set. (testimony of Shelby Johnson, T. Vol. I, p.140).

70. Q. So with A.M. – Is A.M. – do you think A.M. is there most of the time or all of the time or --
A. All of the time.
Q. Okay. So if children were being locked in the home and children were being locked in the bathroom, do you think that he would have seen it or do you feel that he would have seen it?
A. Yes. (Testimony of Shelby Johnson, T. Vol. I, p. 161-162)

71. Ronald Ross Kirk is the Petitioner's father and is a manufacturing manager in Monroe, North Carolina. He lives in Hamlet, North Carolina directly behind the Petitioner's day care. (T. Vol. II, p. 288)

72. Mr. Kirk visits Petitioner's day care home on average about four times a week in the afternoons and other times. He has never observed any child in the care of Petitioner locked in a bathroom. He has never visited Petitioner's day care home and found children left alone in the house when the Petitioner was not there. (T. Vol. II, p. 288-289)

73. A.M. is Petitioner's son. Petitioner's son was not locked in a bathroom nor had he seen any other children in the care of Petitioner locked in the bathroom. (T. Vol. II, p. 298)

74. According to A.M., Petitioner places children in "time-out" for disciplinary purposes. Time-out means sitting at the kitchen table in a chair and time-out is always there in the kitchen. (T. Vol. II, p. 302)

75. During the year 2006, the Petitioner received a violation from Respondent for an unlocked medicine cabinet and for having medicines that were not kept in locked storage. Petitioner was also cited for having hazardous cleaning supplies and other items that could be poisonsous that were not kept out of the reach or in locked storage when preschool children were in her care. They were located in a drawer located in the bathroom. Petitioner was required to make these items inaccessible to children. (T. Vol. II, p. 324, Pet. Exh. 26)

76. …I never locked my children in the bathroom. Yes, there was a lock put on the bathroom, but as I stated before and I even told you – all while the violation occurred – we were doing dental – I tried to bring what I learned in my classes home.
And we – I left the lock – after doing a little routine bathroom things – and the kids actually did their teeth, you know, four or five times a day while in my home – brushing their teeth. But the lock was off when Ms. Sandy Searcy came in my home, and I got a violation.
Ms. Courtney Mabe, she's the one that suggested the outside lock, either a hook – you know, you've got the whole thing locked off and nobody could say anything about the chemicals. And whenever (sic) she said a hook or a slide lock, I went to Wal-Mart and I purchased one. (Petitioner's testimony, T. Vol. II, p. 330).

77. Ms. McLendon's lock had been taken off the bathroom door at the time of this site visit. The lock had been approximately 12 ½ inches from the top of the door as measured by the consultant during this visit. She was asked why she had the lock on the exterior of the door to begin with. She explained by saying that she had her cleansers and medications in the bathroom. During a visit by the child care consultant, a violation had been cited because she only had a lock on one of the cabinets in the bathroom. To be in compliance with the state requirement to keep such items locked, she put a lock on outside of the door so that she could have both medications and the cleansers locked. During this site visit Ms. McLendon's storage areas were checked. In her bathroom, she now had two pad locks on both the medication cabinet as well as the cabinets. (Resp. Exh. 7, p. 10)

78. There was a lock on the bathroom door which was removed when Robbie Hall at DSS said it was against the law. I referred to my family child care home handbook and looked for a rule that stated anything about locks on the bathroom door. I even spoke to Sandy Searcy, my licensing consultant, and she said that there were no laws stating that a day care center or home day care could not have a lock on the bathroom door. I did have a lock and the lock was because I had gotten a violation for not locking the lock to the medicine door. It was just hanging. … this lock was a suggestion from the parent, Courtney Mabe. I had told her about the visit and she gave me a suggestion which was a good idea. I also took the suggestion from my mother about putting a lock on my refrigeration and my freezer because a child has medicine that must be refrigerated, all I have to do is put it in the refrigerator and lock the door. (Resp. Exh. 10, p.6)

79. "It didn't keep them out of it, but yet it had the whole section secure so that if I did forget to hook that lock when Sandy Searcy came and the outside was locked, it's locked. I wouldn't get a violation. That was why Ms. Mabe suggested an outside lock, and again, I state it's Ms. Mabe, the same Ms. Mabe who filed a report saying, "Well, this is going on with my kids." (Petitioner's testimony, T. Vol. II p. 385)

80. …But, no, I did not leave any children at home, and there is no way – no way whatsoever that mother could have found her children locked in the home because it never happened. But I only went one time. She states that she actually witnessed it, says she confronted me, but again, I tell you there is no way under the sun she could have found her children there without me there.
She also states that she doesn't remember any of the children there, yet I had K.B., and you—all had the attendance – I think you – all actually presented it in October. Little K.B. was there. I'm not sure who all was there, but there was other children there. (Petitioner's testimony, T. Vol. II, p. 336)

81. I was also accused of locking children in my home and leaving the premises. My mother fills in for me if children cannot attend. Other than that, if it is

an outing, picking up something I ran out of, church, basically if my kids can go, we all go. I do not ask for help with any of my children not even my own, unless I had no other choice. The mother even stated that she herself had found her children alone in my home and I supposedly told her that I had gone to look for a family pet. This according to the parent was on 2 occassions. Why did the parent not call the police or DSS at the time? Why did she continue to bring her kids? Can she give the dates of these occurrences? As a mother myself, something would have been done about a situation of that nature immediately. I have included the paper why my ad ran for a lost goat. … only one animal has gotten lost and I only went to look for it a week later to the day of the ad running in the paper. The date on the paper is October 25, 2007 on Thursday. Therefore, the day I went to look for the goat through trailwood was on November 1, 2007 on a Thursday. Courtney Mabe's children were not even present on this day. (Resp. Exh. 10, pp 6-7)

82. Complainant demonstrated animosity against Petitioner.
I have a home day care. I have been trying to get more children for a while, without any luck. I feel it is what this parent is saying about me. I pass her home every time I go to church, and if Courtney or Kevin are in the yard they stick their middle fingers up at me passing. I have not done anything to Courtney, Kevin, or her children. … so just like Courtney told her cousin Angie Mayo and you have her letters, she will have won, because her goal was to shut me down. … she made this very clear to Angie on many occassions. (Resp. Exh. 10, p. 8)

83.
Q. Now, when your daughter, H.M. was attending the day care, how long did your daughter attend that day care?
A. No more than about six months. (T. Vol. I, p. 32, Amy Michelle Griffin testimony)
Q. … first of all, how long did you say the children attended --
A. No longer than six months.
Q. Okay.
A. And I wish I had brought that attendance now that you brought that you brought that up. They did come April to almost May – for right at a month back in 2006.
Q. Okay?
A. Unh-hunh
… THE COURT: Please, Please wait. I'd like the record to reflect that in response to the question whether they were in the day care from April to May '06, the witness indicate something like, un-hunh. Was that an affirmative answer to that question?
THE WITNESS: Yes. (Testimony Amy Michelle Griffin,T. Vol. I, pp37-38)

84. Courtney Mabe's three children attended Petitioner's day care from August of 2005 until February of 2008 at a minimum of three days a week. (Testimony of Courtney Mabe, T. Vol. I, pp. 75-78)

85. Investigators were not aware that the complainants had a close familial relationship as sisters.

Q. Okay. Do you know that Ms. Mabe and Ms. Griffin are sisters?
A. I found that out today. I did not know that before today.
Q. By that, do you find it of any concern that no other parent and no … all the letter I sent to you – I mean, sent letters from any different people. Out of all of these letters, no one had a problem except two sisters, even her own cousin didn't have a problem.
Did you – all – did you find that of any, you know, concern?
A. I didn't find it of any concern because it's possible that two people happen to be related could be the only people having the problem. (Testimony of Pamela Smith Cobb, T. Vol. I, pp 181-182)

86. Q. Okay. And during the investigation did you know that Ms. Mabe and Ms. Griffin were sisters?
A. No. I was told in April to call Ms. Griffin. I didn't even know Ms. Griffin existed. (Shelby Johnson testimony, T. Vol. I, p. 149)

87. Those children were not present at my day care for six months, and the mother says they are. However, I've got the attendance here. You – all can look at the actual record and see they have not been altered, proving these children were not present at my day care for six months prior to her taking her children out. They were only there for approximately a month, and prior to that in 2006, one month. (Petitioner's testimony, T. Vol. II, pp312-313)

88. "When she (Shelby Johnson) interviewed the three Mabe children she (Shelby Johnson) was disturbed by some of their statements but did not know whether or not the mother (Courtney Mabe) was coaching them." (Respondent's Exhibit 7, p.7, Interview with Shelby Johnson)

89. Q. BY THE COURT: Each of the allegations against you – it's been your testimony either directly, by circumstantial evidence, or other evidence you have denied these allegations that have been made against you, is that correct?
A Yes, sir.
Q. Each time?
A. Each time.
Q. …according to your testimony, the allegations are not true?
A. No, they're not, Your Honor. They're not. They never happened.
(Petitioner's testimony, T. Vol. II, p. 387

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to Chapters 110 and 150B of the North Carolina General Statutes.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder and the notice of hearing was proper.

3. The primary purpose of child care regulation is to provide for the health, safety and developmental well-being of children in child care facilities. N.C.G.S. § 110-85.

4. Petitioner is subject to the provisions of Chapter 110 of the North Carolina General Statutes and Respondent has the authority, pursuant to N.C.G.S. § 110-105.2 to issue a Special Provisional License to a family child care home when it has determined that abuse or neglect has occurred in the home.

5. Petitioner established by the greater weight of the evidence that the Respondent substantially prejudiced Petitioner's rights and/or failed to use proper procedures when it issued a provisional license to Petitioner.

6. Respondent substantially deprived Petitioner of her rights and failed to use proper procedure in issuing the administrative action.

7. Respondent's actions in issuing Petitioner a Special Provisional License was not justified based upon the foregoing findings of fact. The Respondent failed to carry its burden of proof and to successfully impeach the credibility of Petitioner and A.M. who gave the only eye-witness account of the alleged incidents that underlies Respondent's administrative action against Petitioner. The circumstantial evidence, the inferences to the contrary, the second hand accounts of the events attributed to young children, who were not present in court or subject to cross examination, were not sufficient to overbear the accounts of the events of the eyewitnesses who appeared and offered direct testimony, subject to cross examination.

8. The undersigned concludes that the Petitioner's testimony was credible, according to the normal and customary standards for judging credibility. The undersigned could not grant sufficient credible weight to the testimony of Courtney Mabe or Amy Michelle Griffin based upon the nature of their second hand account of events that neither of them had witnessed, the undersigned's attribution of diminished credibility based upon direct observation of witness demeanor, actual and potential for bias and prejudice against Petitioner, their familial relationship as sister and testimonial inconsistency with other eyewitness testimony, as well as the undersigned's application of other normal and customary standards for judging credibility.

9. Respondent's other witnesses are adjudged credible but their investigative conclusions arose from statements made by children, not based upon direct observation. The investigative findings and conclusions were not sufficient to over bear the direct testimony of

Petitioner and her son as to their eyewitness accounts of the events supporting imposition of sanctions against Petitioner.

10. Petitioner was presented with a sudden emergency when fighting erupted between siblings while Petitioner transported several children under her care in her vehicle on February 13, 2008. Due to the nature of the fighting, the sudden potential for bodily injury, the reluctance of the sibling to remove herslef from the orbit of danger due to this child's emotionally fearful state of mind, and Petitioner's concern for the safety of the other children passengers, Petitioner acted reasonably, given those exigent circumstances, although not necessarily in total conformity with reasonable standards had such a sudden emergency not occurred.

11. D.L.'s ADHD and ODD disorders, coupled with his aggressive and assaultive behavior and his mother's tolerance of aggressive behavior in D.L.'s home environment created a dangerous interaction among those children in Petitioner's care.

12. Respondent's investigative staff with layers of review demonstrates a high degree of professionalism in producing investigative reports and conclusions therefrom; however, after carefully weighing the evidence produced against Petitioner by Respondent's investigative process, the undersigned cannot conclude that these reports, replete with out of court statements and conclusions, overbear Petitioner's direct and credible testimony which was subject to cross examination.

13. Petitioner did not violate 10A NCAC .09 .1718(10)(a), 10A NCAC .09 .1722(8), 10A NCAC .09 .1722(d), 10A NCAC .09 .1719 or C.S. 110-105(2)(a).

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

DECISION

That the Respondent's decision to issue a Special Provisional License to Petitioner is **REVERSED.**

NOTICE

The agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Child Development. The agency is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The agency is required by N.C. Gen. Stat. § 150B-36(b)(3) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency 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.

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.

In accordance with G.S. 150B-35, a member or employee of the agency making a final decision in this contested case may not communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.

This the 7th day of July, 2009.

Julian Mann III
Chief Administrative Law Judge

A copy of the foregoing was mailed to:

Pepper Dawn Kirk-McLendon
189 North Street
Hamlet, NC 28345
PETITIONER

Susannah Cox
Alexandra Gruber
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEYS FOR RESPONDENT

This the 24th day of July, 2009.

Office of Administrative Hearings
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STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF HALIFAX	**08 DOJ 2403**

TAMIKA RICHARDSON, Petitioner, v. NORTH CAROLINA SHERIFF'S EDUCATION AND TRAINING STANDARDS COMMISSION Respondent.	**PROPOSAL FOR DECISION**

THIS MATTER came on for hearing on February 20, 2009 before the undersigned Administrative Law Judge (ALJ), Augustus B. Elkins II, in Raleigh, North Carolina. This case was before the Office of Administrative Hearings (OAH) pursuant to N.C.G.S. § 150B-40(e), and heard upon designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes. The record was left open for submission of materials by the parties. After filing by Respondent on March 23, 2009 and Petitioner on March 24, 2009 and receipt by the Undersigned on March 27, 2009, the record was closed on March 27, 2009.

APPEARANCES

For Petitioner: Michael C. Byrne of the Law Offices of Michael C. Byrne, PC.

For Respondent: John J. Aldridge, III, Special Deputy Attorney General.

ISSUE

Did the Petitioner committed the Class B misdemeanor offense of "Assault With A Deadly Weapon" in violation of N.C.G.S. 14-33(c)(1) on March 29, 2008 and/or does the Petitioner possess the good moral character required of justice officers?

EXHIBITS

For Petitioner: Petitioner's Exhibits 1 through 15

For Respondent: Respondent's Exhibits 1 through 10

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, 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 served as a full time law enforcement officer with the Enfield Police Department from October 13, 1998 until July 14, 2004. Petitioner was sworn in as a deputy sheriff with the Halifax County Sheriff's Office from July 30, 2004 through March 31, 2008, serving as a School Resource Officer. Petitioner has held certification with the Respondent as a deputy sheriff from October 13, 1999 until March 31, 2008 through the Halifax County Sheriff's Office.

2. Respondent North Carolina Sheriff's Education Training and Standards Commission has authority under N.C.G.S. 17E and 12 NCAC 10B to certify justice officers and to deny, revoke, or suspend such certification.

3. 12 NCAC 10B .0204(d)(1) provides that Respondent may revoke, suspend, or deny certification of a justice officer when Respondent finds that the certified officer has committed or been convicted of a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of initial certification. 12 NCAC 10B .0103(16) defines "commission" as it pertains to criminal offenses as a finding by Respondent or by an administrative body pursuant to the provisions of N.C.G.S. 150B, that a person performed the acts necessary to satisfy the elements of a specified criminal offense.

4. The criminal offense of assault with a deadly weapon in violation of N.C.G.S. 14-33 is a Class B misdemeanor offense.

5. The Petitioner was charged by a warrant for arrest with the offenses of assault with a deadly weapon and simple assault on March 29, 2008. The warrant stated that there was "probable cause to believe" that the Petitioner "unlawfully and willfully did assault Ronnie Richardson with a deadly weapon, a steak knife, by striking him on the arm resulting in a one-half inch cut." The warrant also alleged the Petitioner, "unlawfully and willfully did assault and strike Ronnie Richardson by scratching him on the face with her fingernails resulting in open wounds to the face." Both the charges of simple assault and assault with a deadly weapon against the Petitioner were voluntarily dismissed on June 24, 2008 with a notation on the dismissal form stating that the prosecutor entered a dismissal and assigned "per victim" as the reason.

6. After receiving notification of the charges alleged, staff for the Sheriffs' Standards Division requested a copy of the incident report prepared by the Halifax County Sheriff's Office into this matter. Diane Konopka, Deputy Director for the Respondent, interviewed both the Petitioner and Ronnie Richardson in order to document what had happened on the night of March 29, 2008.

7. Petitioner, as of March 29, 2008, was legally married to Ronnie Richardson (Richardson). However, the parties had separated and maintained separate residences. Pursuant to a written understanding between the parties, Petitioner maintained possession of the former marital residence as her home, while Richardson resided elsewhere. Richardson testified that he considered the former marital residence, located at 2123 Ringwood Road in Enfield, NC to be Petitioner's home and not his own.

8. As of March 29, 2008, Petitioner and Richardson had one female child of the marriage who was age six. Petitioner had another male child who was age 14. Richardson was not the father. The parties had no formal court-ordered custody arrangement, though the children lived in Petitioner's residence with Petitioner and Richardson picked them both up for visits.

9. On March 29, 2008, Richardson had the children for a visit at his residence. Petitioner contacted Richardson by telephone around 7:00 pm and asked to talk with her son. After talking with her son, Petitioner requested Richardson bring both children home. Richardson testified he would leave "right now", but instead waited until halftime of a UNC-Chapel Hill basketball game that he was watching at the time of the telephone call.

10. Petitioner at this time was working in the kitchen of Petitioner's residence using a small steak knife. Petitioner's service weapon (a handgun) and the folding knife she used for law enforcement duties were present and easily accessible in the house.

11. Petitioner saw headlights in the yard of the Petitioner's residence and exited the residence into the yard. Prior to doing this, she slipped the steak knife into the back pocket of her jeans. Petitioner testified that she was careful not to leave sharp objects such as knives around the kitchen due to the fact that her daughter, who was under the age of six at the time, could get at them and injure herself.

12. When Petitioner came into the yard, the children exited Richardson's car and began to go into the residence. Petitioner then approached Richardson's car on the driver's side and with the window rolled down and Richardson in the car, the two began to engage in a verbal argument over aspects of Richardson's visitation with the children. As Richardson had had the children all day, Petitioner asked where the kids had been. Richardson replied that it was none of Petitioner's business and that he could take them wherever he wanted. In response, Petitioner pointed her finger at Richardson and began yelling at him. In reply, Richardson slapped her hand away which caused her to be pushed away from him.. At that point Petitioner scratched Richardson in the face. Richardson grabbed Petitioner's arms and forced them behind her back. (Petitioner maintains this with Richardson outside the car; Richardson believes Petitioner was in the car – the events that follow support Petitioner and Richardson being outside the car) Regardless of specific location, at the time Richardson was forcing Petitioner's arms behind her,

he felt a knife. It was here the Undersigned determines that Richardson was cut. Petitioner testified that it was in her back pocket and Richardson was forcing her arms to that area. Richardson testified that he felt the knife while he had Petitioner's arms pinned back, and it could have been in Petitioner's back pocket, and that is where he would have cut himself. Richardson testified that he never saw the steak knife. Richardson only became aware of the knife in Petitioner's pocket when he cut his hand on it, upon which he asked Petitioner's 14-year-old son (who had returned to the car area) to retrieve the knife and take it inside the residence, which he did.

13. Outside the car, Petitioner struggled to have Richardson release her arms from behind her back. In that process, testimony from both participants shows Richardson pushed Petitioner to the ground and while standing over her drew back his fist as if he was going to hit Petitioner. Though Richardson said he wanted to hit Petitioner he did not, and got in his car and drove away. He testified he felt "woozy" and drove to his sister's house.

14. Petitioner and Richardson testified that they had had arguments and yelling matches in the past but those had never led to physical violence. Petitioner testified that she was not afraid of Richardson at the time he arrived with the children, and stated that had she wished to arm herself against Richardson there were two more superior weapons – her service weapon and the folding knife she used in her duties – easily accessible in her home.

15. It is undisputed that, although certain exact details of the scuffle differ between Richardson and Petitioner, Richardson first initiated physical contact with Petitioner by shoving or pushing Petitioner's hand away while Petitioner was pointing at him. Petitioner testified that Richardson shoved her hard enough to knock her backwards, upon which the parties engaged in a brief physical scuffle. Petitioner testified that she was afraid of Richardson at this point.

16. Both parties testified that during the altercation, Richardson held Petitioner's arm behind her back in an attempt (per Richardson) to prevent Petitioner from scratching Richardson. On cross-examination, Richardson agreed that he forced Petitioner's arm behind her back, with him holding her by the wrist, at the location where the knife was in the pocket of Petitioner's jeans. Richardson agreed that this was when he received the cut on his arm or hand from the knife. This differs from prior statement(s) by Richardson but carries the stronger weight of testimony under oath and subject to cross-examination.

17. While again some of the details varied according to who was testifying, Richardson testified that he never saw a knife during the altercation and that Petitioner did not "pull" a knife on him. Petitioner vigorously denied that she threatened or assaulted Richardson with the steak knife, and that she never pulled it out of her back pocket during the scuffle. The evidence, including Richardson's testimony during this hearing, supports her contentions.

18. In their respective interviews with Diane Konapka, Respondent's investigator, both Petitioner and Richardson consistently denied that Petitioner threatened or willfully injured Richardson with the steak knife, or that she removed the steak knife from the pocket of her jeans. Konapka, who obviously did not witness any of the events between Petitioner and Richardson on

March 29, 2008, placed her interview notes into evidence. Richardson's conversation with Ms. Konapka includes a statement from him that he did not initiate the charges against Petitioner.

19. Later in the evening of March 29, 2008 at approximately 2244 hours, Deputy Charles Jenkins with the Halifax County Sheriff's Office received a call for assistance to 12693 Highway 481. When he arrived at the residence, later determined to be the residence of Ronnie Richardson's sister, he spoke with Ronnie Richardson who told him that he was married to the Petitioner but they were currently separated. Mr. Richardson went on to explain that he had custody of the children that day and that when he went to return the children to the Petitioner's home, a verbal argument began. In Deputy Jenkins' report, he cites that Mr. Richardson told him that the Petitioner grabbed him in the face on his left side and scratched him several times. He stated that the Petitioner "pulled out a knife and stabbed him in his right forearm." Deputy Jenkins observed blood on Ronnie Richardson's clothing and cuts on his upper arm. He also observed scratches on his face. While Deputy Jenkins made photographs of Ronnie Richardson's injury, he was unable to locate those photographs at the time of trial. According to Deputy Jenkins' report EMS was called to check Richardson's injuries and he (Richardson) refused treatment at a hospital.

20. Deputy Jenkins left and proceeded to the Petitioner's residence at 2123 Ringwood Road. Deputy Jenkins conducted a non-custodial interview of the Petitioner at her home. The Petitioner told Deputy Jenkins that when Richardson arrived back at her home, an argument began, and she put her hand in Ronnie's face. When she did that, Ronnie pushed her hand away and Petitioner then grabbed Ronnie's face and scratched him. Deputy Jenkins' report states that the Petitioner "pulled out a steak knife during the struggle." The report does not mention Petitioner's son whom both Petitioner and Respondent stated retrieved the knife. Deputy Jenkins testified he did not know anyone else was involved with the knife except Petitioner and Richardson. Petitioner told Deputy Jenkins that she did not cut Richardson and that he must have stabbed himself while he was trying to grab the knife.

21. Petitioner testified that a lieutenant with the Halifax County Sheriff's Department first arrived on the scene, and asked to see the knife, and went into Petitioner's residence. Petitioner testified that the lieutenant then shined his spotlight on the back pocket of Petitioner's jeans and noted a couple of drops of blood on or around the back pocket – consistent with Richardson cutting his hand on the knife when it was placed there.

22. Deputy Jenkins, who apparently arrived at Petitioner's residence after a fellow Halifax County Deputy and a Trooper, has worked with Petitioner and stated he had never found her to be untruthful. He stated that Petitioner cooperated with him but that Richardson was uncooperative at first.

23. Petitioner was charged with simple assault and assault with a deadly weapon and placed under arrest. Subsequently, the charges were dismissed without trial, and Petitioner was not convicted on either charge in a court of law nor was she found civilly liable for assault on Richardson in any court of law.

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

1. The Office of Administrative Hearings and the undersigned Administrative Law Judge have personal and subject matter jurisdiction of this contested case pursuant to N.C. Gen.Stat. §150B-40(e). All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter. 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.

2. The North Carolina Sheriffs' Education and Training Standards Commission has the authority granted under 17E of the N.C.G.S. and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke or suspend such certification.

3. Pursuant to 12 NCAC 10B .0204(d)(1), the Commission may revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed a crime or unlawful act defined in 12 NCAC 10B. 0103(10)(b) as Class B Misdemeanor and which occurred after the day of initial certification.

4. At issue in this case is whether or not, on March 29, 2008, Petitioner "committed the Class B Misdemeanor offense of Assault with a Deadly Weapon, in violation of North Carolina General Statute 14-33(c)(1), when you (she) unlawfully and willfully did assault Ronnie Richardson with a deadly weapon, a steak knife, by cutting him on the arm resulting in a one-half inch cut." Based on this allegation, Respondent further asserts probable cause to believe that Petitioner "no longer possess the good moral character required of all justice officers." (Res. Ex. 8)

5. As the issue in this case is revocation of an existing certification, Respondent has the burden of proof by a preponderance of the evidence that Petitioner committed the Class B Misdemeanor offense of Assault with a Deadly Weapon.

6. The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

7. The issue of whether Petitioner committed simple assault on Ronnie Richardson (Richardson) is irrelevant to this case, as simple assault is not a Class B misdemeanor.

8. Further in this case, Petitioner was neither convicted of assault with a deadly weapon in a court of law nor was she otherwise found civilly liable for such in a court of law.

9. To find that Petitioner "committed" the offense of Assault with a Deadly Weapon Petitioner must have "performed the acts necessary to satisfy the elements of a specified criminal offense." *Britt v. Commission*, 348 N.C. 573, 501 S.E2d 75 (1998)

10. There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules. North Carolina General Statute 14-33 does not create a new offense as to assaults (with a deadly weapon), but only provides for different punishments for various types of assault. *State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967), citing *State v. Lefler,* 202 N.C. 700, 163 S.E. 873; and *State v. Jones*, 258 N.C. 89, 128 S.E.2d 1.

11. The North Carolina Supreme Court "generally defines the common law offense of assault as 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." The common law rule regarding assault (in this case with a deadly weapon) followed by the North Carolina courts places "emphasis on the intent or state of mind of the person accused." *State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967)

12. The decisions of the North Carolina Supreme Court have moreover, "brought forth another rule known as the 'show of violence rule,' which places the emphasis on the reasonable apprehension of the person assailed. The 'show of violence rule' consists of a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed." *State v. Roberts*, 270 N.C. 655, 155 S.E.2d 303 (1967)

13. Richardson, the only other person who actually witnessed the altercation who gave testimony, and who was the purported victim, testified that he never saw a knife in his altercation with Petitioner. Petitioner repeatedly denied taking the knife out of her pocket. All of the credible evidence suggests that Richardson cut himself on the knife while forcing Petitioner's arm behind her back. And the only two witnesses to the event testified that Petitioner neither threatened nor brandished the knife at Richardson, or even removed it from her pocket, during the altercation.

14. In this case, the preponderance of the evidence does not show that willful, overt act by Petitioner required of any assault. Moreover, the preponderance of the evidence does not support any showing that Richardson had any reasonable apprehension of immediate bodily harm. In short, the evidence in this case can not and does not support a finding that Petitioner committed the Class B Misdemeanor offense of Assault with a Deadly Weapon.

15. There is no dispute that Richardson, and not Petitioner, initiated the physical element of the confrontation between Petitioner and Richardson on March 29, 2008 in the front yard of Petitioner's house. The mere fact Petitioner pointed her finger at Richardson in even an animated fashion does not meet any of the elements of assault. However when Richardson

struck Petitioner, he in fact committed both an assault and a battery. Petitioner stated without contradiction that she was frightened of Richardson when Richardson initiated the physical aspect of their confrontation.

16. "One without fault in provoking or continuing an assault is privileged to use such force as is reasonably necessary to protect himself from bodily harm or offensive physical contact." *State v. Grant,* 57 N.C. App. 589, 291 S.E.2d 913, citing *State v. Anderson*, 230 N.C. 54, 51 S.E.2d 895 (1949). Further, a person "is not obliged to retreat when assaulted while in his [or her] dwelling or the cartilage thereof, whether the assailant be an intruder or another lawful occupant of the premises. The castle doctrine is derived from the principle that one's own home is one's castle and is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her in the world. *State v. Stevenson*, 81 N.C. App. 409, 344 S.E.2d 334 (1986); citing *State v. Browning*, 29 N.C. App. 376, 379 221 S.E.2d 375, 3777 (1976). As such, Petitioner's actions of scratching Richardson are not illegal and would not rise to the level of a Class B misdemeanor. Of note here also is that Respondent has not alleged this action as justification for revocation.

17. Respondent's probable cause finding that there was a belief that Petitioner no longer possessed the good moral character required of justice officers is founded solely on the allegation that Petitioner committed the Class B Misdemeanor offense of Assault with a Deadly Weapon. Having found that not to be the case, no other evidence was presented that would call into question Petitioner's moral character.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on those conclusions and the facts in this case, Respondent's determination that probable cause existed that Petitioner committed the Class B Misdemeanor offense of Assault with a Deadly Weapon and/or that Petitioner lacked the moral character required of justice officers cannot be and is not supported by the testimony and evidence in this case. A holding of the existence of probable cause in each of the above cited allegations is in error. Respondent's evidence in this case does not create that superiority of weight needed to carry the requisite burden of proof. As such, there is no cause or foundation to revoke, Petitioner, Tamika Sharnell Richardson's justice officer certification.

NOTICE

Per the North Carolina General Statutes, the agency that will issue a final decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

The agency is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact, and to present oral and written arguments to the Board pursuant to N.C. Gen.Stat. § 150B-40(e).

A copy of the final decision or order shall be served on each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to each party's attorney of record if any. The agency shall furnish a copy of the final decision to the Office of Administrative Hearings.

IT IS SO ORDERED.

This the 6th day of May, 2007.

Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEY FOR PETITIONER

John J. Aldridge III
Special Deputy Attorney General
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ATTORNEY FOR RESPONDENT

This the 7th day of May, 2009.

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STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 08 OSP 2293
SHARON ANNETTE MERCER, Petitioner v. N.C. DIVISION OF MOTOR VEHICLES, Respondent.	**DECISION**

THIS MATTER came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge on April 21-22, 2009 in Raleigh, North Carolina. After considering the allegations in the Petition, the testimony of the witnesses, and the documentary evidence and exhibits admitted, the undersigned makes the following **DECISION**:

APPEARANCES

For the Petitioner:
Angela Newell Gray, Attorney at Law
Gray Newell & Johnson, LLP
7 Corporate Center Court, Suite B
Greensboro, North Carolina 27408

For the Respondent:
Kathryne E. Hathcock, Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699

ISSUES

1. Did the Petitioner timely file her Petition with regard to all five Notices of Rejection from the License and Theft Bureau?

2. Was Petitioner denied promotions because she is female?

EXHIBITS

Petitioner's Exhibits #1
Respondent's Exhibits A-D, K-GG.

WITNESSES

Petitioner called as witnesses: Petitioner and Ms. Georgia Warren.
Respondent called as witnesses: Dawn Godwin, Lieutenant Colonel Greg Lockamy, Major Neil Callahan, Captain Keith King, Amanda Olive, Captain Charles Irvin, and Captain Norman Blake.

DECISION – TIMELINESS OF FIVE APPEALS

After considering the briefs submitted and arguments of counsel along with all relevant cases, statutes and rules submitted, the undersigned finds as follows: that of the five appeals, Petitioner abandoned her appeals of two cases which have not been filled by Respondent and these two cases are dismissed with prejudice. Of the three remaining appeals, the undersigned finds that Petitioner timely appealed the law enforcement supervisor position in Wake County ("Santiago Position") The "Hayes Position" and "Butler Position" appeals were not timely and therefore the Office of Administrative Hearings lacks subject matter jurisdiction to hear these two appeals and are dismissed with prejudice. Although the undersigned has ruled that this Court lacks jurisdiction to hear the Butler and Hayes appeals, for the sake of clarity by reviewing tribunals, the undersigned also finds facts and conclusions of law relating to the Butler and Hayes appeals.

FINDINGS OF FACTS

1. The parties stipulated to adequate notice of the hearing.

2. On October 9, 2008, Petitioner filed a Petition for Contested Case Hearing pursuant to N.C.G.S. " 126-34.1 and 126-37. In her Petition, Petitioner alleged sex discrimination in failure to promote. Specifically, Petitioner alleged, "I have applied for numerous positions since May, 2008 within the agency and have been rejected each time even though I was qualified for the positions. In some instances, I have not even been interviewed. Male colleagues with equal or less qualifications were interviewed, considered and ultimately hired to these positions." See Petition.

3. The Department of Transportation ("DOT") is a State agency that employs over 14,000 employees and whose work is divided among seven (7) divisions, each addressing different modes of transportation: Aviation, Bicycle & Pedestrian, Motor Vehicles, Ferry, Highways, Public Transportation, and Rail.

4. The Division of Motor Vehicles (hereinafter "Respondent") employs 1,627 employees and is responsible for driver licensing, vehicle registration, license plates, and law enforcement responsibilities relative to the agency. The agency is divided into two divisions, the Driver's License/ Registration division and the License and Theft Bureau. NCDMV is largely composed of male employees. (T p. 322, 324).

5. The License and Theft Bureau is a para-military organization that currently employs approximately one hundred and eighty three sworn law enforcement officers. The officers are ranked by importance in the order of Inspector (entry level), Lieutenant, Captain, Major, Lieutenant Colonel and Colonel.

6. Approximately 12-15 females (9-10%) hold sworn law enforcement positions within the License and Theft Bureau (T pp 108, 167). Most of the 12-15 female law enforcement officers are relatively new hires, and three of the females (approximately 25%) occupy supervisory positions. (T pp 108, 111). Seven or eight of the female officers have never applied for a promotion. (T p 118).

7. The national average for women in entry-level law enforcement positions is approximately 14.1%. Captain Keith King testified that The License and Theft Bureau's 9-10% ratio is below the national average because the agency only hires seasoned law enforcement officers with a minimum of two to three years of investigative or basic law enforcement experience. (T pp 167-168).; that approximately 50% of the Bureau's Inspectors have been hired within the past five years, including eleven or twelve of the currently employed Inspectors (T p 168), and that only three females within the License and Theft Bureau have greater than five years' experience with the agency. (T p 170). Captain King also testified the License and Theft Bureau is in the process of rewriting some of its policies relating to recruitment; that the policy has been under review in 2006 and 2007 and that a draft has been proposed for 2009. Captain further testified hat he has been promoted three times since 2000 and Petitioner has not been promoted at all since 2001. (T pp 172-173) (However see Paragraph #8 below). Considering the deplorable demographics of DMV, Captain King curiously testified that "in 2006, there was an issue addressed that we were slightly underrepresented in protected classes, being any minority class or gender-specific class." (T p 173).

8. In September 2001, Respondent Division of Motor Vehicles hired Sharon Annette Mercer (hereinafter "Petitioner") as an Enforcement Officer in the License and Theft Bureau. In June 2004, Petitioner was promoted to the entry-level position of Inspector. (Ex. N p. 4).

9. Prior to 2008 Petitioner had not applied for promotions but that year she began seeking advancement within the License and Theft Bureau. See Petition. Of the five positions that she applied for in 2008, the Petitioner did not meet the minimum supervisory experience qualifications for one (hereinafter "Butler position"). (Ex. B).

10. Petitioner was interviewed and considered for the remaining two positions (hereinafter "Santiago position" and "Hayes position").

Santiago Position

11. The License and Theft Bureau posted a position from June 24-July 1, 2008 seeking a law enforcement supervisor for its Fraud Investigations Unit at Raleigh Headquarters ("Santiago position"). (Ex. K, T p 26).

12. The above-mentioned Fraud Investigations Supervisor position had been previously located in District II (Cumberland County) and had been occupied by Captain Diego Santiago. Because management felt that the position would best serve the License and Theft Bureau if it was instead located at Headquarters, it was posted on the Office of State Personnel website as a Raleigh-based new position. (T pp 82-83, 93). There is no longer a Fraud Investigations Supervisor position located in District II. (T pp 118-119).

13. After the posting for the Fraud Investigations Supervisor closed, the Department of Transportation's Human Resources Department screened the applications without input, involvement or influence from the Division of Motor Vehicles. (T pp 43-44, 54, 57, 60). At the conclusion of its screening process, the Department of Transportation determined that eight applicants were most qualified and had promotional priority, and that two applicants (not including Inspector Mercer) also had veterans' preference priority in addition to promotional priority. (T p 27).

14. Amanda Olive, Assistant Manger for the DOT Salary Administration, Qualification Review and Alternative Pay Systems, testified that the Department of Transportation Human Resources Department considered Captain Santiago's application to be complete even though he had failed to indicate whether he had any convictions on his criminal record. (Ex. M). Amada Olive also testified that the error was made on the part of DOT Human Resources, and there was no requirement for DMV to check behind DOT. (T p 181). Further Ms. Olive admitted, "The personnel technical just missed it, so it is an error on our [DOT's] part." When asked if DMV did anything wrong in allowing Captain Santiago to proceed through the interview process, Assistant Manager Olive emphasized, "No. The error was in the DOT HR Office." When questioned further by the Undersigned regarding the relationship between DOT and DMV, Assistant Manager Olive clarified, "At the point in time that these applications were done, the DOT Human Resources Office was solely responsible for the qualification review and then the determination of the applicants being qualified, most qualified, etc., so it would have been a DOT mistake, and [DMV] would not - I mean if we sent it over to them that way [DMV] wouldn't have questioned it. That would have been an error on our part." (T pp 198-199).

15. After completing the initial screening process, the Department of Transportation Human Resources Department forwarded the screened applications and evaluation report to the Division of Motor Vehicles Personnel Office so that the hiring process could begin. (Ex. L, T p 79). It was not the policy of DMV to review the applications for a second time or second-guess the initial screening decisions of DOT. (T p 57). The DMV personnel technician simply "would receive [the applications from DOT] and would...take all of the most qualified [applications]...in a packet and send it to the manager [for interviews]." (T p 57). Panel members automatically assumed that if they were given an application that had been pre-screened by DOT and a candidate to interview, that the candidate's application was complete. (T p 144).

16. Among the eight qualified applicants for the Fraud Investigations Supervisor were Inspector Mercer, Inspector (now Lieutenant) Otto Hayes, and Captain Santiago. (Ex. L). The promotion would have been at least a four step promotion for Inspector Mercer, but only a lateral transfer for Captain Santiago. (T pp 55-56, 84-85). Respondent's evidence suggested that it is unusual for an Inspector to obtain such a promotion to Captain without first serving as a Lieutenant, because the approximately thirty supervisory positions within the Bureau are very competitive, and it often "takes numerous times to apply before being promoted." (T pp 56, 73, 78, 114, 168-169).

17. DMV Personnel Manager Dawn Godwin, Lieutenant Colonel Greg Lockamy and Major Neil Callahan were selected to serve on the interview panel for the Santiago position. (T pp 33, 79, 93). Each of the three members had served on at least one prior on interview panels, and each had no problem hiring a female into a supervisory position assuming she was the most qualified candidate. (T pp 40, 58, 77-78, 93). Dawn Godwin, a female, was selected chairwoman and assumed the leadership role during the interview and selection process. (T p 30).

18. As Manager of the License and Theft Bureau Training and Accreditation Unit, panel member Major Callahan was very aware of the need to hire protected classes and expand the demographic makeup of the agency. (T p 158).

19. Chairwoman Godwin, Lieutenant Colonel Lockamy, and Major Callahan first reviewed the qualified candidates' applications before starting each of the eight interviews. (Exs. M and N, T pp 30-32, 133).

A. In reviewing Captain Santiago's application, Chairwoman Godwin noted that he had progressive law enforcement experience and that he had held prior supervisory positions within the License and Theft Bureau. (T p 30). In reviewing Inspector Mercer's application, Chairwoman Godwin noted that she did not have progressive law enforcement experience. (T p 32). Chairwoman Godwin did not give any consideration to the fact that Captain Santiago is male or that Inspector Mercer is female. (T pp 30-32).

B. In reviewing Captain Santiago's application, Lieutenant Colonel Lockamy reviewed his education, special training programs and seminars that he attended, and his licenses and certifications, in addition to his work history. In reviewing Inspector Mercer's application, Lieutenant Colonel Lockamy noted that she had an associate's degree, and he reviewed special training programs that she attended in addition to her work history. (T p 81).

C. In reviewing Captain Santiago's application, Major Callahan took note of his education, prior work history and experience, and his training, and Major Callahan was aware that Captain Santiago "was in charge of a team out of Cumberland County." (T pp 134, 160). In reviewing Inspector Mercer's

application, Major Callahan reviewed her education, job history and work experience. (T p 135).

20. Santiago had an associate's degree in Criminal Justice, and BLET. (T p 30). He did not graduate from High School, rather he received his GED. (T p 47). He was not certified as an Instructor. Godwin admitted that at the time of the interview, Mercer had more education than Santiago, more law enforcement experience, as an instructor and had BLET. (T p 50). Godwin testified, "it was considered, you know, that she did have some additional education, but then at the same time, you have to weigh that with the experience, the type of experience." (T p 48-49). The fact that Mercer had more years of employment with DMV than Santiago was also not a concern of Godwin's, and the fact that Mercer had more overall law enforcement experience than Santiago and was working at the advanced level did not matter to Godwin. (T p 45-46, 359). Godwin also testified on cross examination that she was not aware that Mercer was certified as a criminal justice instructor and Santiago was not. (T p 48)

21. Each applicant was asked the same set of interview questions, and he or she was given a written copy of the questions during the interview to follow along. (Exs. O-P and R-U, T pp 33, 103). Panel members took independent notes of each candidate's performance and responses during his or her respective interview. (Ex. O-P and R-V, T pp 33, 105).

22. There were no guidelines for the interview process and the interview questions were prepared by Bozard and Lockamy. (T p 68). Lockamy testified that prior to the Santiago interview process, DMV usually had a five (5) member interview panel which was trained on the interviewing and grading process. However that process was no longer followed when the Santiago position was filled. Consequently, there was no training, no grading guidelines and no guidelines on how to conduct the interview (T p 98-101, 104).

A. Chairwoman Godwin explained that Captain Santiago, "was very good at relating his experiences from his current job as well as his previous positions to the position that he was applying for. His answers were very detailed, and...complete." Chairwoman Godwin was impressed that Captain Santiago had experience directly relevant to the position for which he was applying and that he was able to "communicate a lot of depth, understanding of - investigations and covert operations." (T pp 34-35). With regard to Inspector Mercer's interview, Chairwoman Godwin explained that Inspector Mercer "did not bring out a lot of her experiences and relate them to the questions that were asked," and that Inspector Mercer lacked a lot of experience with investigations and undercover operations. (T p 37).

B. Lieutenant Colonel Lockamy explained that Captain Santiago, "was very thorough with his questions" that Captain Santiago gave a lot of detail on his experience...in doing fraud investigations, covert operations, hundreds of undercover operations, and that he "listed currently the assignments and job duties that he was

performing in the position as an assistant supervisor there in Cumberland County." (T p 85-88). Lieutenant Colonel Lockamy reiterated that because Captain Santiago had been performing the exact same fraud investigation duties in Cumberland County, "the experience, and the overall knowledge, skills, and the abilities that Mr. Santiago was performing qualified him for this position." (T p 85). With regard to Inspector Mercer's interview, Lieutenant Colonel Lockamy explained that she, "didn't go into details as far as listing the nature or ability to express herself and explain her experience with this type of work." (T p 89).

C. Major Callahan was impressed that Captain Santiago "went into pretty much great detail and specifics" when answering a question, that he answered each question completely, "did not hesitate," "took a moment to think about what he was going to say and how he said it before he answered the question, and really the completeness of it." Major Callahan remembered that Captain Santiago "knew what the job specifics were. He explained what he had done in the past, what he would like to do, and how he could handle the job, [and he] gave a little bit of the background of his experience level again and what he felt the goals and the needs were of this [Fraud Investigations] unit and what accomplishments he wanted to do." (T pp 137-138). With regard to Inspector Mercer's interview, Major Callahan explained that, "Her answers were relatively short. They were quick, not a lot of detail," and Major Callahan added, "I would have been better with [Inspector Mercer's] interview if she had been more in detail with the answers or more complete answers. They were very short, very brief, and very quick answers with not a lot of information in them." (T pp 138-139).

23. Captain Santiago's interview took thirty-five minutes, while Inspector Mercer's interview took only twelve minutes for 16 questions. (T pp 106-107). Respondent's evidence was the candidates were not rushed through their interviews, and each was given a chance to fully tell the interview panel about his or her respective qualifications and experience. (T p 108). Inspector Mercer herself admitted that she was allowed to answer each question before the next was asked of her and that she was not interrupted when providing her responses. (T p 381). However, Inspector Mercer also testified that she felt like she was rushed through the process and that she felt like the panel already had their mind already made up (T p 358). If the candidates did not volunteer lengthy answers, the panel members did not try to pull more information out of them and did not ask additional follow-up questions that were not on the approved interview questionnaire. (T pp 120, 138, 155).

24. Godwin testified that she didn't even have the applications before her at the Interviews. She also testified that prior to sitting on this interview panel; she had never worked in law enforcement herself and had only been working for DMV for about nine months. (T p 49). Callahan testified that he reviewed the job description "right quick." Further the panel reviewed the applications only thirty (30) minutes before the interviews were conducted (T p 29, 43, 142).

25 The application of Santiago was not complete at the time it was forwarded from DOT to DMV. Santiago did not fill in the application relating to criminal convictions. Moreover it remained incomplete as of the time it was reviewed by the interview panel. (Ex. M). The question relating to criminal convictions is encircled on the application (Ex. M) Dawn Godwin testified that DOT verifies items on the applications by placing checks and circles to compare entries on the application against the posting. She further testified that "if things were circled, then we looked at those things as well." (T p 203).

26 The undersigned takes official notice that the North Carolina Department of Transportation Merit Based Hiring Policy, which provides as follows: "If complete information is not provided on the application by the established deadline, application will not be accepted for revaluation purposes. Applications without signatures or conviction statement checked off will be accepted as long as management obtains the necessary information during the interview process." On cross examination in response to a question about whether Santiago's application was complete, Dawn Godwin testified that under the standards that we use currently, we would not have considered him to be most qualified. (T pps 52-54).

27 In response to the Court's Bench questions submitted to Petitioner and Respondent dated August 7, 2009, Respondent's affiants outline how Captain Santiago's application relating to whether he had been convicted of a crime other than traffic violation was carelessly overlooked and thereby included in the pool of applicants marked most qualified. In the Affidavit of DMV employee, Pamela McKelvy indicates she was reviewing the Qualification Evaluation Report when she noticed that five applicants had been disqualified from consideration. She indicated that she recognized several of the names and thought that those candidates probably did meet the minimum qualification requirements. [The alleged Qualification Evaluation Report that was being processed by McKelvy on July 9, 2008, does not appear to be a part of the Record in this case as Ex. M with the date Thursday July 10, 2008 contains the names of Santiago and Mercer]. McKelvy then contacted Norma Hodges with the Department of Transportation Human Resources Office and asked her to re-screen all of the applications for the position. (Affidavit of Pamela McKelvy). The undersigned finds as a fact that this sworn testimony is inconsistent with the sworn testimony at the hearing that DMV played no role in screening applications and that DMV accepted all screened applications forwarded to it by DOT without any involvement as to which applicants were forwarded to DMV. (See Godwin testimony – Paragraph 14 herein). While not dispositive of the decision in this case, the process followed by DMV in filling this position and the manner in which the interview was carried out cast considerable doubt on the credibility and fairness of the process. As indicated in paragraph 26 above, present DOT policy allows management up to obtain omitted signatures or conviction statement check off so long as management obtains the information during the interview process. It does not appear from the record that this was accomplished by the management team comprising the interview panel. Even cursory review of the Santiago application by the management team would have revealed the encircled omission relating to whether Santiago had a criminal record. Based upon the record, there were at least three opportunities for DOT or DMV to correct the error that

allowed Santiago to be selected for this position. The undersigned concludes that the testimony by the witnesses for the DMV who testified or submitted affidavits that the criminal record check off question on the Santiago application was submitted in error were not entirely credible using the customary standards for judging credibility. The undersigned finds as a fact and matter of law that responsibility for having a pool of applicants that conform to all policies of DOT and DMV. The undersigned also finds as a fact and as a matter of law that responsibility for assuring a fair selection process rest squarely upon the shoulders of DMV, and DMV cannot hide behind errors made by DOT. This is especially applicable to the Fraud License and Theft Bureau, a division of DMV that has such deplorable numbers with respect to diversity in its work force.

28 Godwin admitted that Mercer is in an underrepresented class at DMV. (T p 51-52). Colonel Lokamy testified that he would like to see more positions filled by women. (T p 77).

29 Georgia Warren, a former DMV employee, currently employed by the NC State Highway Patrol, testified that it was because of a diverse interview panel that she was able to be promoted at DMV. (T pp 399, 401)

30 The undersigned finds that some subjective criteria were used to evaluate the candidates. Godwin testified that she was most impressed by Santiago's communication skills. (T p. 34-35), that Mercer was somewhat "soft spoken." (T p 36), and that Mr. Santiago's experience was more progressive. (T pp 58-59). DOT's hiring policy states, "in the recruiting and selection process, the Department of Transportation will give equal employment opportunity to all applicants, without regard to race, religion, color, creed, national origin, sex, age, disability, or political affiliation/influence, and will be based solely on job-related criteria."

31 Inspector Mercer indicated that her covert experience with the License and Theft Bureau was limited to motor vehicle inspections, and that any other undercover experience took place at least seven years previous when she worked at the Goldsboro Police Department. (T p 379). She further admitted that Captain Santiago "may have been qualified" for the Law Enforcement Supervisor position since he had been performing the exact duties consistently for four years. (T p 378).

32 Inspector Mercer admitted that Lieutenant Hayes (who had more overall law enforcement experience than both herself and Captain Santiago and who also had Veterans Preference priority) was similarly rejected from the Fraud Investigations Supervisor position. (T pp 377-379, 384).

i.Inspector Mercer testified that she was not aware of any training that DMV offers
ii.that specifically instructs individuals on advancing within DMV. (T p 363)

33 Inspector Mercer was never informed by anyone on the interview panels how much weight was going to be placed on the individual qualities that she had. (T p

34 After all of the interviews were concluded, the panel discussed the strengths and weaknesses of each candidate and came to the unanimous conclusion that Captain Santiago would be recommended for the Fraud Investigations Supervisor position. (T pp 37-38, 90, 119, 140). The panel members were all in agreement that no other candidate could compare with Captain Santiago's very relevant qualifications, collective law enforcement experience, or interview performance. (T pp 38, 90).

35 The interview panel recommended Captain Santiago for the Fraud Investigations Supervisors position. After the Respondent articulated legitimate and nondiscriminatory reasons for denying promotions to the Petitioner, the Petitioner was given the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination. Petitioner failed to meet this burden and was unable to show that she was, in fact, the most qualified candidate for both the Hayes and Santiago positions. Specifically, Petitioner made arguments such as "my education background should weigh the same" (T p 370), "I had a degree. He didn't" (T p 372), "I'm comparing my education" (p 375), "With my...education, I felt like I should have had as just a fair a shot" (T p 381), and "Education...plays a part in an interview process" (T p 381). However, as set out above, "Fairness...requires more than a comparison of objective factors." Even though the Petitioner had the same educational qualifications as Captain Santiago and two more years of schooling that Lieutenant Supervisor position, and Captain Santiago was selected for the promotion. (T p 39).

Butler Position

36 The License and Theft Bureau posted a position from July 2-July 9, 2008 seeking a Law Enforcement Manager for the Eastern Region ("Butler position"). (Ex. A).

37 The Butler position required that qualified candidates possess a four-year degree from an accredited college or university and two years of supervisory law enforcement experience in the area supervised; or, university or an equivalent combination of training and experience. (Ex. A, T p 235). A year's worth of education could be substituted with a year's worth of experience, but no substitution was allowed for the supervisory experience requirement. (T pp 236, 263). DOT and/ or DMV was not permitted by the North Carolina Office of State Personnel to manipulate the requirement for supervisory experience. (T p 242). Similarly, personnel technicians who screened the applications were afforded no discretion in computing the amount of experience that could be substituted for education. (T pp 250-251). Olive admitted the substitution calculation is subjective. (T p 244). None of the alleged calculations for substitutions were presented during the hearing, nor disseminated to applicants. (T p 250). In response to the Court concerning whether there was a piece of paper or something from the Office of State Personnel that was in writing which gives an interpretation of substitution of experience for education or training provision in the job Posting [Exhibit A], Olive did not have it with her. (T p. 262). Mercer testified that she has never seen any such document (T p

356). Conversely, DMV does not offer a substitution of education or training for experience with regard to supervisory experience. T p 239, 243-245).

38 Supervisory experience was important for the Butler position because the successful candidate was responsible for managing multiple units, multiple priorities, and multiple technical special areas. (T p 266).

39 Inspector Mercer applied for the Butler position. Although she met the minimum educational requirements, Inspector Mercer was considered "Not Qualified" solely for lack of the required supervisory experience. (Ex. B, T pp 235, 238, 254, 257-258). It is undisputed that Inspector Mercer met the educational requirements for the Butler position. (T pp 376-377).

40 Applications submitted to DOT are considered on their face. Because there are 14,000 positions within the agency, it is impractical for the agency's Human Resources Department to follow up with each potential job seeker to ask him or her questions about missing, incomplete or incorrect information on the applications. (T p 252).

41 Inspector Mercer admittedly did not indicate any supervisory experience on her application for the Butler position. (T p 369). She further admitted that Major Butler, did, in fact, indicate supervisory experience on his application for the same position. (T p 370).

42 In order to be considered qualified for the Butler position, Inspector Mercer's application would need to have shown that she had supervised some individuals in the "Number Supervised by You" block, or it would need to have described her supervision responsibilities in the "Description of Duties" block. (Ex. C, T pp 251-252). If Inspector Mercer had noted somewhere on her application that she had supervisory experience, it would have been counted by DOT. (T p 264). Even if Inspector Mercer had "indicated that she did supervise a number of people without going into details about what that supervision required, that [would] be sufficient." (T pp 265-266).

43 At the time of her application for the Butler position, Inspector Mercer had been a law enforcement officer with the License and Theft Bureau for seven years. She admitted that her years of experience could not match those of Major Butler, who had been a law enforcement officer specifically with the License and Theft Bureau for twenty-six years. (T p 371). Inspector Mercer further admitted that by supervising thirty-three people, Major Butler "would be more qualified than me." (T p 373).

44 Inspector Mercer was unable to articulate any plausible explanation as to how she was more qualified that Major Butler for the Law Enforcement Manager position. (T pp 369-377).

Hayes Position

45 The License and Theft Bureau posted a position from July 9-July 15, 2008 seeking a Law Enforcement Supervisor for District III ("Hayes position"). (Ex. V).

46 After the posting closed, the Department of Transportation's Human Resources Department screened the applications and determined that seven applicants, including Inspector Mercer and Lieutenant Hayes, were considered most qualified and had promotional priority. The Human Resources Qualification Evaluation Report also indicated that Lieutenant Hayes had veteran's preference priority in addition to promotional priority. (Ex. V, T p 268).

47 Captains Keith King, Charles Irvin and Norman Blake were selected to serve on the interview panel for the Hayes position. (T pp 268, 276, 286, 306). Captain Irvin was selected chairman and assumed the leadership role during the interview and selection process. (T p 285).

48 As Supervisor of the License and Theft Bureau Training and Accreditation Unit, Captain King is very aware of the need to hire protected classes and expand the demographic makeup of the agency. (T pp 165-167).

49 Captains King, Irvin and Blake first reviewed the qualified candidates' applications before starting each of the eight interviews. (Exs. Y-Z, T pp 269, 287, 307-308).

A. In reviewing Lieutenant Hayes application, Captain King noted that he had Veteran's preference priority in addition to promotional priority and that he had numerous years of supervisory experience in which he managed large numbers of personnel. (T p 269). In reviewing Inspector Mercer's application, Captain King denoted some post-high school education and numerous training classes. (T p 270).

B. In reviewing Lieutenant Hayes' application, Captain Irvin noted his military experience and considered his certifications, work history and supervisory experience. (T pp 287-288). In reviewing Inspector Mercer's application, Captain Irvin took note of her education, skills and work history. (T p 288).

C. In reviewing Lieutenant Hayes' application, Captain Blake was impressed by his varied level of law enforcement experience both with the military and the License and Theft Bureau. (T pp 307-308). He similarly noted Inspector Mercer's total years of law enforcement and the fact that she was working on an undergraduate degree. (T p 308).

50 Each applicant was asked the same set of questions and provided a copy of the questions to follow along with during the interview. (Exs. AA-BB, DD-GG, T pp 271-278, 287, 291, 309). Panel members took independent notes of each candidate's

performance and responses during his or her respective interview. (Exs. AA-BB, DD-GG, T pp 271-278, 287, 291, 309).

A. Captain King was impressed with Lieutenant Hayes' thorough and in-depth answers to the questions, his knowledge of both sides of the License and Theft Bureau, and his extensive supervisory experience in other law enforcement agencies. (T p 271). Captain King explained, "It was impressive for an applicant - actually interviewing for a first-line supervisory position - that he had previously proven himself in supervisory roles...The ultimate years of experience was rather extensive, and the thoroughness of his answers showed programmatic knowledge." (T pp 271-272). With regard to Inspector Mercer's interview, Captain King described her responses to the panel's questions as short and brief, and he said, "I believe Ms. Mercer could have expanded on some of her answers. Some of her answers were left a little bit short." (T p 273).

B. Captain Irvin explained that Lieutenant Hayes gave full answers to the questions and completely detailed his prior law enforcement positions and duties: "I think what impressed me most...is that he has a...lengthy history in law enforcement. He had worked in various sections of DMV. He had worked in the Emissions Program. He had worked in the Theft Program, and he was currently assigned to the ID Theft Lab...at Headquarters." (T pp 289-290). With regard to Inspector Mercer's interview, Captain Irvin explained that some of her answers to the questions "became a little shorter as we progressed during the interview," and Captain Irvin was concerned that Inspector Mercer did not have any supervisory experience. (T p 291).

C. Captain Blake indicated that Lieutenant Hayes gave very detailed answers during his interview and expounded on his law enforcement experience, military experience, and supervisory experience. Captain Blake was most impressed by "the level of experience that [Lieutenant Hayes] brought to the table and the fact that he did a very good job of presenting himself to the panel." (T p 310). With regard to Inspector Mercer's interview, Captain Blake noted that "As the interview went on, her answers were not as detailed as they should have been or could have been," and he indicated, "She failed to really expound on her experiences, and her answers were not as detailed as they could have been." (T p 311).

51 As directed by management, the interview panel administered an unannounced written test to each applicant to assess his or her programmatic knowledge of "the areas that they would potentially be supervising and potentially the areas that they had worked in." (T p 280). The applicants were given an unlimited amount of time to complete the test. (T pp 278, 384). Lieutenant Hayes answered 20/20 questions correctly, while Inspector Mercer only answered 15/20 questions correctly. (Exs. W and X, T pp 274, 293, 312, 384).

52 Inspector Mercer did not have a problem with taking the test, she did not complain about having to take the test, and she did not observe anyone cheat on the test. (T pp 313-314, 384). In fact, Inspector Mercer considered the test to be "pretty reasonable," and she thought the questions the test posed were important to the position for which she was applying. (T p 385). Further, Inspector Mercer considered it "very telling that the test was given unexpectedly and [Lieutenant Hayes] still was able to answer every question correctly without notice, without time to study." (T p 386).

53 After all of the interviews were concluded, the panel discussed the strengths and weaknesses of each candidate and reviewed the test results to reach the unanimous conclusion that Lieutenant Hayes would be recommended for the Supervisor position. (T pp 276, 279, 292, 304, 314, 318-319). The panel members were all in agreement that no other candidate could compare with Lieutenant Hayes' very relevant qualifications, collective law enforcement and extensive supervisory experience, or interview performance. (T pp 276, 292-294)

54 The interview panel recommended Lieutenant Hayes for the Supervisor position, and Lieutenant Hayes was selected for the promotion. (T pp 275-276, 292, 294, 314-315).

55 At the time of her application for the Hayes position, Inspector Mercer had been a law enforcement officer for sixteen years. Inspector Mercer admitted that Lieutenant Hayes, who had been a law enforcement officer for twenty-five years, had more total years of experience than she did. (T p 383). Inspector Mercer further admitted that she "had not held any supervisory positions in any law enforcement agency" while that Lieutenant Hayes had extensive supervisory experience. (T pp 383-384).

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties.

2. At the time of her discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C.G.S. ' 126-1 *et seq.* Under N.C.G.S. ' 126-16 and 126-36, it is unlawful for an employer to deny an employee subject to the State Personnel Act promotion based upon the employee's gender.

3. The Supreme Court of North Carolina has adopted the standard used by the United States Supreme Court in proving discrimination: (1) the claimant carries the initial burden of establishing a prima facie case of discrimination; (2) the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection; and (3) if a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination. Gordon v. NC DOC, 173 N.C. App. 22, 618 S.E.2d 280 (2005).

4. With regard to the Santiago and Hayes positions, the Petitioner has satisfied her initial burden of establishing a prima facie case of discrimination by showing that a) as a female, she is a member of a protected group; b) she was qualified for a promotion; c) she was passed over for the promotion; and d) the person receiving the promotion was not a member of the protected female class. Enoch v. Alamance County DSS, 164 N.C. App. 233, 242, 595 S.E.2d 744, 752 (2004). With regard to the Butler position, the Petitioner has not established a prima facie case of discrimination in that she did not meet the minimum supervisory experience requirements to be considered qualified for the position.

5. The undersigned concludes as a matter of fact that the sworn hearing testimony of Amanda Olive that DMV played no role in the screening of applications and that DMV accepted all screened applications forwarded to it by DOT without any involvement of DMV is not fully credible. (See Godwin testimony – Paragraph 14 herein). The undersigned also concludes that the sworn affidavits by the witnesses for DMV that the criminal record check off question on the Santiago application was submitted to DMV in error were also not fully credible in light of the other testimony and evidence in the record.

6. The undersigned finds as a matter of law that the responsibility for obtaining a pool of applicants that conforms to all policies of DOT and DMV are ultimate the responsibility of DMV. The undersigned also finds as a matter of law that responsibility for assuring a fair selection process rest squarely upon the shoulders of DMV, and DMV cannot hide behind errors made by DOT. This is especially applicable to the Fraud License and Theft Bureau, a division of DMV that has such deplorable numbers with respect to diversity in its work force.

7. Even though the Petitioner established a prima facie case of discrimination with regard to the Santiago and Hayes positions, DMV sufficiently articulated legitimate, nondiscriminatory reasons for her rejection from each of the positions. The selection process that failed to exclude Santiago from the interview pool, while suspect in light of the evidence in the record, was not sufficient evidence of a "pretext" for discrimination as a matter of law. Moreover, the "ultimate burden" of proving that the employee discriminated against the employee remains with the employee at all times. North Carolina Dep't of Correction v. Gibson, 308 N.C. at 138, 301 S.E.2d at 83). Based upon the evidence in the Record as a whole, including the undersigned's consideration of the DMV License and Theft Bureau's unacceptable workforce ratios of women to men and other evidence of pre-textual nature, Petitioner did not carry her burden of proving she was not promoted because she is a female. Respondent sufficiently articulated legitimate, nondiscriminatory reasons for her rejection from each of the two positions which outweigh the "mere pretext" evidence presented by Petitioner. Specifically the nondiscriminatory reasons articulated include:

A. Because Captain Santiago had four years of experience performing the exact same position in District II, he was exceptionally qualified for the position. Further, Captain Santiago had twelve years of progressive law enforcement experience with several law enforcement agencies and had several years of

supervisory experience within the License and Theft Bureau. In his thirty-five minute interview for the Fraud Investigations Supervisor position, Captain Santiago expressed a significant depth of understanding regarding the work of the Fraud Investigations Unit, and he detailed his relevant experiences with undercover operations and investigations on cases involving narcotics, illegal sale of copper and illegal driver's licenses. Captain Santiago answered all interview questions thoroughly and precisely, and he expressed a thorough understanding of License and Theft Bureau Policies and Procedures. In contrast, Inspector Mercer admittedly had very little experience with covert and undercover operations, and it is uncontroverted that she had no supervisory experience. Her twelve-minute interview for the Santiago position was brief and the panel members indicated that her answers did not provide detailed information with regard to her experiences and potential contributions to the position. Even though she possessed equal educational credentials as Captain Santiago and had four more years of total service in law enforcement, solely because Captain Santiago had performed the exact same position for four years in Fayetteville, Inspector Mercer did not prove that she was more qualified than Captain Santiago for the Fraud Investigations Supervisor position.

B. Lieutenant Hayes was the unanimous choice for the District III Supervisor position, and Inspector Mercer admitted that she could not match his extensive qualifications. Lieutenant Hayes had over twenty-five years of law enforcement experience and twenty-nine years of military experience, and he had held a variety of supervisory positions in which he managed up to thirty personnel. Additionally, Lieutenant Hayes had served as Sergeant in two different agencies and as Chief of Police, and he had worked in both sides of the License and Theft Bureau. In his interview for the District III Supervisor position, Lieutenant Hayes answered all questions thoroughly and confidently, and he scored 100% on the unannounced written test. In contrast, Inspector Mercer had only sixteen years of total law enforcement experience, and she had no supervisory experience like Lieutenant Hayes. Her interview for the Hayes position was brief and the panel members indicated that her answers did not provide detailed information with regard to her experiences and potential contributions to the position. Even though Inspector Mercer had an Associates Degree and Lieutenant Hayes had only a high school education, Inspector Mercer was not as qualified for the District III Supervisor position as Lieutenant Hayes.

8. The North Carolina State Personnel Commission recognizes that "a specific quantity of formal education or number of years experience does not always guarantee possession of the identified skills, knowledge, and abilities for every position in a class. Qualifications necessary to perform successfully may be attained in a variety of combinations. Management is responsible for determining specific job-related qualifications that are in additional to minimum standards." State Personnel Manual, Section 12 p. 7.

Accordingly, despite her Associate's Degree, Inspector Mercer was not necessarily the most qualified candidate for each position for which she applied.

On the basis of the above-noted Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The undersigned Administrate Law Judge denies the Petition and AFFIRMS Respondent's denial of promotions to Petitioner in that Respondent had legitimate and nondiscriminatory reasons for not selecting Petitioner.

NOTICE

Before the agency makes the FINAL DECISION, it is required by N.C.G.S. § 150B-36(a) to give each party an opportunity to file exceptions to this DECISION, and to present written arguments to those in the agency who will make the final decision.

The agency is required by N.C.G.S § 150B-36(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the Parties' attorneys of record.

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

This the 13th day of August, 2009.

Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 17th day of August, 2009.

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STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF CUMBERLAND	**08 OSP 2955**
DENISE VEE, Petitioner, v. CUMBERLAND COUNTY DEPARTMENT OF PUBLIC HEALTH, Respondent.	**DECISION**

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on March 13, 2009 in the old Cumberland County Courthouse in Fayetteville, North Carolina upon a Petition appealing a personnel disciplinary action. The record was left open for the Parties' submission of materials, including but not limited to supporting Memorandums of Law. After filing by Respondent on June 5, 2009 and Petitioner on June 8, 2009 with the Clerk of the Office of Administrative Hearings (OAH) and receipt by the Undersigned on June 11, 2009, the record was closed on June 11, 2009.

APPEARANCES

For Petitioner:
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For Respondent:
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ISSUE

Whether Respondent had just cause to terminate Petitioner from her employment at the Cumberland County Department of Public Health, including whether any violations of procedures for termination were such as to significantly effect a just cause determination.

APPLICABLE STATUTES AND RULES

N. C. Gen. Stat. § 126, *et seq*
N.C. Gen. Stat. § 150B
25 N.C.A.C. 01I *et seq.*

WITNESSES

For Petitioner: Denise Vee
Debbie Andrade
Arlene Littlejohn

For Respondent: Debbie Andrade
Nina Bragg
Myra Baker
Dorothy McNeil
Denise Vee

EXHIBITS

For Petitioner:

A. Report regarding number of patients actually seen on the second floor of the Cumberland County Health Dept.; June 16, 2008 – June 19, 2008.
B. Report regarding number of patients actually seen on the third floor of the Cumberland County Health Dept.; June 16, 2008 – June 19, 2008.
C. Thank you note from Debbie Andrade to Denise Vee.
D. Strawberry Sundae Star Performer for Excellence in Customer Service; November 16, 2007.
E. Certificate to Denise Vee "Administrative Professionals Day" (Recognizing dedication, teamwork …); April 23, 2008.
F. Thank you note "Heart" from Dorothy McNeil to Denise Vee.
G. Letter dated October 17, 2008 stating written warnings are not grievable
H. Debbie Andrade's notes concerning Denise Vee's conduct on July 9, 2008
I. Adult Health Clinic Roster for June 16, 2008

For Respondent:

1. Blank Cumberland County Health Department Registration Form
2. Adult Health Clinic Roster for July 9, 2008

3. Sign-in Sheets (Cumberland County Health Department Registration Forms) for July 9, 2009
4. Written Warning to Address Inappropriate Conduct dated June 20, 2008
5. Letter dated July 16, 2008 from Sharon Barrett to Denise Vee concerning investigatory leave
6. Letter of dismissal dated September 10, 2008 from Wayne Raynor to Denise Vee
7. Notice of Pre-dismissal conference dated August 12, 2008

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (ALJ) makes the following Findings of Fact. In making these findings of fact, the ALJ has weighed all the evidence and has assessed the credibility, including, but not limited to the demeanor of the witnesses, 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, Denise Vee, was employed as a Processing Assistant III (PA-III) with the Cumberland County Department of Health at the Adult Health Clinic in Fayetteville, North Carolina. Denise Vee was dismissed from her position as a PA-III on September 10, 2008. Petitioner had worked for the Cumberland County Department of Health for at least 24 months.

2. The Respondent, Cumberland County Department of Health, is a public health department established to provide an array of health-related services to the citizens of Cumberland County. Respondent Health Department provides clinical health services; and promotes good health practices by educating the public.

3. Petitioner was primarily responsible for the Adult Health Clinic located on the third floor of the Health Department. The patients in the Adult Health Clinic have scheduled appointments. As a PA-III, Petitioner was responsible for registering patients upon their arrival at the clinic and preparing their records for use by the medical staff.

4. Petitioner's primary assignment was to register patients for the Adult Health Clinic but she was also expected to assist in registering patients for the STD/HIV Clinic as directed by her supervisor.

5. At all times relevant hereto, Petitioner's first-line supervisor was Debbie Andrade and her second-line supervisor was Dorothy McNeil.

6. Patients in the Adult Health Clinic have appointments. Ten patients per provider are scheduled for the morning and ten patients per provider are scheduled for the afternoon. Petitioner was responsible for registering the Adult Health Clinic patients, and for prioritizing these patients who had appointments over those in the STD/HIV Clinic. Prioritizing appointments for registration was mandated through the department, and was a key to ensuring an efficient use of the physician's time.

7. The STD/HIV Clinic is also located on the third floor of the Health Department. Patients are seen in this clinic on a first-come, first-serve basis. The patients may begin signing in at eight o'clock in the morning and continue until eleven-thirty. The clinic closes for lunch and patients are allowed to start signing in again at twelve-thirty in the afternoon. Myra Baker, Processing Assistant III, was primarily responsible for registering STD/HIV clinic patients in June and July 2009.

8. There is a second floor in Respondent's clinic building which houses the Maternity Clinic, Family Planning Clinic and Child Health Clinic. Respondent maintains an additional staff of Processing Assistants to assist with the registration of patients on the second floor.

9. There was an established protocol for registering patients on the Third Floor clinics in June and July 2009. If the patient had an appointment and was present at or before their appointment time, the patient would be registered and forwarded back to be seen by a provider. If there were no patients with appointments, the processing assistant assigned to the Adult Health Clinic was to help register STD/HIV patients in order to keep a continuous patient flow. This protocol was communicated to Petitioner and the other processing assistants during training sessions held the third Friday of every month.

10. On June 16, 2008, Petitioner arrived to work at 7:30 am as was her usual practice, and proceeded to open the clinic and start checking in the patients. This was Petitioner's daily duty until the front desk person, Marisha Roberts, arrived. However, Ms. Roberts was not going to be at work on this day. At 8:00 am Petitioner was normally responsible for answering the phones until discharge person, Nina Bragg, arrived at 8:15 am, at which time she would take over the phones until she left at 5:15 pm. At approximately 7:45 am, the Adult Health Clinic patients began to arrive. At approximately 8:15 on June 16, Petitioner called to the second floor to request assistance. Fanita Christian, Team Leader for Respondent, informed Petitioner that there was no help available to send due to a large number of absences that day. She asked Petitioner to work as a team with Ms. Bragg and Ms Baker.

11. Petitioner was an efficient worker, and was often required to support Myra Baker. Petitioner was looking for help throughout the day to assist with the backlog, and did not receive help. Petitioner continued to seek additional support on June 16, 2008.

12. Petitioner eventually contacted the Finance Manager, Eddie Beale, a senior manager in the department who, based on the chain of command available June 16, 2008, was the next to be asked for help. Mr. Beale was unable to send help, but was interested in why the floor was under-staffed, and expressed concern for the situation. Petitioner expressed concern to

Mr. Beale that she would become the target of retaliation based on her contacting him, and he reassured her that would not happen.

13. On June 20, 2008, Respondent issued Petitioner a written warning letter citing inappropriate and grossly unprofessional conduct on June 16, 2008. (R. Ex. 4). Dorothy McNeil, Administrative Officer III, gave the written warning letter to Petitioner citing that during a conversation with "Ms. Christian, you stated on two occasions that you were not going to assist patients at the front reception window." The letter also stated that throughout the day, Petitioner "continued to demand help on the third floor clinical area" and that each time individuals "presented to the 3rd floor to assist, there were no back-up of patients, no patients waiting at the reception window to be registered, and no more than 2-3 registration slips waiting to be processed." The written warning stated that that Debbie Andrade, Patient Relations Supervisor called Petitioner "from her home to address the situation," and that Petitioner told her "to leave me alone right now, because I'm mad and do not want to be bothered."

14.. Petitioner did not sign the written warning letter. Petitioner sought the assistance of the Cumberland County Human Resources Department to grieve the letter. Petitioner was provided a grievance procedure, and followed the procedure, but did not get a response from Respondent. In an October 17, 2008 letter Respondent wrote that "as we previously indicated, written warnings are not grievable." (P. Ex. G).

15. The basis for termination action which was the cause of filing this Petition concerned events taking place on July 9, 2008.

16. Sometime after the third floor clinics reopened following lunch (patients are allowed to sign-in beginning at 12:30 pm but the clinic does not open to see patients until 1:00 pm) on July 9, 2008, Debbie Andrade, Patient Relations Supervisor and Petitioner's immediate supervisor, contacted Myra Baker by telephone and inquired as to the number of patients waiting to be registered for the STD/HIV Clinic. After being informed that seven to eight patients were waiting to be registered, Ms. Andrade attempted to contact Petitioner by telephone. Petitioner's telephone line was busy and Ms. Andrade left Petitioner a message instructing Petitioner to assist Myra Baker in registering STD/HIV patients. Ms. Andrade called Nina Bragg, the Discharge Clerk and a Processing Assistant assigned to the front window on the third floor. After verifying the number of patients waiting to be registered for the STD/HIV Clinic and that Petitioner was not registering patients, Ms. Andrade instructed Ms. Bragg to place several of the STD/HIV patients' sign-in sheets in Petitioner's box for processing.

17. Ms. Bragg brought 5 check-in tickets to Petitioner from Myra Baker. Petitioner returned them as these were numbered 44 – 48, and she stated she was concerned that these would be registered after the three patients she had who had appointments and Myra Baker would proceed with number 49. This would have violated the first-come, first-serve policy of the Communicable Disease Clinic. Ms. Andrade was able to speak with Petitioner and told her to assist Myra Baker in registering patients. Petitioner stated she had three Adult Health Clinic appointments of her own to register and that she could not assist Ms Baker.

Ms. Andrade went to the STD/HIV Clinic on the third floor to assist with registering STD/HIV Clinic patients. When Ms. Andrade arrived on the clinic floor, Petitioner was not registering any patients for the Adult Health Clinic. Ms. Andrade testified that she saw no Adult Health clinic patients waiting to be registered. Ms. Andrade assisted Myra Baker in registering patients until the backlog was eliminated.

18. The evidence from Respondent's Exhibit G shows the following Registration Numbers, Sign-In times and Appointment status:

No. 42	12:33 pm	Appointment No
No. 43	12:30	Appointment No
No 44	12:45	Appointment No
No. 45	12:59	Appointment No
No. 46	1:00	Appointment No
No. 47	1:08	Appointment No
No. 48	1:07 pm	Appointment No
No. 49	1:10	Appointment No
No. 50	1:17	Appointment Yes
No. 51	1:20	Appointment Yes
No. 52	Missing	
No. 53	1:15	Appointment No
No. 54	1:25	Appointment No

19. This evidence shows that Ms. Baker, the primary processing assistant for the STD/HIV clinic, was registering three persons while Petitioner, who was her back-up, was given five registrations to handle, while awaiting those persons who had appointments that she was responsible for. Petitioner had complained prior to Ms. Andrade that she felt a sense of unfairness because she felt she had to work the clinic by herself because of the slowness of Ms. Baker. Ms. Andrade replied that "some are slower than others" and that "we needed to work as a team," and "to get the patients in and out in a timely manner." (Tr. Pg 34-35) The first Adult Health clinic patient appeared on July 9, 2008 at 1:17 p.m.

20. By 1:20 pm on July 9, 2008, testimony indicates there were three patients, all who had appointments, waiting to be registered for the Adult Health Clinic. A piece of written evidence, Adult Health Clinic Registration Form No. 52 for July 9, 2008, is missing from the records. As other evidence shows (No. 67 sign-in time is 3:50 and No. 69 sign-in time is 3:30). No. 52 sign-in could have been at 1:00 pm. or after 1:20 pm or some other time (for example, No. 68 has no sign-in time).

21. Respondent's witnesses contend that they had contacted Petitioner prior to 1:20 on July 9, 2008, however, Respondent's witness, Debbie Andrade, in notes kept in Petitioner's personnel file acknowledges that she first called Myra Baker at 1:15 pm. This would be consistent with eight patients awaiting registration since the eighth patient signed in at 1:10 pm. Ms. Andrade's note also shows she left a message on the Petitioner's voicemail at 1:17 pm and that she did not speak with Petitioner until 1:22 pm. (P. Ex. H). Ms. Andrade's file note also shows she spoke with Nina Bragg at 1:18 pm which would have been after the first appointment for the Adult Health Clinic arrived for Petitioner to register. During this time

Ms. Andrade was getting information regarding patient status by phone from Nina Bragg who also chose the number of files to take to Petitioner. Petitioner testified that five files were given to her and Ms. Bragg testified that she gave Petitioner three files. Ms. Bragg further testified that Petitioner would be on the phone every day; that Petitioner "would be on the phone the majority of the day in between trying to register the patients," and that "most of the clinic staff knew this." (Tr. Pg. 95-96)

22. Petitioner takes a lunch break between 11:30 am and 12:30 pm. Between 12:30 pm and 1:00 pm (when the clinic opens to see patients), Petitioner usually makes packets if needed and if the clinic is low on charts, Petitioner makes charts. On July 9, 2008, Petitioner did not receive a voice mail message but did recall talking to Ms. Andrade by telephone around 1:25 pm (Ms. Andrade's file notes indicate 1:22 pm). As soon as Petitioner had completed registering the Adult Health Clinic patients who had appointments, she helped Myra Baker with her backlog. on July 9, 2008.

23. Between 2:00 pm and 2:30 pm on July 9, 2008, Petitioner was called to the boardroom by her management team. At that time, she was accused of insubordination for not registering 5 patients. Dorothy McNeil said that the schedule showed Denise didn't have any patients at the time she was asked to help. Petitioner asked to go get the sign-in sheets, she brought them back to the meeting and showed her management team that she did have patients at that time. The sign-in sheets showed that appointment patients signed in at 1:17 and 1:20. These patients had arrived and signed in prior to Petitioner speaking with her supervisor at 1:22 pm, as acknowledged by her supervisor's notes.

24. On July 16, 2008, Petitioner, Denise Vee was again called into the boardroom. Petitioner was being accused of making derogatory comments about her co-workers and supervisors. These were new allegations to her, but were statements allegedly made between June 23 and June 27, 2008.

25. Also, on July 16, 2008, Respondent through its human resource manager, Sharon Barrett, notified Petitioner that she was being placed on investigative leave with pay immediately so that an investigation of allegations of Petitioner's "regular and on-going unacceptable personal conduct" could be conducted. The July 16 letter notified Petitioner that "we have received information that suggests you may have repeatedly engaged in unacceptable personal conduct in the form of constantly delaying, refusing and/or failing to follow directions," as well as for "regularly badmouthing, name calling and using derogatory terms to describe staff and supervisors." The letter lists six specific items of investigation including the July 9, 2009 incident and including saying Fanita Christian was "lazy" and "not a team player," and calling Debbie Andrade a "backstabber."

26. Petitioner received notice by letter dated August 12, 2008 of a Pre-dismissal Conference scheduled for August 15, 2008. Petitioner attended the conference and was allowed to present relevant evidence. The Pre-dismissal Conference letter stated the reason for such a conference was fact-finding involving "alleged unacceptable personal conduct in the form of insubordination." The letter cites two causes, the July 9, 2008 "refusal. . .to assist in registering STD patients," and a June 24th "failure to answer the telephone when

given a directive from Ms. Christian, team leader." These are the only two causes of dismissal cited. The other four cited in the July 16 letter had been apparently dropped.

27. In a letter dated September 10, 2008, Wayne Raynor, Director of the Health Department notified Petitioner that he had concluded she was insubordinate on July 9, 2008 and that her employment with the Health Department was terminated effective September 12, 2008. Specifically the letter states: "On the afternoon of the most recent incident of misconduct, July 9 around 1:00 p.m. to 1:20 p.m., your supervisor, Ms. Debbie Andrade, Administrative Assistant gave you an order to immediately assist with the registering of walk-in patients to the Communicable Disease/STD/HIV Clinic because eight patients had arrived at approximately the same time." The letter goes on to state that "you refused to follow the direct order of your supervisor."

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

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. 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.

2. At the time of the termination of her employment, Petitioner was subject to the State Personnel Act in accord with N.C.G.S. § 126-5(a)(2)(c).. N.C.G.S. §126-35 provides that no career State employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause.

3. At the time of this termination, Petitioner and all employees of Respondent were subject to the State Personnel Act pursuant to N.C.G.S. § 126-5(a)(2)(c). Respondent was subject to the State Personnel Act as codified in N.C.G.S. § 126-1 *et seq*. and all applicable regulations. By stipulation from both Petitioner and Respondent, notice is taken that neither Respondent Department nor the Board of County Commissioners for Cumberland County had applied for "substantial equivalency" designation from the State of North Carolina's Office of State Personnel as to its employment policies regarding the matters in this case and they had not otherwise received a substantial equivalent exemption different from Chapter 126 pursuant to N.C. Gen. Stat. § 126-11. As Respondent was not exempt from the provisions of Chapter 126 for purposes of this hearing, the Undersigned is guided by the law, regulations, guidelines and/or policies established by the Office of State Personnel.

4. N.C.G.S. §126 states that in contested cases pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer. The Respondent has the burden of proof by a greater weight or preponderance of the evidence that its dismissal of Petitioner was for just cause. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

5. Respondent has failed to prove by a preponderance of the evidence that Petitioner engaged in the conduct as described in the September 10, 2008 letter terminating Petitioner's employment with the Cumberland County Department of Public Health.

6. The preponderance of the evidence shows that the direct order given to Petitioner by her supervisor was done so at 1:22 pm and not between 1:00 pm and 1:20 pm. as set forth in the dismissal letter. The circumstances at the clinic were markedly different at that time with Petitioner's appointments (at least two already signed in). Moreover, any direction given by the supervisor through a third party prior to 1:22 pm is suspect as vague (number of files) and quite frankly suspect as to its authority to be given. Of most importance, however, is that the dismissal letter does not give as a reason that the order was given by or through anyone else other than "Debbie Andrade, Administrative Assistant." Further, the preponderance of the evidence in the case shows that the reason outlined in the dismissal letter for the assistance, "because eight patients had arrived at approximately the same time," is inaccurate. The eight cases came in between 12:33 pm and 1:10 pm, almost a 40 minute time period which occurred some seven minutes before the two appointments with priority arrived and some12 minutes after the order was given. Besides the incorrectness of the dismissal letter, further legal analysis is warranted into the totality of the Petitioner's employment termination.

7. In *North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004) the North Carolina Supreme Court stated: [D]etermining whether a public employer had just cause to discipline its employee requires two separate inquires: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause, citing *Sanders v. Parker Drilling Co.*, 911 F. 2d 191 (9th Cir. 1990), *cert denied*, 500 U.S. 917, 114 L. Ed. 2d 101 (1991).

8. Petitioner was terminated from her position for insubordination. "[I]nsubordination is a form of personal misconduct." *Souther v. New River Area Mental Health Development Disabilities and Substance Abuse Program*, 142 N.C. App. 1, 541 S.E. 2d 750 (2001) citing *Amanini v. North Carolina Dept. of Human Resources, N.C. Special Care*, 114 N.C.App. 668, 443 S.E.2d 114 (1994). Insubordination is defined as, "1. A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a workers

employment 2. An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give." Black's Law Dictionary (7th ed. 1999)

9. The North Carolina Court of Appeals in *Souther v. New River Area Mental Health Development Disabilities and Substance Abuse Program*, 142 N.C. App. 1, 541 S.E. 2d 750 (2001), used that definition to create a two part test to determine whether an employee was insubordinate. The two part test in *Souther* requires two elements for a court to find insubordination, "(1) A reasonable and proper instruction or assignment by an authorized supervisor; and (2) A willful or intentional refusal to comply with such instruction or assignment." *Souther*, 142 N.C. App. 1, 6.

10. The *Souther* court relied on a previous North Carolina Court of Appeals decision, *Urback v. East Carolina University*, 105 N.C. App. 605, 414 S.E. 2d 100 (1992), in applying the two-part test. The *Souther* court acknowledged that the *Urback* Court's test for a willful refusal would apply to the second element of the two-part test. The *Urback* court found that, "[t]he conduct of an employee cannot be termed willful misconduct if it is determined that the employee's actions were reasonable and taken with good cause." *Urback v. East Carolina University*, 105 N.C. App. 605, 608 (1992) *disc. review denied*, 331 N.C. 291, 417 S.E. 2d 70 (1992).

11. The *Souther* Court relied on an additional case to determine whether an employee's actions were reasonable under the *Urback* test. In *Mendenhall v. North Carolina Department of Human Resources*, 119 N.C. App. 644, 459 S.E. 2d 820 (1995), the court ruled that in determining whether an employee's actions were reasonable a subjective analysis should be used. The *Souther* two-part test, the *Urback* reasonableness inquiry and the subjective analysis required by *Mendenhall*, should be and is hereby applied to Petitioner's case

12. The first element of the *Souther* test requires " ... A reasonable and proper instruction or assignment by an authorized supervisor[.]" *Souther v. New River Area Mental Health Development Disabilities and Substance Abuse Program*, 142 N.C. App. 1, 541 S.E. 2d 750 (2001). On July 9, 2008, Petitioner, Denise Vee was given five registration cards by Nina Bragg the discharge clerk. Upon Petitioner's initial refusal based on the fact that she had patients ahead of these new registration card, Petitioner was not given this instruction by an authorized supervisor, but rather by a co-worker. When Petitioner was finally able to speak to her "authorized supervisor" concerning this request, Petitioner explained that she had patients; that she could not help at the moment, but would help when she had completed her patients that had appointments. The preponderance of the evidence is favorable to the Petitioner in this regard.

13. Respondent further fails to meet the second element of the *Souther* test. The second element of the *Souther* test requires "A willful or intentional refusal to comply with such instruction or assignment." *Souther v. New River Area Mental Health Development Disabilities and Substance Abuse Program*, 142 N.C. App. 1, 541 S.E. 2d 750 (2001). Petitioner, Denise Vee never refused to assist Myra Baker with her work. Petitioner simply informed her co-worker who assigned the work, and then later, her supervisor that she could not assist at that time, since she had patients with appointments to register and that they

always had priority. Petitioner did assist after she had completed the registration of her patients.

14. However, even if Petitioner's actions were determined to be a refusal (and the Undersigned finds that they were not) of the instruction, her actions in postponing when she assisted Myra Baker were reasonable under the *Mendenhall* subjective analysis. Because Petitioner's actions were reasonable and taken with good cause, *Urback v. East Carolina University*, 105 N.C. App. 605, 608 (1992) *disc. review denied*, 331 N.C. 291, 417 S.E. 2d 70 (1992), the second element of the *Souther* test still cannot be met by Respondent. Denise Vee was instructed that her patients with appointments came first. This was the standard practice throughout the facility, and was stressed by the medical staff that rendered the medical services. Petitioner had acknowledged and enforced this policy in the past, and it allowed her to be recognized for her dedication, teamwork and customer service. When Petitioner, Denise Vee, was approached with the additional registration forms, since she was instructed to prioritize patients with appointments, and since she had patients with appointments to register, her refusal to immediately register those five walk-ins was reasonable. Moreover, Petitioner's refusal to immediately handle the registration cards she was given, which would have resulted in patients who had signed in before others being registered and seen after other patients who arrived later (violating the first-come, first-serve policy of the Communicable Disease clinic) was reasonable. In summary, Petitioner's refusal to immediately assist her coworker which would have resulted in the violation of two widely held policies ("appointments are a priority on the third floor" policy and "the first-come, first-serve" policy) was reasonable.

15. Respondent's evidence taken in whole, under current case law analysis, does not overbear the weight of the evidence of Petitioner and Respondent has failed to carry its legally required burden of proof under a just cause analysis.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

It is the decision of the Undersigned that Respondent has failed to carry its burden of proof by a preponderance of the evidence that Petitioner was discharged for just cause. As such, it is the decision of the Undersigned that Respondent reinstate Petitioner to the same or similar position that she was in at the time of her dismissal and that Petitioner be awarded back pay and the return of all lost benefits. Further, Petitioner should be awarded reasonable attorney fees pursuant to 25 N.C.A.C. 1B.0414 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 North Carolina State Personnel Commission in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the Undersigned, and to present written arguments to the Commission. N. C. Gen. Stat. § 150B-36(a). In accordance with N.C. Gen. Stat. § 150B-36 the State Personnel Commission 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. For each finding of fact not adopted by the Commission, the Commission 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 Commission in not adopting the finding of fact. For each new finding of fact made by the Commission that is not contained in the Administrative Law Judge's decision, the Commission shall set forth separately and in detail the evidence in the record relied upon by the Commission in making the finding of fact. The State Personnel Commission shall adopt the decision of the Administrative Law Judge unless the Commission demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record.

In so far as this matter involves a local government employee subject to Chapter 126 pursuant to North Carolina General Statute §126-5(a)(2), the decision of the State Personnel Commission is guided by North Carolina General Statute §126-37. 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.*). Further requirements of or inquiries regarding rights and notices to the Parties should be directed to the State Personnel Commission and/or the local appointing authority as the circumstances and/or stage of the process may dictate.

ORDER

It is hereby ordered that the agency making the final decision in this matter serve a copy of the final decision to the Office of Administrative Hearings in accordance with N.C. Gen. Stat. § 150B-36.

IT IS SO ORDERED.

This is the 21st day of July, 2009.

Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

Rick Wright
RA Wright Law Firm PLLC
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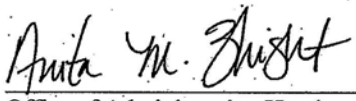
#224
Wake Forest, NC 27587
ATTORNEY FOR PETITIONER

Phyllis P. Jones
Attorney at Law
PO Drawer 1829
Fayetteville, NC 28302
ATTORNEY FOR RESPONDENT

This the 23rd day of July, 2009.



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STATE OF NORTH CAROLINA COUNTY OF CUMBERLAND	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 08 SOS 1200
Sarah D Larson Petitioner vs. N. C. Department of the Secretary of State Respondent	**DECISION**

This contested case came on for hearing before the Honorable Donald W. Overby, Administrative Law Judge, on February 12, 2009, in Courtroom 3 of the Old Cumberland County Courthouse, 130 Gillespie Street, in Fayetteville, North Carolina.

APPEARANCES

Petitioner: F. Hill Allen
Tharrington Smith, LLP
Post Office Box 1151
209 Fayetteville Street
Raleigh, North Carolina 27602

Respondent: North Carolina Department of Justice, by
Melissa H. Taylor, Esq.
Assistant Attorney General
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Respondent properly revoked Petitioner's North Carolina Notary Public Commission?

Based upon the testimony of the witnesses, exhibits submitted by the parties, argument of counsel and upon a preponderance of the admissible evidence the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner is a citizen and resident of Cumberland County. Respondent is an agency and Department of the State of North Carolina.

2. Respondent is the State agency in North Carolina responsible for enforcing the rules and regulations that govern individuals holding a Notary Public Commission in North Carolina.

3. Respondent issued Petitioner a Notary Public Commission on October 24, 2005.

4. The purposes of the Notary Public Act, N.C. Gen. Stat. § 10B-2, among others, are to promote, serve, and protect the public interests and to prevent fraud and forgery.

5. N.C. Gen. Stat. § 10B-60(a) provides that the Respondent may revoke a notarial commission on any ground for which an application for a commission may be denied under N.C. Gen. Stat. §10B-5(d). N.C. Gen. Stat. § 10B-5(d)(5) provides that Respondent may deny an application for a commission if the applicant has engaged in "official misconduct" within the meaning of N.C. Gen. Stat. § 10B-3(15).

6. N.C. Gen. Stat. § 10B-3(15)(a) and (b) defines "official misconduct" as "[a] notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization" or "[a] notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest."

7. On January 7, 2008, Respondent received a complaint regarding an affidavit of George Miller notarized by Petitioner on September 27, 2006.

8. On February 6, 2008, Respondent sent Petitioner a letter asking her to explain the complaint.

9. On March 10, 2008, William O. Richardson, an attorney and Petitioner's employer sent Respondent a letter on Petitioner's behalf explaining the notarized affidavit.

10. In his letter, Mr. Richardson stated that on September 27, 2006, he took the affidavit to Mr. Miller's residence between Kinston and Pollocksville, North Carolina, approximately two hours from Mr. Richardson's office. Mr. Miller knew that he would be signing an affidavit. Mr. Miller had told Mr. Richardson that a notary was available in Mr. Miller's community who would be able to notarize Mr. Miller's execution of the affidavit. The notary was not available on that date so Mr. Miller signed the affidavit in Mr. Richardson's presence, and Mr. Richardson took it back to his office in Fayetteville for Petitioner to notarize.

11. It is stipulated by the parties that Petitioner was not physically present when George Miller signed his original Affidavit dated September 27, 2006.

12. It is uncontested that George Miller in fact signed his original Affidavit, as reflected by his subsequent Affidavit dated October 5, 2008 admitted into evidence, the testimony of William O. Richardson, the Supplemental Affidavit of George Miller, the audiovisual recording of George Miller reading and affirming the accuracy of the statements in his original Affidavit, the affirmations of George Miller that it was his signature to Joel Morris and all of the other evidence before the Court.

13. Prior to September 27, 2006, Petitioner had met and talked with Mr. Miller and was familiar with Mr. Miller and his voice.

14. Prior to executing his original Affidavit, George Miller spoke with Petitioner on the phone for purposes of having her understand that he was, in fact, signing his Affidavit.

15. Prior to the execution of the original Affidavit of George Miller, attorney William O. Richardson spoke with Petitioner on the phone to confirm that George Miller was signing his original Affidavit in the presence of Mr. Richardson. Attorney William O. Richardson was in fact present when George Miller signed his original Affidavit. Mr. Richardson is not a notary public and did not give Mr. Miller an oath. Petitioner did not give Mr. Miller an oath on September 27, 2006, prior to Mr. Miller signing the affidavit in question.

16. On Mr. Richardson's return to his law office, Petitioner made Mr. Richardson swear and subscribe that the signature of George Miller was true and correct at the time of notarizing the original Affidavit. The affidavit of George Miller was notarized by Petitioner with the acknowledgment "Sworn to and subscribed before me, this 27th day of September, 2006." Petitioner signed the acknowledgment and affixed her seal indicating that her commission expired in 2010.

17. When Mr. Richardson swore and affirmed to Petitioner that George Miller signed his original Affidavit in Mr. Richardson's physical presence, as a subscribing witness, Petitioner did not remember that a different attestation needed to be attached for an "acknowledgment" as provided by N.C. Gen. Stat. §10B-41.

18. Attorney Richardson erroneously but in good faith believed it was permitted for Petitioner to notarize the Affidavit of George Miller in the manner and based on the circumstances in which Petitioner did so and directed her to notarize the original Affidavit.

19. The law of the Sate of North Carolina provides other instances when the person administering oaths do not have to be in the physical presence of the person being sworn. N.C. Gen. Stat. § 1A-1, Rule 28(b) and Rule 30(f). The North Carolina and Federal Rules of Civil Procedure are not as specific as N.C. Gen Stat. §10B-1 *et. seq*. in that they require depositions be taken "before a person authorized to administer oaths." Courts interpreting those rules have consistently upheld the ability of notaries public and court reporters to not be physically present when administering oaths, and one has allowed a subsequent deposition for the sole purpose of asking if all the information given in the questioned deposition was true and accurate. See *Aquino v. Automotive Serv. Indus. Ass'n*, 93 F. Supp 2d 922 (N.D. Ill. 2000); *Rodriguez-Carias v. Nelson's Auto Salvage and Towing Service,* 189 N.C. App. 404 (2008).

20. As reflected in a memorandum from Respondent dated September 9, 2008 posted on Respondent's website within the last year, http://www.secretary.state.nc.us/notary/, and confirmed by the testimony of Ms. Gayle Holder, Respondent's Director for Certification & Filing, there was uncertainty in the notary public and legal community concerning the appropriateness of giving oaths via the telephone, with some part of that community believing it appropriate to do so, at least prior to the publication of the "opinion" on Respondent's website within the last year. At the time of George Miller's original Affidavit on September 27, 2006, that "opinion" had not been issued or posted on Respondent's website.

21. In September 2007, Mr. Richardson had been practicing law for over twenty five years with an excellent reputation as an attorney. His integrity is not challenged. Petitioner acted at the direction of her employer, attorney William O. Richardson, relied in good faith on his guidance as an experienced attorney for whom she worked, and believed her actions to be permitted based on the circumstances.

22. There was no fraud or forgery with respect to the signature of George Miller on his original Affidavit or the manner in which it was notarized. The "public interests" were not compromised nor placed in jeopardy in any regard. The Affidavit was in fact not used or published in any regard until well after all curative actions had taken place.

23. Petitioner had taken the North Carolina Notary Public Educational Course prior to her receiving her Notary Public Commission in October 2005. Further, she had a copy of the most current North Carolina Notary Public Manual, but did not consult the manual.

24. On September 27, 2006, the date Petitioner notarized Mr. Miller's affidavit, N.C. Gen. Stat. § 10B-20(a) provided that a Notary may perform notarial acts of acknowledgments, oaths and affirmations, execute jurats, verifications and proofs. The statute was amended effective October 1, 2006, four days after the affidavit at issue.

25. On September 27, 2006, when petitioner notarized the affidavit, N.C. Gen. Stat. § 10B-3(14) defined "Oath" as being "legally equivalent to an affirmation" and required the person to personally appear before the notary, be satisfactorily identified and swear to its truthfulness. The statute was amended effective October 1, 2006, four days after the affidavit at issue.

26. On September 27, 2006, when petitioner notarized the affidavit, N. C. Gen. Stat. § 10B-3(8) defined "Jurat" as including requirements that the person signing the affidavit or deposition did so in the notary's presence, the signer appeared before the notary on the date indicated, the notary administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document. The statute was amended effective October 1, 2006, four days after the affidavit at issue.

27. The definitions of "oath", "affirmation" and "jurat" require the signer of the document to be in the presence of the notary when the oath is given and when the document is signed. An "acknowledgment" does not require that the notary actually see the signator execute the document. These requirements remained the same in both pre- and post October 1, 2006 amendments.

28. Mr. Miller was video recorded by Mr. Joel Morris between Thanksgiving and Christmas 2006, reading the September 27, 2006 affidavit. Mr. Morris is employed by Mr. Richardson as an investigator and is a notary as well. The recording does not show Mr. Miller being administered an oath. In Mr. Miller's reading of his original affidavit, he affirms the original affidavit and its contents which were given two to three months earlier in the original affidavit at issue.

29. On March 22, 2006, George Miller executed a Supplemental Affidavit, which was properly notarized, and incorporated and affirmed the accuracy of the statements in the original Affidavit of George Miller, and was intended to correct any issue as to the original Affidavit.

30. Mr. Richardson executed an acknowledgment on February 25, 2008, before notary Joel Morris regarding his witnessing Mr. Miller sign the September 27, 2006, affidavit. That acknowledgment was completed after Respondent notified Petitioner that she was being investigated and did not indicate that Mr. Richardson gave Mr. Miller an oath.

31. Corrective action was taken to cure or remedy any deficiencies in the notarization of the original Affidavit of George Miller.

32. In a proceeding in Superior Court on the civil case wherein the testimony of Mr. Miller was of importance, Superior Court Judge Craig Ellis considered the original Affidavit and the Supplemental Affidavit of George Miller and ruled that the Supplemental Affidavit was properly executed and affirmed and thereby corrected the original Affidavit of George Miller.

33. Respondent's position as articulated by Ms. Gayle P. Holder, Director, Certification and Filing Division, NC Department of the Secretary of State, is that "personal appearance" is the main purpose of the North Carolina Notary Public Act and is required in order to prevent fraud and forgery. "Personal appearance", although of paramount importance in the scheme of the statute, is not listed as a "purpose" in N.C. Gen. Stat. §10B-2. Indeed, §10B-3 defines "acknowledgment" and establishes a process for notarizing a document when the signature was not affixed in the notaries presence. Personal appearance is a method utilized to help prevent fraud and forgery.

34. A specific purpose of the Notary Public Act is to prevent fraud and forgery by establishing the guidelines and procedures therein. There was no fraud or forgery, nor attempt or intent to defraud or forge, with respect to the signature of George Miller on his original Affidavit or the manner in which it was notarized.

35. In making its determination, according to Ms. Holder, Respondent considered only the fact that George Miller was not in the physical presence of Petitioner when he signed his original Affidavit, and no other factor.

36. In making its determination, Respondent did not consider that at the time of notarizing the original Affidavit, Petitioner made Mr. Richardson swear that the signature of George Miller was true and correct.

37. In making its determination, Respondent did not consider the fact that there was no fraud or forgery with respect to the signature of George Miller on his original Affidavit or the manner in which it was notarized.

38. In making its determination, Respondent did not consider Petitioner's good faith belief that she was permitted to notarize the original Affidavit of George Miller under the circumstances.

39. In making its determination, Respondent did not consider the effort to remedy or cure any deficiencies in the original Affidavit with the Supplemental Affidavit of George Miller, nor did Respondent consider the Supplemental Affidavit in any way at all.

40. According to Respondent through argument of counsel and its witness, revocation of the notary license is automatic based solely on the nonappearance of the witness. There is absolutely nothing that could have been done to correct the error of non-appearance. Any corrective effort is not considered in arriving at the decision to revoke the notary's commission.

41. The North Carolina Notary Public Act does not provide a specific remedy to correct an improperly completed notarization such as the instant case; however, N. C. Gen. Stat. § 10B-99 establishes a presumption of regularity for the courts to uphold notarial acts when there is no evidence of fraud or evidence of knowing and deliberate violation of the statutes. Further, that statute recognizes the continuing observance of the common law doctrine of substantial compliance which was obviously recognized at the time of the questioned document at issue herein. This statute and the doctrine of substantial compliance evince the notion that indeed notaries public might make mistakes and that such mistakes are not necessarily fatal.

42. To hold that there is no way to correct any defective notarial act would of necessity potentially lead to a host of absurd situations for notaries to face for very innocent mistakes. To hold such an opinion flies in the face of common sense. The Respondent's contention that the only method to correct would be for the attorney to destroy the document and completely start over is absurd as well. Such an act might be a viable option in some instances but certainly not all and especially as in this case where the attorney would be destroying evidence in a civil case where a sizeable amount of money is at stake. Such an act by an attorney would subject that attorney to possible punishment by the court of jurisdiction as well as the State Bar.

43. Respondent's position that an improper notarization when the subscriber is not present is in the nature of "strict liability", is not curable, and results in a revocation in every instance is not in accord with N. C. Gen. Stat. §10B-60 (a) which clearly gives the Secretary discretion by saying that the Secretary may issue a warning to a notary or restrict, suspend or revoke the notary's commission for violation of the Notary Public Act. (Emphasis added)

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the subject matter and the parties herein pursuant to Article 3 of Chapter 150B and Chapter10B of the North Carolina General Statutes.

2. Petitioner notarized an affidavit of George Miller on September 27, 2006, without first giving him an oath and without him personally appearing before her as required by the North Carolina Notary Public Act. Such action on the part of Petitioner, nothing else showing, would constitute a prima facie showing of "official misconduct" as that term is defined in N.C. Gen. Stat. §10B-3(15)(a) and (b) and used in N.C. Gen. Stat. §10B-5(d)(5); however, Petitioner relied on the directions of an experienced attorney who was her employer. She administered an oath to the attorney to verify the signature on the document, and she attempted to comply with, although erroneously, the requirements of an "acknowledgment" and/or subscribing witness, also using the incorrect certification form.

3. Attorney Richardson has accepted blame, and admitted his error and that he directed the Petitioner erroneously but in good faith to notarize the Affidavit of George Miller in the manner and based on the circumstances in which Petitioner did so and directed her to notarize the original Affidavit.

4. The law of the Sate of North Carolina provides other instances when the person administering oaths do not have to be in the physical presence of the person being sworn. N.C. Gen. Stat. § 1A-1, Rule 28(b) and Rule 30(f). *Rodriguez-Carias v. Nelson's Auto Salvage and Towing Service,* 189 N.C. App. 404 (2008).

5. There has been sufficient confusion among notaries public and court reporters to prompt an official opinion by Respondent concerning the administration of oaths or affirmations via telephone when the person is not in the physical presence of the notary. The opinion was issued almost two years after the affidavit at issue herein.

6. N.C. Gen. Stat. §§10B-60(c), 10B-20, 10B-3(8) and 10B-3(14) require the personal appearance and oath of the principal signing a jurat or a sworn statement. N. C. Gen.Stat. § 10B-3 (1) and (26) establishes a process for acknowledging a signature when the signator is not in the physical presence of the notary.

7. Respondent's revocation of Petitioner's notary license under the circumstances before the Court was arbitrary and capricious.

8. Respondent's revocation of Petitioner's notary license under the circumstances before the Court was erroneous.

9. Respondent failed to use proper procedure in automatically revoking Petitioner's notary license under the circumstances before the Court.

10. Respondent's automatic revocation of Petitioner's notary license under the circumstances otherwise substantially prejudiced Petitioner's rights.

11. Respondent's contention that any deficiency in the notarization of the original Affidavit of George Miller is not correctable or that the only possible corrective action would have been to destroy the document and completely redo the document is arbitrary and capricious, unsupported by law, and in conflict with the obligations of the attorney who possessed the signed Affidavit to not destroy evidence. Neither N.C. Gen. Stat. § 10B-1 *et seq.* nor any other authority requires that the only available corrective action under these circumstances would have been to destroy the Affidavit and completely redo it.

12. Respondent's failure in making its determination to consider any factor other than whether Petitioner was in the physical presence of George Miller at the time she notarized the Affidavit was arbitrary and capricious, was erroneous, constituted improper procedure and otherwise substantially prejudiced Petitioner's rights.

13. Respondent's failure in making its determination to consider the corrective action taken with respect to the original Affidavit was arbitrary and capricious, was erroneous, constituted

improper procedure and otherwise substantially prejudiced Petitioner's rights.

14. Respondent's failure in making its determination to consider Petitioner's good faith belief that she was permitted to notarize the original Affidavit of George Miller under the circumstances was arbitrary and capricious, was erroneous, constituted improper procedure and otherwise substantially prejudiced Petitioner's rights.

15. Respondent's failure in making its determination to consider the fact that there was neither fraud or forgery nor any jeopardy to the public interests with respect to the signature of George Miller on his original Affidavit or the manner in which it was notarized was arbitrary and capricious, was erroneous, constituted improper procedure and otherwise substantially prejudiced Petitioner's rights.

16. Respondent's failure in making its determination to consider Petitioner's lack of any prior violation was arbitrary and capricious, was erroneous, constituted improper procedure and otherwise substantially prejudiced Petitioner's rights.

17. Pursuant to N.C. Gen. Stat. §§ 10B-60(a) and 10B-5(d)(5), Respondent may revoke Petitioner's North Carolina Notary Public Commission for acts of official misconduct.

18. N.C. Gen. Stat. §10B-1 *et seq.* does not mandate the automatic revocation of a notary's license for notarizing the signature of a witness when not in the physical presence of a witness. There are a range of other less severe disciplinary options available to Respondent, including issuing a warning.

19. Based on the findings of fact in this specific case, a suspension of Respondent's license for a period of sixty (60) days would not be an arbitrary or capricious determination by Respondent and is a sanction available to Respondent as discipline for Petitioner's conduct under the facts and circumstances.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

IT IS HEREBY ORDERED that Petitioner's North Carolina Notary Public Commission shall be revoked for a period of sixty days.

ORDER AND NOTICE

The North Carolina Department of the Secretary of State will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This is the 4th day of June, 2009.

Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

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Melissa H. Taylor
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This the 4th day of June, 2009.

Vicki Bullock

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