

# ***NORTH CAROLINA REGISTER***

**VOLUME 24 • ISSUE 16 • Pages 1302 - 1496**

**February 15, 2010**

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## **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  
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### **Rule Review and Legal Issues**

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### **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: Anca Grozav, Economic Analyst osbmruleanalysis@osbm.nc.gov (919)807-4740

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  
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Raleigh, North Carolina 27603  
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### **Governor's Review**

Edwin M. Speas, Jr. edwin.speas@nc.gov  
General Counsel to the Governor (919) 733-5811  
116 West Jones Street  
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### **Legislative Process Concerning Rule-making**

Joint Legislative Administrative Procedure Oversight Committee  
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300 North Salisbury Street (919) 733-2578  
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contact: Karen Cochrane-Brown, Staff Attorney Karen.cochrane-brown@ncleg.net  
Jeff Hudson, Staff Attorney Jeffrey.hudson@ncleg.net



**NORTH CAROLINA REGISTER**  
Publication Schedule for January 2010 – December 2010

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:	270 <sup>th</sup> day from publication in the Register
24:13	01/04/10	12/09/09	01/19/10	03/05/10	03/22/10	05/01/10	05/12/10	10/01/10
24:14	01/15/10	12/22/09	01/30/10	03/16/10	03/22/10	05/01/10	05/12/10	10/12/10
24:15	02/01/10	01/08/10	02/16/10	04/05/10	04/20/10	06/01/10	01/26/11	10/29/10
24:16	02/15/10	01/25/10	03/02/10	04/16/10	04/20/10	06/01/10	01/26/11	11/12/10
24:17	03/01/10	02/08/10	03/16/10	04/30/10	05/20/10	07/01/10	01/26/11	11/26/10
24:18	03/15/10	02/22/10	03/30/10	05/14/10	05/20/10	07/01/10	01/26/11	12/10/10
24:19	04/01/10	03/11/10	04/16/10	06/01/10	06/21/10	08/01/10	01/26/11	12/27/10
24:20	04/15/10	03/24/10	04/30/10	06/14/10	06/21/10	08/01/10	01/26/11	01/10/11
24:21	05/03/10	04/12/10	05/18/10	07/02/10	07/20/10	09/01/10	01/26/11	01/28/11
24:22	05/17/10	04/26/10	06/01/10	07/16/10	07/20/10	09/01/10	01/26/11	02/11/11
24:23	06/01/10	05/10/10	06/16/10	08/02/10	08/20/10	10/01/10	01/26/11	02/26/11
24:24	06/15/10	05/24/10	06/30/10	08/16/10	08/20/10	10/01/10	01/26/11	03/12/11
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25:04	08/16/10	07/26/10	08/31/10	10/15/10	10/20/10	12/01/10	01/26/11	05/13/11
25:05	09/01/10	08/11/10	09/16/10	11/01/10	11/22/10	01/01/11	01/26/11	05/29/11
25:06	09/15/10	08/24/10	09/30/10	11/15/10	11/22/10	01/01/11	01/26/11	06/12/11
25:07	10/01/10	09/10/10	10/16/10	11/30/10	12/20/10	02/01/11	05/2012	06/28/11
25:08	10/15/10	09/24/10	10/30/10	12/14/10	12/20/10	02/01/11	05/2012	07/12/11
25:09	11/01/10	10/11/10	11/16/10	01/03/11	01/20/11	03/01/11	05/2012	07/29/11
25:10	11/15/10	10/22/10	11/30/10	01/14/11	01/20/11	03/01/11	05/2012	08/12/11
25:11	12/01/10	11/05/10	12/16/10	01/31/11	02/21/11	04/01/11	05/2012	08/28/11
25:12	12/15/10	11/22/10	12/30/10	02/14/11	02/21/11	04/01/11	05/2012	09/11/11

## **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.



BEVERLY EAVES PERDUE  
GOVERNOR

EXECUTIVE ORDER NO. 44

PROCLAMATION OF A STATE OF EMERGENCY  
BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA

**WHEREAS**, I have determined that a state of emergency, as defined in G.S. § 166A-4 and G. S. § 14-288.1(10), existed in the State of North Carolina, specifically in Alleghany, Avery, Ashe, Buncombe, Burke, Caldwell, Haywood, Jackson, Madison, McDowell, Mitchell, Transylvania, Watauga, Rutherford, and Yancey counties, due to two major winter storms, beginning on December 18, 2009, and December 25, 2009.

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

**Section 1.** Pursuant to G.S. §§ 166A-5 and 14-288.15, therefore, I proclaim that a state of emergency existed in the aforementioned counties in the State, during the period beginning on December 18, 2009.

**Section 2.** I hereby order all state and local government entities and agencies to cooperate in the implementation of the provisions of this proclamation and the provisions of the North Carolina Emergency Operations Plan, including but not limited to obtaining federal reimbursement and assistance.

**Section 3.** I hereby delegate to Reuben F. Young, Secretary of Crime Control and Public Safety, and/or his designee, all power and authority granted to me and required of me by Chapter 166A, and Article 36A of Chapter 14 of the General Statutes for the purpose of implementing the said Emergency Operations Plan and to take such further action as is necessary to promote and secure the safety and protection of the populace in North Carolina.

**Section 4.** Further, Reuben F. Young, Secretary of Crime Control and Public Safety, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in G.S. § 143B-476.

**Section 5.** I hereby order this proclamation: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the

circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of Crime Control and Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this proclamation.

**Section 6.** This proclamation shall become effective immediately and shall continue until it is terminated in writing.

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 **twenty-first** day of **January** in the year of our Lord two thousand and ten, and of the Independence of the United States of America the two hundred and thirty-third.



A handwritten signature in cursive script, reading "Beverly Eaves Perdue".

Beverly Eaves Perdue  
Governor

ATTEST:

A handwritten signature in cursive script, reading "Elaine F. Marshall".

Elaine F. Marshall  
Secretary of State



EXECUTIVE ORDER NO. 45

TO FACILITATE EMPLOYEE ACCESS TO  
STATE FACILITIES AND CABINET AGENCY LEADERS

**WHEREAS**, the people of North Carolina have a right to expect that their public agencies will be run as efficiently and effectively as possible; and

**WHEREAS**, regular communication and exchange of ideas between employees and managers is essential to addressing service delivery problems and achieving greater levels of efficiency and effectiveness in governmental operations; and

**WHEREAS**, ensuring a more effective, accountable, reliable and efficient state government requires the commitment, dedication, cooperation, and hard work of all state employees in both managerial and non-managerial positions; and

**WHEREAS**, employee organizations that represent and articulate the views, concerns, and ideas of state employees are important participants in improving the efficiency and quality of service delivery and government operations; and

**WHEREAS**, ensuring reasonable opportunities for public employees to communicate with the representatives of their employee organizations is in the interests of furthering effective dialog between state employees and managers.

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

**Section 1.**     **Reasonable Access to Facilities**

- a. All heads of state institutions, departments, bureaus, agencies, or commissions subject to the authority of the Governor (hereinafter "executive branch agency") shall permit reasonable access to their facilities for the purposes of membership recruitment, distribution of educational materials related to membership, and consultation regarding membership with representatives of a domiciled employee association that has at least 2,000 members in the State, 500 of whom are employees of the State, a political

- b. subdivision of the State, or a local board of education (hereinafter "covered employee association").
- c. A covered employee association desiring access to facilities under this Order must submit a request for access to the head of an executive branch agency at least two weeks prior to the requested date of access, unless a shorter time period is authorized by the head of the executive branch agency. A covered employee association's access under this Order shall be limited to a reasonable number of times each year, as determined by the head of the executive branch agency. Unless otherwise authorized by the head of the executive branch agency, the times for access under this Order shall be limited to the beginning or end of the workday, during shift changes, or at the lunch hour.

**Section 2. Meet and Confer**

- a. The representatives of each covered employee association shall have the opportunity to meet annually with representatives of the Governor and quarterly with the State Personnel Director regarding issues of mutual concern.
- b. Additionally, the representatives of a covered employee association whose membership includes at least 20 percent of the employees in an executive branch agency shall have the opportunity to meet at least quarterly with representatives of that agency to confer regarding areas of mutual concern, including ways of improving employee-management cooperation, ways of more efficiently and cost effectively delivering high quality services to the public, and the terms and conditions of employment. The head of an executive branch agency may authorize additional meetings as she or he deems appropriate.

The head of each executive branch agency shall designate agency representatives to meet with the representatives of a covered employee association. Such designated persons shall have a level of authority and areas of responsibility that are appropriate to the matters to be discussed. Following the meetings, the representatives of the executive branch agency shall forward to representatives of the Governor any areas of concern related to their particular agency. The representatives of the covered employee association may also forward areas of concern to representatives of the Governor.

**Section 3. Participation of Employees in Certain Association Activities**

State employees who serve as elected officers or delegates of covered employee associations shall be allowed up to three (3) days of managerially approved leave to participate in the annual convention or annual conference of the covered employee association without a loss of the employees' personal leave time.

**Section 4. Participation by Associations in this Order**

Any domiciled employee association that desires to be included in the provisions of this Order shall provide to the Director of State Personnel evidence that it meets the criteria under Section 1.a. of this Order. Any domiciled employee association that desires to meet with an executive

branch agency shall provide to the head of that agency evidence that it meets the criteria under Section 2.b. of this Order.

**Section 5. Employee and State Rights and Responsibilities Maintained**

This Order is intended to encourage communication between employees and State leaders. Nothing in this order shall be construed to limit communication between or among employees, representatives of employee associations, the heads of executive branch agencies, and the Governor. The provisions of this Order shall not be construed or interpreted to diminish any rights, responsibilities, powers, or duties of individual employees in their service to the State or to require or prohibit any state employee's participation in a covered employee association or any other association or group. Further, the provisions of this Order shall not diminish or infringe upon any rights, responsibilities, powers, or duties conferred upon any state officer or agency by the Constitution or laws of the State of North Carolina.

**Section 6. Participation by Other State Entities**

The Board of Governors of the University of North Carolina System, the State Board of Community Colleges, the State Board of Education, and each head of the Council of State agencies are encouraged and invited to participate in this Executive Order.

**Section 7. Effect and Duration**

This Executive Order shall be effective immediately and shall remain in effect until rescinded. All other Executive Orders or portions of Executive Orders inconsistent with this Order are hereby rescinded. This Order specifically rescinds Executive Order No. 105 signed on August 18, 2006.

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 **twenty-first** day of **January** in the year of our Lord two thousand and ten 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

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

**Citation to Existing Rule Affected by this Rule-Making:** *North Carolina Building, Energy Conservation, Fire, Fuel Gas, Mechanical, Plumbing and Residential Codes.*

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

**Reason for Proposed Action:** *To incorporate changes in the NC State Building Codes as a result of rulemaking petitions filed with the NC Building Code Council and to incorporate changes proposed by the Council. To adopt the 2012 NC State Building Codes.*

**Public Hearing:** *March 8, 2010, 1:00PM, NC Department of Insurance, First Floor Classroom, 322 Chapanoke Road, Raleigh, NC 27603*

**Comment Procedures:** *Written comments may be sent to Chris Noles, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comment period for Items 1-7 expires on April 16, 2010. Comment period for Item 8 expires on July 16, 2010.*

**Statement of Subject Matter:**

**1. Request by Bryan Readling, PE, to amend the 2009 NC Building Code, Table 503 as follows:**

*Add the following footnote (e) to Table 503, Allowable Height and Building Areas  
(in three cells for Type V-A, group B, R-1 and R-2)*

e. For group B, Group R, Division 1 and Division 2 Occupancies, the permitted increase of one story allowed by Section 504.2 may be increased to two stories and the maximum building height may be increased by 20 feet when all of the following conditions are met:

1. An automatic fire-extinguishing system complying with Section 903.3.1.1 (NFPA 13) is installed throughout with the installation of quick-response sprinkler heads in all areas where the use of these heads is allowed by NFPA 13.
2. Vertical exit enclosures are constructed as Smoke proof enclosures in accordance with Section 909.20.

**2. Request by Kirk Grundahl, P.E., with The Structural Building Component Industry, to amend the 2009 NC Building Code, Section 2303.4. This Petition was Denied and will not proceed through the Rule-making process.**

Reason: There are inconsistencies in wording between this proposal, the NC Code and the 2009 IBC. There was concern about potential conflict with NCBELS rules.

**3. Request by Alan Perdue, NC Building Code Council to amend the 2009 NC Fire Code, Sections 3301.2.4, 3302, 3308.2 and 3308.3 as follows:**

**Section 3301.2.4 Financial responsibility.** Before a permit is issued, as required by Section 3301.2, the applicant shall file with the jurisdiction a corporate surety bond in the principal sum of ~~\$100,000~~ 500,000 or a public liability insurance policy for the same amount,

**Section 3302 Definitions**

**DISPLAY OPERATOR** - An individual who exhibits, uses, handles, manufactures, or discharges pyrotechnics at a concert or public exhibition in this State and possesses a Display Operator's Permit issued by the Office of State Fire Marshal.

**DISPLAY OPERATOR'S PERMIT** – A permit issued by the Office of State Fire Marshal to an individual in accordance with North Carolina General Statutes, Chapter 58, Article 82A.



**3308.2. Permit application.** *Add the following to the end of the section.* Prior to issuing any fireworks permits regulated by this code, the fire code official shall verify that permission has been granted to conduct a fireworks display by the board of county commissioners in accordance with NC G.S. 14-410.

**3308.3 Approved fireworks displays.** Approved displays shall include only the approved fireworks 1.1G, fireworks 1.3G, fireworks 1.4G, fireworks 1.4S and pyrotechnic articles, 1.4G which shall be handled by an approved, competent operator. Approved Division 1.1G, 1.3G and 1.4G displays shall be handled by a display operator possessing a Display Operator's Permit issued by the Office of State Fire Marshal. Prior to granting approval to any fireworks display the fire code official shall verify that the display operator and the display operator's assistants are properly permitted in accordance with the NC Fireworks Display Operator's rules regulated by the Office of State Fire Marshal.

**4. Request by William Rakatansky, Carolinas Health Care Facilities to amend the 2009 NC Fire Code, Section 3405.5.1 as follows:**

**3405.5.1 Corridor Installations.** Where wall-mounted dispensers containing alcohol-based hand rubs are installed in corridors, they shall be in accordance with all of the following:

1. Aerosol containers shall not be allowed in corridors. Level 2 and Level 3 aerosol containers shall not be allowed in corridors.
2. The maximum capacity of each Class I or II liquids dispenser shall be 41 ounces (1.21 L) and the maximum capacity of each Level 1 aerosol dispenser shall be 18 ounces (0.51 kg).
3. The maximum quantity allowed in a corridor within a control area shall be 10 gallons (37.85 L) of Class I or II liquids or 1135 ounces (32.2 kg) of Level 1 aerosols, or a combination of Class I or II liquids and Level 1 aerosols not to exceed, in total, the equivalent of 10 gallons (37.85 L) or 1135 ounces (32.2 kg) such that the sum of the ratios of the liquid and aerosol quantities divided by the allowable quantity of liquids and aerosols, respectively, shall not exceed one.
4. The minimum corridor width shall be 72 inches (1829 mm).
5. Projections into a corridor shall be in accordance with Section 1003.3.3.

**5. Request by Louie Mullikin, with ALM Investments d.b.a Bath Fitter, to amend the 2009 NC Plumbing Code, Section 417.3 and Table 709.1. The proposed amendment is as follows:**

**417.3 Shower waste outlet.** *(no change to Section, add Exception)*

**Exception:** *Retaining pre-existing 1 ½ inch in diameter waste outlets shall be permitted when removing an existing bathtub and installing in its place a shower.*

**Table 709.1**

*(amend to reduce the minimum size of trap for a shower from ~~2 inches~~ to 1 ½ inches)*

**6. Request by Kim Reitterer and Al Bass, NC Building Code Council to add Appendix H, Rainwater Harvesting to the 2009 NC Plumbing Code.**

**The text has been posted on the NCDOT website at the following link.**

[http://www.ncdot.com/OSFM/Engineering/BCC/engineering\\_bcc\\_minutes.asp](http://www.ncdot.com/OSFM/Engineering/BCC/engineering_bcc_minutes.asp)

**September 14-15, 2009 (Item B-7, Rainwater Harvesting, for public comment)**

**7. Request by David Smith, NC Building Code Council to amend the 2009 NC Residential Code, Section R802.3.1 as follows:**

**R802.3.1 Ceiling joist and rafter connections.** Ceiling joists and rafters shall be nailed to each other in accordance with Table R802.5.1(9), and the rafter shall be nailed to the top wall plate in accordance with Table R602.3(1). Ceiling joists shall be continuous or securely joined in accordance with Table R802.5.1(9) where they meet over interior partitions and are nailed to adjacent rafters to provide a continuous tie across the building when such joists are parallel to the rafters.

Where ceiling joists are not connected to the rafters at the top wall plate, joists connected higher in the attic shall be installed as rafter ties, or rafter ties shall be installed to provide a continuous tie. Where ceiling joists are not parallel to rafters, rafter ties shall be installed. Rafter ties shall be a minimum of 2-inch by 4-inch (51 mm by 102 mm) (nominal), installed in accordance with the connection requirements in Table R802.5.1(9), or connections of equivalent capacities shall be provided. Where ceiling joists or rafter

ties are not provided, the ridge formed by these rafters shall be supported by a wall or girder designed in accordance with accepted engineering practice.

Rafter ties shall be spaced not more than 4 feet (1219 mm) on center.

Collar ties or ridge straps to resist wind uplift shall be connected in the upper third of the attic space in accordance with Table R602.3(1).

A 1-inch by 6-inch or 2-inch by 4-inch (25 mm by 153 mm or 51 mm by 102 mm) collar tie shall be nailed in the upper third of the roof to every third pair of rafters not to exceed 4-feet (1219 mm) on centers. Collar ties shall be connected to the rafters as specified in Table R602.3(1) for rafter ties.

**8. Request by Staff, on behalf of the NC Building Code Council, to adopt the 2009 International Codes with NC Amendments as the 2012 NC State Building Codes.**

- 2012 NC Building Code
- 2012 NC Energy Conservation Code
- 2012 NC Fire Code
- 2012 NC Fuel Gas Code
- 2012 NC Mechanical Code
- 2012 NC Plumbing Code
- 2012 NC Residential Code

The NC Amendment packages, produced by the Ad-Hoc Committees, will be posted online prior to 5/17/2010 for public review and comment.

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**2010-01 GUIDELINES FOR VOTER REGISTRATION: Preregistration**

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The North Carolina State Board of Elections by publication in the North Carolina Register pursuant to G.S. § 163-82.12, gives notice of adoption of new voter registration guidelines:

**Preregistration Guidelines**

2009 N.C. Session Laws 541 mandated a policy for preregistration of sixteen and seventeen year-olds in North Carolina. *See* G.S. §§ 163-82.1, -82.4(d) and -82.6(f). Preregistration essentially will follow the same processing flow as all other voter registration applications, with the exception that the applicant will not be registered until he or she is eligible by age to vote. County boards will enter the application into the computerized voter registration processing system and will review the application for completeness. Once the application is entered, the county board will send the registrant a preregistration acknowledgment and the application will be kept in a holding status until the registrant reaches voting age according to the law. Although preregistration applicants will be entered into the computerized system, they will not become part of the database of registered voters until the registrant is eligible by age to vote. The outline below sets out the procedures for handling preregistration applications in the current SEIMS system:

**I. Handling the Preregistration Application**

- A. Upon receiving a preregistration application, the County Board of Elections shall scan the form and enter the data into the SEIMS system.
- B. Based on the applicant's date of birth and the date of an impending election, the County Board shall verify whether the applicant is eligible for preregistration, is eligible for voter registration, or is ineligible for preregistration or voter registration.
  - 1. If the applicant is seventeen (17), but will be eighteen (18) on or before the next general or regular municipal election, then the county board shall register the applicant no earlier than 60 days prior to any partisan or non-partisan primary election held for the impending general or regular municipal election.
  - 2. If the applicant is at least sixteen (16), but will not be age eighteen (18) on or before the next general or regular municipal election, then the applicant is eligible only for preregistration.
  - 3. If the applicant is under the age of (16) sixteen, then he or she is not eligible for preregistration or registration and the application must be denied. A denial letter must be sent to the applicant by certified mail within two (2) business days after denial pursuant to G.S. § 163-82.7(b).
- C. The county board shall review the application for completeness and then shall save the application in the computerized system. Preregistration applications will be retained in the Incomplete Queue of the VoterScan module until such time that they are eligible to be processed through to the voter registration database. The applicant will be flagged in the system as a "preregistrant." For purposes of preregistration, the county board shall accept both the North Carolina voter registration application and the national voter registration form.
- D. The preregistration database will be searchable from the State Board of Elections' website.

**II. Preregistration Acknowledgement**

- A. Once a preregistration application is processed and saved in the system, the county board shall mail the applicant a preregistration acknowledgement letter. The acknowledgment letter will convey the following information:
  - 1. Confirmation that the applicant is preregistered in the county of residence;
  - 2. Clarification that the applicant is not yet eligible to vote;
  - 3. Explanation to the applicant that he or she will automatically be registered to vote when he or she becomes eligible by age;
  - 4. Instruction on what to do if the applicant moves;

5. Indication as to whether the county board is missing any required element that will delay the processing of the actual voter registration application upon the applicant becoming eligible to vote. Missing required elements will not prevent a preregistration applicant from being preregistered; however, once the applicant reaches the age of eligibility pursuant to Section III below, the county board shall send the preregistrant an Incomplete Notice and follow the standard policies and procedures for handling incomplete voter registration applications at that time.

- B. The preregistration acknowledgment letter will be mailed immediately upon processing the preregistration application.
- C. If the preregistration acknowledgment letter is returned as undeliverable, the county board shall make all reasonable efforts to contact the applicant to determine the correct address. If the correct address cannot be determined, the preregistration application must not be denied. Instead, once the applicant becomes eligible to vote, his or her voter registration application shall be processed and will be subject to the standard mail verification policies and procedures. It will not be necessary to mail a second preregistration acknowledgment letter to an undeliverable address.

### **III. Automatic Voter Registration**

Upon reaching the age of eligibility, the county board shall automatically register the preregistrant and follow the standard policy for processing voter registration applications. The age of eligibility is determined as the earlier of the following dates:

- A. Sixty (60) days before a partisan or non-partisan primary election, if the voter will be eighteen (18) by the date of the general election or regular municipal election for which the primary is being conducted.
- B. The applicant reaches his or her 18th birthday.

### **IV. Mandated Voter Registration Drives**

Each year, the Governor of North Carolina in conjunction with the State Board of Elections, will designate a month as Citizens' Voter Registration Month. During the designated month, the State Board of Elections will initiate a statewide voter registration drive. Each county board of elections shall participate in the statewide voter registration drive and conduct voter registration and preregistration drives at public high schools in accordance with local board of education policies and school system administrative procedures.

In addition to registering new voters, county boards of elections also shall focus on ensuring that voter information is current (names, addresses, etc), informing voters on how they can vote absentee (mail-in and in-person), and election day procedures.

The statewide voter registration drives may be held on any day of the week, including weekends, for a minimum of four (4) hours. While county boards are encouraged to conduct registration drives on multiple days, only one voter registration drive is required. It will be permissible to work with any non-partisan local group in the county willing to undertake this effort (e.g., PTA, Chamber of Commerce, individual citizens). The training for voter registration drive workers should be coordinated by the county board of elections.

The State Board of Elections has several brochures that may be used for voter registration drives. County boards are permitted to design and distribute their own materials as well.

On a form and at a time to be provided by the State Board of Elections, each county board of elections shall submit a report of their voter registration drive activity to the State Board.

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

Statutory reference: G.S. 150B-21.2.

## **TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES**

**Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commissioner of Agriculture intends to adopt the rules cited as 02 NCAC 09M .0102-.0103.

**Proposed Effective Date:** June 1, 2010

**Instructions on How to Demand a Public Hearing:** (must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than March 2, 2010, to David S. McLeod, Assistant Commissioner, NC Department of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.

**Reason for Proposed Action:** The proposed adoption by reference is necessary in order to maintain consistency of the Wholesale Prescription Drug Distributor Licensing Program with U.S. Food and Drug Administration requirements. The proposed adoption of 02 NCAC 09M .0103 would require that wholesale prescription drug distributors order their products only from licensed or registered suppliers to prevent distribution of counterfeit drugs.

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

**Comments may be submitted to:** David S. McLeod, 1001 Mail Service Center, Raleigh, NC 27699-1001; phone (919) 733-7125 ext. 238; fax (919) 716-0090; email david.mcleod@ncagr.gov

**Comment period ends:** April 16, 2010

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 09 - FOOD AND DRUG PROTECTION DIVISION**

### **SUBCHAPTER 09M - DRUGS**

#### **02 NCAC 09M .0103 DUTY TO VERIFY SUPPLIERS**

Wholesale prescription drug distributors that have distribution facilities in North Carolina shall not purchase or accept delivery of a prescription drug from suppliers that are not licensed or registered to ship or sell in or into North Carolina. A distributor shall notify the Food and Drug Protection Division of the North Carolina Department of Agriculture and Consumer Services of any unlicensed and unregistered suppliers that offer to ship a prescription drug into North Carolina.

Authority G.S. 106-145.12.

#### **02 NCAC 09M .0102 ADOPTION BY REFERENCE**

Title 21, Part 203 of the Code of Federal Regulations, "Prescription Drug Marketing," is adopted by reference, including subsequent amendments and editions. Copies may be obtained at no cost at the United States Government Printing Office website at [http://www.access.gpo.gov/nara/cfr/waisidx\\_09/21cfrv4\\_09.html](http://www.access.gpo.gov/nara/cfr/waisidx_09/21cfrv4_09.html).

Authority G.S. 106-145.12.

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**Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Agriculture intends to amend the rule cited as 02 NCAC 20B .0104.

**Proposed Effective Date:** June 1, 2010

**Instructions on How to Demand a Public Hearing:** *(must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than March 2, 2010, to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

**Reason for Proposed Action:** *This Rule establishes admission fees for entry to the North Carolina State Fair. The proposed changes would increase admission fees in order to provide additional revenues for operation and maintenance of the State Fairgrounds, a receipt-supported program.*

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

**Comments may be submitted to:** *David S. McLeod, 1001 Mail Service Center, Raleigh, NC 27699-1001; phone (919) 733-7125 ext. 238; fax (919) 716-0090; email david.mcleod@ncagr.gov*

**Comment period ends:** *April 16, 2010*

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 ( $\geq$ \$3,000,000)  
☒ None

**CHAPTER 20 - THE NORTH CAROLINA STATE FAIR**

**SUBCHAPTER 20B - REGULATIONS OF THE STATE FAIR**

**SECTION - GENERAL PROVISIONS**

**02 NCAC 20B .0104 ADMISSION RULES**

(a) All persons entering the North Carolina State Fair grounds must pay the established admission fee, except persons holding

worker's permits. One-time-only admissions may be issued to those persons who are employed by the Fair or are asked to appear on the grounds by the Fair management for a specific purpose, relative to the operation of the fair.

(b) The gates of the North Carolina State Fair shall be open to visitors from 9:00 a.m. until midnight each day of the fair. Exhibit buildings shall be open from 9:00 a.m. to 9:45 p.m. daily.

(c) The State Fair Manager may operate a pass-out system at one or more of the outside gates. Persons exiting through these gates may, upon request, have their hand or vehicle stamped for readmittance through the same gate without additional charge. Readmittance must occur before 10:00 p.m. on the same day as pass-out or the hand stamp shall not be honored.

(d) Outside gate admission prices are as follows:

- |     |                                       |                                 |
|-----|---------------------------------------|---------------------------------|
| (1) | adult/child, 13 years of age and over | <del>\$7.00</del> <u>\$8.00</u> |
| (2) | child, 6 through 12 years of age      | <del>\$2.00</del> <u>\$3.00</u> |
| (3) | senior citizen, 65 and over           | Free                            |
| (4) | child, under 6 years of age           | Free                            |

(e) Outside gate admission prices for advance ticket sales are as follows:

- |     |  |                                 |
|-----|--|---------------------------------|
| (1) | adult/child, 13 years of age and over                | <del>\$5.00</del> <u>\$6.00</u> |
| (2) | child, 6 through 12 years of age                     | <del>\$1.00</del> <u>\$2.00</u> |
| (3) | senior citizen, 65 and over                          | Free                            |
| (4) | child, under 6 years of age                          | Free                            |
| (5) | adult group sales purchasing a minimum of 40 tickets | <del>\$4.75</del> <u>\$5.00</u> |

*Authority G.S. 106-503.*

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

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to amend the rule cited as 10A NCAC 70I .0301.*

**Proposed Effective Date:** *June 1, 2010*

**Public Hearing:**

**Date:** *April 16, 2010*

**Time:** *10:00 a.m.*

**Location:** *Albemarle Building, Conference Room 832 (8<sup>th</sup> Floor) 325 Salisbury Street, Raleigh, NC 27603*

**Reason for Proposed Action:** *10A NCAC 70I .0301 needs to be consistent with 10A NCAC 70F .0202. The Division of Social Services receives a capped allocation for state maternity home funds.*

**Procedure by which a person can object to the agency on a proposed rule:** *By submitting your objection in writing to Lisa Johnson, Division of Social Services, 2401 Mail Service Center,*

Raleigh, NC 27699-2401 or email [lisa.johnson@dhhs.nc.gov](mailto:lisa.johnson@dhhs.nc.gov) and by telephone (919)733-3055.

**Comments may be submitted to:** Lisa Johnson, APA Rulemaking Coordinator, Division of Social Services, 2401 Mail Service Center, Raleigh, NC 27699-2401, phone (919)733-3055, fax (919)733-9386, email [lisa.johnson@dhhs.nc.gov](mailto:lisa.johnson@dhhs.nc.gov)

**Comment period ends:** April 16, 2010

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 ( $\geq$ \$3,000,000)  
☒ None

**SUBCHAPTER 70I - MINIMUM LICENSING STANDARDS FOR RESIDENTIAL CHILD-CARE**

**SECTION .0300 - ORGANIZATION AND ADMINISTRATION**

**10A NCAC 70I .0301 GOVERNANCE**

- (a) A private residential child-care facility shall operate under articles of incorporation that are filed with the Department of the Secretary of State ([www.secretary.state.nc.us](http://www.secretary.state.nc.us)). A private residential child-care facility shall submit a copy of the articles of incorporation to the licensing authority.
- (b) A private residential child-care facility shall have a governing body that exercises authority over and has responsibility for its operation, policies and practices. The residential child-care facility shall notify the licensing authority of the type and structure of the governing body.
- (c) In the case of non-profit or for-profit corporations, the governing body shall:
- (1) be composed of no fewer than six members to include men and women;
  - (2) provide for a system of rotation for board members, for limitation to the number of consecutive terms a member may serve;
  - (3) establish standing committees;
  - (4) provide orientation for new members; and

- (5) meet at least four times annually with a quorum present.

(d) Public residential child-care facilities operated by governmental agencies shall be governed by appointed officials of a governmental unit.

(e) A residential child-care facility shall submit to the licensing authority a list of members of the governing body. This list shall indicate the name, address and terms of membership of each member and shall identify each officer and the term of that office.

(f) A residential child-care facility shall permanently maintain meeting minutes of the governing body and committees.

(g) Residential child-care facilities shall follow the records retention policy as established by the NC Department of Health and Human Services, Controller's Office ([www.ncdhhs.gov/control/retention/retention.htm](http://www.ncdhhs.gov/control/retention/retention.htm)). The governing body, in the event of the closing of the residential child-care facility, shall develop a plan for the retention and storage of client records. The specifics of this plan shall be submitted to the licensing authority before the actual closing of the residential child-care facility.

Authority G.S. 131D-10.5; 143B-153.

**TITLE 12 – DEPARTMENT OF JUSTICE**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Private Protective Services Board intends to amend the rules cited as 12 NCAC 07D .0202, .0702, .0802.*

**Proposed Effective Date:** June 1, 2010

**Public Hearing:**

**Date:** March 3, 2010

**Time:** 2:00 p.m.

**Location:** 1631 Midtown Place, Suite 104, Raleigh, NC 27609

**Reason for Proposed Action:** The Board is fee funded. It is necessary to raise fees in order to maintain a positive financial balance.

**Procedure by which a person can object to the agency on a proposed rule:** Objections to the proposed rule change shall be submitted before the end of the comment period in writing to Terry Wright, Director, Private Protective Services Board, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.

**Comments may be submitted to:** Terry Wright, PPSB Director, 1631 Midtown Place, Suite 104, Raleigh, NC 27609

**Comment period ends:** April 16, 2010

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed

objections after the adoption of the Rule 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 ( $\geq$ \$3,000,000)  
☒ None

**CHAPTER 07 - PRIVATE PROTECTIVE SERVICES**

**SUBCHAPTER 07D - PRIVATE PROTECTIVE SERVICES BOARD**

**SECTION .0200 - LICENSES: TRAINEE PERMITS**

**12 NCAC 07D .0202 FEES FOR LICENSES AND TRAINEE PERMITS**

- (a) Application, license and trainee permit fees are as follows:
- (1) one hundred and fifty dollars (\$150.00) non-refundable application fee;
  - (2) ~~two hundred twenty five dollars (\$225.00) two hundred fifty dollar (\$250.00)~~ annual fee for a new or renewal license, unless the applicant is requesting a new license be issued because of a transfer to a new company, which shall require a one hundred dollar (\$100.00) fee for issuance of the new license with the original expiration date in the new company name;
  - (3) ~~two hundred twenty five dollars (\$225.00) two hundred fifty dollar (\$250.00)~~ annual trainee permit fee;
  - (4) fifty dollars (\$50.00) new or renewal fee per year of the license term for each license in addition to the basic license;
  - (5) twenty five dollars (\$25.00) duplicate license ~~fee; fee per year of the license term;~~
  - (6) one hundred dollars (\$100.00) late renewal fee in addition to the renewal fee;
  - (7) one hundred dollars (\$100.00) temporary license fee;
  - (8) fifty dollars (\$50.00) branch office license ~~fee;~~ fee per year of the license term; and
  - (9) fifty dollars (\$50.00) special limited guard and patrol licensee fee.
- (b) Fees may be paid in the form of a check or money order made payable to the Private Protective Services Board.

Authority G.S. 74C-9.

**SECTION .0700 - SECURITY GUARD REGISTRATION (UNARMED)**

**12 NCAC 07D .0702 FEES FOR UNARMED SECURITY GUARD REGISTRATION**

- (a) Fees for unarmed security guards are as follows:
- (1) ~~twenty five dollars (\$25.00)~~ thirty dollar (\$30.00) non-refundable initial registration fee;
  - (2) ~~twenty five dollars (\$25.00)~~ thirty dollar (\$30.00) annual renewal, or reissue fee; and
  - (3) ~~ten dollars (\$10.00)~~ fifteen dollar (\$15.00) transfer fee.
- (b) Fees shall be paid in the form of a check or money order made payable to the Private Protective Services Board.

Authority G.S. 74C-9.

**SECTION .0800 - ARMED SECURITY GUARD FIREARM REGISTRATION PERMIT**

**12 NCAC 07D .0802 FEES FOR ARMED SECURITY GUARD FIREARM REGISTRATION PERMIT**

- (a) Fees for armed security guard registration permits are as follows:
- (1) thirty dollars (\$30.00) non-refundable initial registration fee;
  - (2) thirty dollars (\$30.00) annual renewal, or reissue fee; and
  - (3) ~~ten dollar (\$10.00)~~ fifteen dollar (\$15.00) application fee; fee for new, renewal, and reissuance.
- (b) Fees shall be paid in the form of a check or money order made payable to the Private Protective Services Board.

Authority G.S. 74C-9.

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to adopt the rule cited as 15A NCAC 02B .0274 and amend the rule cited as 15A NCAC 02B .0240.*

**Proposed Effective Date:** September 1, 2010

**Public Hearing:**

**Date:** March 22, 2010

**Time:** 6:00 p.m.

**Location:** Pitt County Extension Center Auditorium, 403 Government Circle, Greenville, NC 27834

**Date:** March 23, 2010

**Time:** 6:00 p.m.

**Location:** Archdale Building, Ground Floor Hearing Room, 512 N. Salisbury St., Raleigh, NC 27604



**Reason for Proposed Action:** *The North Carolina General Assembly has directed the NC Department of Environment and Natural Resources to develop a mechanism for charging customers of the Nutrient Offset Payment Program, administered by the NC Ecosystem Enhancement Program (EEP), the actual cost of delivering nutrient load reductions (see S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486). 15A NCAC 02B .0274 establishes a method by which EEP will establish and update rates using all actual costs incurred by the program in achieving nutrient reduction obligations. The proposed amendments to Rule 02B. 0240 provide procedures for making payments to other entities (including EEP) to achieve nutrient reduction requirements specified in other rules.*

**Procedure by which a person can object to the agency on a proposed rule:** *You may attend the public hearings and make relevant verbal comments, and/or submit written comments, data or other relevant information by April 16, 2010. The Hearing Officer may limit the length of time that you may speak at the public hearings so that all those who wish to speak may have an opportunity to do so. DENR and the EMC are very interested in all comments pertaining to the proposed amendments and proposed rule. All persons interested and potentially affected by the proposals are strongly encouraged to read this entire notice and make comments on the proposed new rule and the proposed amendments to the existing rules. Please note that two options are being proposed in 2B .0240 for language regarding geographic restrictions for nutrient reduction projects. Comments regarding these alternatives are specifically solicited in addition to general comments regarding the proposed rule and amendments contained in this publication. DENR and the EMC may not adopt a rule that differs substantially from the text of the proposed rule published in this North Carolina Register unless the text of the proposed different rule is published in the North Carolina Register and comments on the proposed different rule are accepted (General Statute 150B 21.2(g)). Written comments may be submitted to: Suzanne Klimek, NC Ecosystem Enhancement Program, 1652 Mail Service Center, Raleigh, NC 27699-1652, or Suzanne.klimek@ncdenr.gov.*

**Comments may be submitted to:** *Suzanne Klimek, NC Ecosystem Enhancement Program, 1652 Mail Service Center, Raleigh, NC 27699-1652, phone (828) 329-0871, and email suzanne.klimek@ncdenr.gov*

**Comment period ends:** *April 16, 2010*

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 ( $\geq$ \$3,000,000)**
- ☐ **None**

**Fiscal Note posted at**

[http://www.osbm.state.nc.us/files/pdf\\_files/DENR01212010.pdf](http://www.osbm.state.nc.us/files/pdf_files/DENR01212010.pdf)

**CHAPTER 02 - ENVIRONMENTAL MANAGEMENT**

**SUBCHAPTER 02B - SURFACE WATER AND WETLAND STANDARDS**

**SECTION .0200 - CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA**

**15A NCAC 02B .0240 NUTRIENT OFFSET PAYMENTS**

(a) The purpose of this Rule is to establish procedures for the optional payment of ~~nutrient offset~~ fees to ~~partially offset~~ ~~nutrient loading requirements~~. This Rule may apply to any area of the State as directed by the Environmental Management Commission (EMC). Monies paid to this fund pursuant to this Rule shall be targeted toward the same river basin in which the ~~nutrient reduction credits have been purchased~~. the NC Ecosystem Enhancement Program, subsequently referred to as the Program, or to other public or private parties where the Program or such parties implement projects for nutrient offset purposes and accept payments for those purposes, and where either of the following applies:

- (1) The following rules of this Section allow ~~offsite options or nutrient offset payments toward fulfillment of nutrient reduction requirements~~. .0234 and .0235 of the Neuse nutrient strategy, .0258 of the Tar-Pamlico nutrient strategy, and applicable rules of the Jordan nutrient strategy, which is described in Rule .0262.
- (2) Other rules adopted by the Commission allow this option toward fulfillment of nutrient load reduction requirements.

(b) Offset fees paid pursuant to this Rule shall be used to ~~achieve nutrient load reductions subject to the following geographic restrictions~~:

**--- OPTION A FOR PUBLIC COMMENT ---**

- (1) Load reductions shall be located within the same 8-digit cataloguing unit, as designated by the US Geological Survey, as the loading activity that is being offset.
- (2) Fees paid to offset loading activities that occur in the watershed of Falls Lake in the upper

Neuse River Basin shall be used to achieve offsetting reductions in the same watershed, while fees paid for loading activities in the Neuse 01 8-digit cataloguing unit below the Falls watershed, as designated by the US Geological Survey, shall be used to achieve offsetting reductions in that same lower watershed.

- (3) Restrictions established in the Jordan nutrient strategy, which is described in Rule 15A NCAC 02B .0262.
- (4) Any further restrictions established by the Commission through rulemaking.

**--- OPTION B FOR PUBLIC COMMENT ---**

- (1) Load reductions shall be located within the same 10-digit cataloguing unit, as designated by the US Geological Survey, as the loading activity that is being offset.
- (2) Restrictions established in the Jordan nutrient strategy, which is described in Rule 15A NCAC 02B .0262.
- (3) Any further restrictions established by the Commission through rulemaking.

(c) The Program and other parties shall obtain Division approval of proposed nutrient offset projects prior to construction. Other parties shall sell credits in compliance with approved credit release schedules and with the requirements of this Rule.

~~(d)(b) For the Neuse and Tar-Pamlico River Basins this Rule authorizes the partial offsetting of the nitrogen loading requirements specified in 15A NCAC 02B .0234 and 02B .0235 and the partial offsetting of the nitrogen and phosphorous loading requirements specified in 15A NCAC 02B .0258 by payment into the Riparian Buffer Restoration Fund administered by the North Carolina Department of Environment and Natural Resources according to the equations presented in this Rule. The Program shall establish and revise nutrient offset rates as set out in Rule .0274 of this Section. Offset payments accepted by the Program shall be placed into the Riparian Buffer Restoration Fund administered by the Department pursuant to G.S. 143-214.21~~

(e) Persons who seek to pay nutrient offset fees under rules of this Section shall do so in compliance with such rules, the requirements of Paragraph (b) of this Rule, and the following:

- (1) A non-governmental entity shall purchase nutrient offset credit from a party other than the Program if such credit is available in compliance with the criteria of this Rule at the time credit is sought, and shall otherwise demonstrate to the permitting authority that such credit is not available before seeking to make payment to the Program.
- (2) Where persons seek to offset more than one nutrient type, they shall make payment to address each type.
- (3) Persons who seek offsets to meet new development stormwater permitting requirements shall provide proof of offset

credit purchase to the permitting authority prior to approval of the development plan.

- (4) Wastewater dischargers that propose to make offset payments toward fulfillment of nutrient load reduction requirements shall make payment prior to National Pollutant Discharge Elimination System (NPDES) permit issuance or shall make incremental payments for additional nutrient allocations, contingent upon receiving a letter of commitment from the Program to provide the offset credit needed for permit issuance. In the event that a discharger seeking a NPDES Permit for a new or expanded wastewater discharge chooses to purchase some or all of the requisite allocation through this Rule and to make incremental payments for this allocation, the Division may issue or modify that permit accordingly, and shall condition any flow increase associated with that incremental purchase payment in full for the total cost of the additional allocation. Offset responsibility for nutrient increases covered under this Paragraph shall be transferred to the Program when it has received the entire payment.

~~(e) Payments to offset nitrogen loading shall be calculated by using the following equation:~~

$$N \text{ Payment} = [(\$ / \text{lb})(\# \text{ of lbs/year})(30 \text{ years}) + (\text{Land Cost } \$ / \text{Ae})(1 \text{ Ae} / 35 \text{ Ae})(\text{Devel. in Ae})] \times (1.1 \text{ Ad Costs})$$

~~Where,~~

~~$\$ / \text{lb} =$  The cost of mitigation in dollars per pound of nitrogen mitigation. For stormwater offsets required under 15A NCAC 02B .0235 and 02B .0258, this factor will be initially established at \$57/lb for calendar year 2006 and thereafter adjusted on an annual basis (in January of every year) based upon the construction cost index factor published every December in the *Engineering News Record (ENR)*. For group compliance association wastewater discharge offsets required under 15A NCAC 02B .0234(9), this factor will be initially established at \$57/lb for calendar year 2006 and thereafter adjusted on an annual basis (in January of every year) based~~

upon the construction cost index factor published every December in the *Engineering News Record (ENR)*. For new and expanding wastewater discharge offsets required under 15A NCAC 02B .0234(7) and (8), this factor will be initially established at \$28.50/lb for calendar year 2006 and thereafter adjusted on an annual basis (in January of every year) based upon the construction cost index factor published every December in the *Engineering News Record (ENR)*. The annual updating of these costs will be performed by the In-Lieu Fee Program Coordinator in the Ecosystem Enhancement Program.

# of lbs/year = The number of pounds of nitrogen exported or discharged each year for which mitigation is being requested.

Land Cost \$/Ac = The current property value, in dollars per acre, of the property being developed, based upon the most recent county tax assessment.

1 Ac / 35 Ac = An adjustment factor, indicating that one acre of mitigation is required for every 35 acres of development.

Devel in Ac = The overall size of the development, for which the mitigation is requested, in acres.

(1.1 Ad Costs) = An adjustment factor, necessary to cover the administrative costs associated with the requested mitigation.

(d) Payments to offset phosphorous loading shall be calculated by using the following equation:

$$P \text{ Payment} = [(\$ / 0.1 \text{ lb}) (\# \text{ of } 0.1 \text{ lbs/year}) (30 \text{ yrs}) + (\text{Land Cost } \$ / \text{Ac}) (1 \text{ Ac} / 35 \text{ Ac}) (\text{Devel in Ac})] \times (1.1 \text{ Ad Costs})$$

Where,

\$/0.1 lb = The cost of mitigation in dollars per tenth of a pound of phosphorous mitigation. This factor will be initially established at \$45/0.1 lb for calendar year 2006 and thereafter adjusted on an annual basis (in January of every year) based upon the construction cost index factor published every December in the *Engineering News Record (ENR)*. The annual updating of this cost will be performed by the In-Lieu Fee Program Coordinator in the Ecosystem Enhancement Program.

# of 0.1 lbs/year = The number of tenths of a pound of phosphorous exported or discharged each year for which mitigation is being requested.

Land Cost \$/Ac = The current property value, in dollars per acre, of the property being developed, based upon the most recent county tax assessment.

1 Ac / 35 Ac = An adjustment factor, indicating that one acre of mitigation is required for every 35 acres of development.

Devel in Ac = The overall size of the development, for which the mitigation is requested, in acres.

(1.1 Ad Costs) = An adjustment factor, necessary to cover the administrative costs associated with the requested mitigation.

(e) In those cases where offset reductions are required for both nitrogen and phosphorous, the appropriate calculations shall be performed for both the nitrogen and phosphorous offset payments, as detailed in Paragraphs (c) and (d) of this Rule. In these cases, only the greater value of the two payments shall be required to satisfy the offset reductions for both the nitrogen and phosphorous limits.

~~(f) For loading offset in the Neuse River Basin in wastewater discharge found in 15A NCAC 02B .0234, payment shall be made prior to permit issuance or as provided in Paragraph (i) of this Rule. For loading offset in the Neuse River Basin in stormwater discharge as specified in 15A NCAC 02B .0235, payment shall be made prior to approval of the development plan.~~

~~(g) For loading offset in the Tar Pamlico River Basin in stormwater discharge as specified in 15A NCAC 02B .0258, payment shall be made prior to approval of the development plan.~~

~~(f)(h) The nitrogen and phosphorous reduction credits Credits associated with restored wetlands and riparian areas load reducing activities funded under this Rule shall be awarded exclusively to the person, municipality, discharger, or group of dischargers who paid the offset fee.~~

~~(i) Wastewater dischargers subject to the nutrient requirements in 15A NCAC 02B .0234 shall be provided the option of making incremental payments for additional nutrient allocations. In the event that a discharger seeking a National Pollutant Discharge Elimination System (NPDES) Permit for a new or expanded wastewater discharge chooses to purchase some or all of the requisite allocation through this Nutrient Offset Payments Rule and to make incremental payments for this allocation, the Division of Water Quality may issue or modify the affected NPDES Permit to authorize the increased discharge, provided that the Division conditions any increase associated with that incremental purchase to notification that the total cost of the additional allocation has been paid in full. Mitigation responsibility for nutrient increases covered under this Paragraph shall not be transferred to the Ecosystem Enhancement Program of the Department of Environment and Natural Resources until the entire payment has been made to the Riparian Buffer Restoration Fund; provided, however, that the Ecosystem Enhancement Program shall provide a letter of commitment to provide the mitigation as necessary for issuance of the NPDES Permit for a discharger covered under the provisions of this Paragraph.~~

*Authority G.S. 143-214.1; 143-214.20; 143-214.21; S.L. 1995, c. 572; S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486.*

#### **15A NCAC 02B .0274 NUTRIENT OFFSET PAYMENT RATES FOR THE NC ECOSYSTEM ENHANCEMENT PROGRAM**

The purpose of this Rule is to establish actual cost rates for the payment of nutrient offset fees to the NC Ecosystem Enhancement Program, subsequently referred to as the Program, where rules adopted by the Commission allow this option toward fulfillment of nutrient load reduction requirements and where the Program implements projects to achieve nutrient reductions. Wherever the term "cost" or "costs" is used in this Rule, it shall mean the Program's costs associated with nutrient offset projects in a given rate area, as described below. For this purpose, the Program shall operate according to the following requirements:

- (1) The Program shall calculate and publish general offset payment rates applicable to each river basin where Commission rules allow

such nutrient offsets and special rates for specific watersheds as identified in Item (3). All rates shall be based on the actual and complete per-pound nutrient reduction costs incurred by implementing projects in those watersheds.

- (2) Payment rates shall be developed for nitrogen, phosphorus, or other nutrients as dictated by Commission rule requirements for each watershed.

- (3) Special Watershed Rates - the Program shall apply special watershed rates to:

- (a) Any watershed smaller than an 8-digit cataloguing unit where the EMC has established separate nutrient offset requirements where the offset is restricted to that watershed; and
- (b) Any 8 digit cataloging unit where costs are 40% greater than costs in the larger watershed in which that cataloging unit is located.

The initial rate for a special watershed with fewer than two nutrient reduction projects that have reached the design stage shall be the highest rate in effect under the Program for the applicable nutrient. The initial rate shall be revised for a special watershed the quarter following a quarter in which at least two nutrient reduction projects in that watershed have reached design stage.

- (4) Once an area has been established as an area with Special Watershed Rates, it shall remain a Special Watershed Rate area.

- (5) Rate Adjustment Frequency. Initial rates shall be effective as of [effective date of this Rule]. They shall be adjusted quarterly whenever the rate increases ten percent above the existing rate. The rates shall also be adjusted annually. Annual calculations and adjusted rates shall be published by June 1st on the Program's Web site, [www.nceep.net](http://www.nceep.net), and shall become effective July 1st. Any quarterly rate adjustments shall become effective on the 1st day of October, January, or April as applicable, and shall be published on the same Web site two weeks prior to that date.

- (6) Payment rates for each nutrient shall be determined for a rate area using the following equation and presented in per pound values:

$$ActualCostRate = \frac{ActualCosts_{PresentDay}}{TotalPoundsOffset_{PresentDay}} + AdjustmentFactor$$

Where:

- (a) Actual Costs<sub>PresentDay</sub> means the sum of all costs adjusted for inflation as described in this Sub-Item. Costs are project costs and administrative costs. Projects in the calculation are

completed projects, terminated projects and projects in process. At the time the rate is set, to ensure that collected payments are sufficient to implement new projects, all completed land acquisition contracts and expenditures shall be adjusted to present day values using the current North Carolina Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values. All other completed contracts and expenditures shall be adjusted to present day values using the annual composite USACE Civil Works Construction Cost Index. Future land acquisition contract costs for projects in process are calculated using the Program's per credit contract costs of the same type adjusted to the inflated future value when the contracts will be encumbered using the North Carolina Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values. All other future contracts shall be calculated using the Program's per credit contract costs of the same type adjusted to the inflated future value when the contracts will be encumbered using the current composite USACE Civil Works Construction Cost Index. For projects in process where the contract type has not been determined, the cost of the project shall be calculated using the Program's average per pound cost adjusted to the future inflated value when the project will be initiated. Future year annual inflation rates shall be drawn from either the North Carolina Department of Agriculture and Consumer Services' Agricultural Statistics Farm Real Estate Values or the USACE Civil Works Construction Cost Index. If not available from either source, they shall be calculated using the average annual percentage change over the last three year period.

As used in this Rule:

(i) Project Costs are the total costs associated with development of nutrient reduction projects including identification, land acquisition, project design, project construction,

monitoring, maintenance and long-term stewardship.

(ii) Administrative Costs are costs associated with administration of the Program including staffing, supplies and rent.

(iii) The cost for projects in process is the sum of expenditures of project contracts to date, contracted cost to complete existing contracts, and the projected cost of future contracts needed to complete those projects required to fulfill Program nutrient reduction obligations in the rate area.

(b) Total Pounds Offset<sub>PresentDay</sub> means the total number of pounds of a nutrient reduced by projects in the rate area at the time of calculation.

(c)

$$\text{Adjustment Factor} = \frac{(\text{Actual Costs} - \text{Actual Receipts})}{\text{Number of Pounds Paid During Adjustment Period}}$$

Where:

(i) The Adjustment Factor is a per-pound value used to bring actual costs and actual receipts into balance, ensuring that future payments are sufficient to cover the cost of implementing the Program in the rate area. The Adjustment Factor shall be applied in only those calculation periods where actual costs are calculated to be greater than actual receipts.

(ii) Actual Costs are the same as Actual Costs<sub>PresentDay</sub> as defined in Sub-Item (5)(a), except that existing contracts and completed land acquisitions are not adjusted for inflation.

(iii) Actual Receipts are the sum of all offset payments made to the Program to date in the rate area at the time of calculation.

(iv) Number of Pounds Paid during Adjustment Period is the average number of pounds of a nutrient purchased by regulated parties per year over the last

three years in the rate area, multiplied by the adjustment period. If no payments have been made to the Program in a rate area, the number of pounds paid shall be set to 1,000 pounds until greater than 1,000 pounds have been purchased in that rate area.

(v) Adjustment Period is one to four years determined as follows for a rate area: one year if Actual Costs exceed Actual Receipts by less than five percent; two years if Actual Costs exceed Actual Receipts by five percent or more but less than 15 percent; three years if Actual Costs exceed Actual Receipts by 15 percent or more but less than 25 percent; and four years if Actual Costs exceed Actual Receipts by 25 percent or more.

(7) When individual projects produce more than one type of nutrient reduction, the project costs shall be prorated for each nutrient being offset by the project.

(8) In cases where an applicant is required to reduce more than one nutrient type and chooses to use the Program to offset nutrients, the applicant shall make a payment for each nutrient.

Authority G.S. 143-214.1; 143-214.20; 143-214.21; S.L. 1995, c. 572; S.L. 2006, c. 215; S.L. 2007, c. 438; S.L. 2009, c. 337; S.L. 2009, c. 484; S.L. 2009, c. 486.

\*\*\*\*\*

**Notice** is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to adopt the rules cited as 15A NCAC 02U .0101-.0117, .0120, .0201-.0202, .0301, .0401-.0403, .0501, .0601, .0701, .0801-.0802, .0901, .1101, .1401, amend the rules cited as 15A NCAC 02T .0113, .0506, and repeal the rules cited as 15A NCAC 02T .0901-.0915.

**Proposed Effective Date:** September 1, 2010

**Public Hearing:**

**Date:** March 23, 2010

**Time:** Registration 6:30 p.m./Start time 7:00 p.m.

**Location:** Pitt Community College, Goess Bldg., 1986 Pitt Tech Rd., Winterville, NC 28590

**Date:** March 25, 2010

**Time:** Registration 6:30 p.m./Start time 7:00 p.m.

**Location:** Archdale Building (Ground Floor Hearing Room), 512 N. Salisbury St., Raleigh, NC 27604

**Date:** March 30, 2010

**Time:** Registration 6:30 p.m./Start time 7:00 p.m.

**Location:** Asheville-Buncombe Technical College, Simpson Admin. Bldg., 340 Victoria Rd., Asheville, NC 28801

**Reason for Proposed Action:** The proposed adoption of the new 15A NCAC 02U subchapter clarifies existing reclaimed water rule language in order to remove unintended restrictions and facilitate the use of reclaimed water. The proposed adoption also provides two separate categories for reclaimed water based upon the level of treatment and intended use, and replaces Fecal Coliform with E. Coli as the pathogen indicator for effluent sampling. The proposed adoption also allows additional uses of reclaimed water through wetlands augmentation and crop irrigation and defines new application requirements, design criteria, and effluent standards for these new uses. The proposed repeal of the existing reclaimed water rules in Section .0900 of subchapter 15A NCAC 02T is necessary in order to create a new subchapter 15A NCAC 02U for reclaimed water. This change will categorize reclaimed water as a resource, rather than associating it with a set of rules that address wastewater disposal. It will also allow for easier modification of the rules if new beneficial uses for reclaimed water are allowed in the future. The proposed amendments to 15A NCAC 02T .0113 and .0506 are necessary in order to revise existing rule references to be consistent with the citations in the newly proposed subchapter 15A NCAC 02U.

**Procedure by which a person can object to the agency on a proposed rule:** You may attend the public hearings and make relevant verbal comments, and/or submit written comments, data or other relevant information by the end of the public comment period. The Hearing Officer may limit the length of time that you may speak at the public hearings so that all those who wish to speak may have an opportunity to do so. The EMC is very interested in all comments pertaining to the proposed rule adoption, proposed rule repeal, and proposed amendments. All persons interested and potentially affected by the proposals are strongly encouraged to read this entire notice and make comments on the proposed rule adoption, amendments, and repeal. The EMC may not adopt a rule that differs substantially from the text of the proposed rule published in this North Carolina Register unless the EMC publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule (General Statute 150B 21.2(g)). Written comments may be submitted to: Jon Risgaard, DENR/Division of Water Quality/Aquifer Protection Section, 1636 Mail Service Center, Raleigh, NC 27699-1636, jon.risgaard@ncdenr.gov, or by fax at (919) 715-6048.

**Comments may be submitted to:** Jon Risgaard, DENR/Division of Water Quality/Aquifer Protection Section, 1636 Mail Service Center, Raleigh, NC 27699-1636, phone

(919) 715-6167, fax (919) 716-6048, and email [jon.risgaard@ncdenr.gov](mailto:jon.risgaard@ncdenr.gov)

**Comment period ends:** April 27, 2010

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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
- ☒ Substantial Economic Impact ( $\geq \$3,000,000$ )
- ☐ None

**Fiscal Note posted at**

[http://www.osbm.state.nc.us/files/pdf\\_files/DENR11182009.pdf](http://www.osbm.state.nc.us/files/pdf_files/DENR11182009.pdf)

## CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

### SUBCHAPTER 02T – WASTE NOT DISCHARGED TO SURFACE WATERS

#### SECTION .0100 – GENERAL REQUIREMENTS

#### 15A NCAC 02T .0113 PERMITTING BY REGULATION

(a) The following disposal systems as well as those in Permitting By Regulation rules in this Subchapter (i.e., Rules .0203, .0303, .0403, ~~.0903~~, .1003, .1103, .1203, .1303, .1403, and .1503) are deemed to be permitted pursuant to G.S. 143-215.1(b) and it shall not be necessary for the Division to issue individual permits or coverage under a general permit for construction or operation of the following disposal systems provided the system does not result in any violations of surface water or groundwater standards, there is no direct discharge to surface waters, and all criteria required for the specific system is met:

- (1) Swimming pool and spa filter backwash and drainage, filter backwash from aesthetic fountains, filter backwash from commercial or residential water features such as garden ponds or fish ponds that is discharged to the land surface.
- (2) Backwash from raw water intake screening devices that is discharged to the land surface.

- (3) Condensate from residential or commercial air conditioning units that is discharged to the land surface.
- (4) Discharges to the land surface from individual non-commercial car washing operations.
- (5) Discharges to the land surface from flushing and hydrostatic testing water associated with utility distribution systems, new sewer extensions or new reclaimed water distribution lines.
- (6) Street wash water that is discharged to the land surface.
- (7) Discharges to the land surface from fire fighting activities.
- (8) Discharges to the land surface associated with emergency removal and treatment activities for spilled oil authorized by the federal or state on-scene coordinator when such removals are undertaken to minimize overall environmental damage due to an oil spill.
- (9) Discharges to the land surface associated with biological or chemical decontamination activities performed as a result of an emergency declared by the Governor or the Director of the Division of Emergency Management and that are conducted by or under the direct supervision of the federal or state on-scene coordinator and that meet the following criteria:
  - (A) the volume produced by the decontamination activity is too large to be contained onsite;
  - (B) the Division is informed prior to commencement of the decontamination activity; and
  - (C) the wastewater is not radiologically contaminated or classified as hazardous waste.
- (10) Drilling muds, cuttings and well water from the development of wells or from other construction activities including directional boring.
- (11) Purge water from groundwater monitoring wells.
- (12) Composting facilities for dead animals, if the construction and operation of the facilities is approved by the North Carolina Department of Agriculture and Consumer Services; the facilities are constructed on an impervious, weight-bearing foundation, operated under a roof; and the facilities are approved by the State Veterinarian pursuant to G.S. 106-403.
- (13) Overflow from elevated potable water storage facilities.
- (14) Mobile carwashes if:
  - (A) all detergents used are biodegradable;
  - (B) no steam cleaning, engine or parts cleaning is being conducted;

- (C) notification is made prior to operation by the owner to the municipality or if not in a municipality then the county where the cleaning service is being provided; and
- (D) all non-recyclable washwater is collected and discharged into a sanitary sewer or wastewater treatment facility upon approval of the facility's owner.
- (15) Mine tailings where no chemicals are used in the mining process.
- (16) Mine dewatering where no chemicals are used in the mining process.
- (17) Wastewater created from the washing of produce, with no further processing on-site, on farms where the wastewater is irrigated onto fields so as not to create runoff or cause a discharge.
- (b) Nothing in this Rule shall be deemed to allow the violation of any assigned surface water, groundwater, or air quality standards, and in addition any such violation shall be considered a violation of a condition of a permit. Further, nothing in this Rule shall be deemed to apply to or permit disposal systems for which a state/NPDES permit is otherwise required.

- (c) Any violation of this Rule or discharge to surface waters from the disposal systems listed in Paragraph (a) of this Rule or the activities listed in other Permitted By Regulation rules in this Subchapter shall be reported in accordance with 15A NCAC 02B .0506.
- (d) Disposal systems deemed permitted under this Subchapter shall remain deemed permitted, notwithstanding any violations of surface water or groundwater standards or violations of this Rule or other Permitted By Regulation rules in this Subchapter, until such time as the Director determines that they should not be deemed permitted in accordance with the criteria established in this Rule.
- (e) The Director may determine that a disposal system should not be deemed to be permitted in accordance with this Rule or other Permitted By Regulation rules in this Subchapter and require the disposal system to obtain an individual permit or a certificate of coverage under a general permit. This determination shall be made based on existing or projected environmental impacts, compliance with the provisions of this Rule or other Permitted By Regulation rules in this Subchapter, and the compliance history of the facility owner.

*Authority G.S. 130A-300; 143-215.1(a)(1); 143-215.1(b)(4)(e); 143-215.3(a),(d).*

### **SECTION .0500 – WASTEWATER IRRIGATION SYSTEMS**

#### **15A NCAC 02T .0506 SETBACKS**

- (a) The setbacks for Irrigation sites shall be as follows:

	Spray (feet)	Drip (feet)
Any habitable residence or place of public assembly under separate ownership or not to be maintained as part of the project site	400	100
Any habitable residence or place of public assembly owned by the permittee to be maintained as part of the project site	200	15
Any private or public water supply source	100	100
Surface waters (streams – intermittent and perennial, perennial waterbodies, and wetlands)	100	100
Groundwater lowering ditches (where the bottom of the ditch intersects the SHWT)	100	100
Surface water diversions (ephemeral streams, waterways, ditches)	25	25
Any well with exception of monitoring wells	100	100
Any property line	150	50
Top of slope of embankments or cuts of two feet or more in vertical height	15	15
Any water line from a disposal system	10	10
Subsurface groundwater lowering drainage systems	100	100
Any swimming pool	100	100
Public right of way	50	50
Nitrification field	20	20
Any building foundation or basement	15	15

- (b) The setbacks for Treatment and storage units shall be as follows:

	(feet)
Any habitable residence or place of public assembly under separate ownership or not to be maintained as part of the project site	100
Any private or public water supply source	100
Surface waters (streams – intermittent and perennial, perennial waterbodies, and wetlands)	50
Any well with exception of monitoring wells	100
Any property line	50



(c) Achieving the reclaimed water effluent standards contained in 15A NCAC 02T-.0906 02U .0301 shall permit the system to use the setbacks located in 15A NCAC 02T-.0900 02U .0701(d) for property lines and the compliance boundary shall be at the irrigation area boundary.

(d) Setback waivers shall be written, notarized, signed by all parties involved and recorded with the County Register of Deeds. Waivers involving the compliance boundary shall be in accordance with 15A NCAC 02L .0107.

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

## **SECTION .0900 – RECLAIMED WATER SYSTEMS**

### **15A NCAC 02T .0901 SCOPE**

The rules in this Section apply to reclaimed water systems; the utilization of tertiary treated wastewater effluent, meeting the standards in Rule .0906 of this Section, used in a beneficial manner and for the purpose of conservation of the states water resources by reducing the use of a water resource (potable water, surface water, groundwater). The disposal of treated wastewater effluent that does not serve in place of the use of a water resource shall be covered by Section .0500 of this Subchapter. Requirements for closed loop recycle systems are provided in Section .1000 of this Subchapter.

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

### **15A NCAC 02T .0902 DEFINITIONS**

As used in this Section:

"Conjunctive system" means a system where the reclaimed water option is not necessary to meet the wastewater disposal needs of the facility and where other wastewater utilization or disposal methods (e.g., NPDES permit) are available to the facility at all times.

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

### **15A NCAC 02T .0903 PERMITTING BY REGULATION**

(a) The following systems are deemed permitted pursuant to Rule .0113 of this Subchapter provided the system meets the criteria in Rule .0113 of this Subchapter and all criteria required for the specific system in this Rule:

- (1) Overflow from elevated reclaimed water storage facilities where no viable alternative exists and all possible measures are taken to reduce the risk of overflow.
- (2) Any de minimus runoff from reclaimed water used during fire fighting or extinguishing, dust control, soil compaction for construction purposes, street sweeping, overspray on yard inlets, overspray on golf cart paths, or vehicle washing provided the use is approved in a permit issued by the Division.
- (3) Rehabilitation, repair, or replacement of reclaimed water lines in kind (i.e., size) with the same horizontal and vertical alignment.

(b) The Director may determine that a system should not be deemed permitted in accordance with this Rule and Rule .0113 of this Subchapter. This determination shall be made in accordance with Rule .0113(e) of this Subchapter.

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

### **15A NCAC 02T .0904 APPLICATION SUBMITTAL – CONJUNCTIVE SYSTEMS**

(a) The requirements in this Rule apply to all new and expanding conjunctive facilities, as applicable.

(b) A soil evaluation of the utilization site where the reclaimed water is applied to the land surface or otherwise used in a ground absorption manner shall be provided to the Division by the applicant. Recommendations shall include loading rates of liquids, solids, and other constituents. For systems that utilize reclaimed water through irrigation, the evaluation shall also include recommended maximum irrigation precipitation rates. If required by G.S. 89F, a soil scientist shall prepare this evaluation.

[Note: The North Carolina Board for Licensing of Soil Scientists has determined, via letter dated December 1, 2005, that preparation of soils reports pursuant to this Paragraph constitutes practicing soil science under G.S. 89F.]

(c) Engineering design documents. If required by G.S. 89C, a professional engineer shall prepare these documents. The following documents shall be provided to the Division by the applicant:

[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that preparation of engineering design documents pursuant to this Paragraph constitutes practicing engineering under G.S. 89C.]

- (1) engineering plans for the entire system, including treatment, storage, application, and disposal facilities and equipment except those previously permitted unless those previously permitted are directly tied into the new units or are critical to the understanding of the complete process;
- (2) specifications describing materials to be used, methods of construction, and means for ensuring quality and integrity of the finished product including leakage testing; and
- (3) engineering calculations including hydraulic and pollutant loading for each treatment unit, treatment unit sizing criteria, hydraulic profile of the treatment system, total dynamic head and system curve analysis for each pump, buoyancy calculations, and irrigation design.

(d) Site plans. If required by G.S. 89C, a professional land surveyor shall provide location information on boundaries and physical features not under the purview of other licensed professions. Site plans or maps shall be provided for treatment and storage facilities and where the reclaimed water is applied to the land surface or otherwise used in a ground absorption manner showing the location, orientation and relationship of facility components including:

[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that locating boundaries and physical features, not under the purview of other licensed professions, on maps pursuant to this Paragraph constitutes practicing surveying under G.S. 89C.]

- (1) a sealed map of the site showing all facility-related structures and fences within the treatment, storage, and utilization areas;
- (2) for land application sites and other ground absorption uses, the site map shall include topography; and
- (3) to the extent needed to determine compliance with setbacks, the location of all wells (including usage and construction details if available), streams (ephemeral, intermittent, and perennial), springs, lakes, ponds, and other surface drainage features on all waste treatment, storage, and utilization site(s) and any other feature included in the Rule .0912.

(e) Property Ownership Documentation shall be provided to the Division consisting of:

- (1) legal documentation of ownership (e.g., contract, deed or article of incorporation);
- (2) written notarized intent to purchase agreement signed by both parties, accompanied by a plat or survey map; or
- (3) written notarized lease agreement signed by both parties, specifically indicating the intended use of the property, as well as a plat or survey map. The lease agreements shall adhere to the requirements of 15A NCAC 02L .0107. Where a lease is not required, a compliance boundary for the site shall not be established.

(f) Public utilities shall submit a Certificate of Public Conveyance and Necessity or a letter from the NC Utilities Commission to the Division stating that a franchise application has been received.

(g) A complete chemical analysis of the typical reclaimed water to be utilized shall be provided to the Division for industrial waste. The analysis may include Total Organic Carbon, 5 day Biochemical Oxygen Demand (BOD<sub>5</sub>), Chemical Oxygen Demand (COD), Nitrate Nitrogen (NO<sub>3</sub>-N), Ammonia Nitrogen (NH<sub>3</sub>-N), Total Kjeldahl Nitrogen (TKN), pH, Chloride, Total Phosphorus, Phenol, Total Volatile Organic Compounds, Fecal Coliform, Calcium, Sodium, Magnesium, Sodium Adsorption Ratio (SAR), Total Trihalomethanes, Toxicity Test Parameters and Total Dissolved Solids.

(h) A project evaluation and a receiver site agronomic management plan (if applicable) and recommendations concerning cover crops and their ability to accept the proposed application rates of liquid, solids, minerals and other constituents of the wastewater shall be provided to the Division.

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

## 15A NCAC 02T .0905 APPLICATION SUBMITTAL – NON-CONJUNCTIVE SYSTEMS

(a) The requirements in this Rule apply to all new and expanding non-conjunctive facilities, as applicable.

(b) Soils Report. A soil evaluation of the disposal site shall be provided to the Division. This evaluation shall be presented in a report that includes the following. If required by G.S. 89F, a soil scientist shall prepare this evaluation:

[Note: The North Carolina Board for Licensing of Soil Scientists has determined, via letter dated December 1, 2005, that preparation of soils reports pursuant to this Paragraph constitutes practicing soil science under G.S. 89F.]

- (1) Field description of soil profile, based on examinations of excavation pits and auger borings, within seven feet of land surface or to bedrock describing the following parameters by individual diagnostic horizons:
  - (A) thickness of the horizon;
  - (B) texture;
  - (C) color and other diagnostic features;
  - (D) structure;
  - (E) internal drainage;
  - (F) depth, thickness, and type of restrictive horizon(s); and
  - (G) presence or absence and depth of evidence of any seasonal high water table (SHWT).

Applicants shall dig pits when necessary for proper evaluation of the soils at the site.

- (2) Recommendations concerning loading rates of liquids, solids, other wastewater constituents and amendments. Annual hydraulic loading rates shall be based on in situ measurement of saturated hydraulic conductivity in the most restrictive horizon for each soil mapping unit. Maximum irrigation precipitation rates shall be provided for each soil mapping unit.
- (3) A soil map delineating soil mapping units within each land application site and showing all physical features, location of pits and auger borings, legends, scale, and a north arrow.
- (4) A representative soils analysis (i.e., Standard Soil Fertility Analysis) conducted on each land application site. The Standard Soil Fertility Analysis shall include the following parameters:
  - (A) acidity;
  - (B) base saturation (by calculation);
  - (C) calcium;
  - (D) cation exchange capacity;
  - (E) copper;
  - (F) exchangeable sodium percentage (by calculation);
  - (G) magnesium;
  - (H) manganese;
  - (I) percent humic matter;
  - (J) pH;
  - (K) phosphorus;

- (L) — potassium;
- (M) — sodium; and
- (N) — zinc.

(e) ~~Engineering design documents. If required by G.S. 89C, a professional engineer shall prepare these documents. The following documents shall be provided to the Division:~~

~~[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that preparation of engineering design documents pursuant to this Paragraph constitutes practicing engineering under G.S. 89C.]~~

- ~~(1) — engineering plans for the entire system, including treatment, storage, application, and disposal facilities and equipment except those previously permitted unless those previously permitted are directly tied into the new units or are critical to the understanding of the complete process;~~
- ~~(2) — specifications describing materials to be used, methods of construction, and means for ensuring quality and integrity of the finished product including leakage testing; and~~
- ~~(3) — engineering calculations including, hydraulic and pollutant loading for each treatment unit, treatment unit sizing criteria, hydraulic profile of the treatment system, total dynamic head and system curve analysis for each pump, buoyancy calculations, and irrigation design.~~

~~(d) Site plans. If required by G.S. 89C, a professional land surveyor shall provide location information on boundaries and physical features not under the purview of other licensed professions. Site plans or maps shall be provided to the Division where the reclaimed water is applied to the land surface or otherwise used in a ground absorption manner depicting the location, orientation and relationship of facility components including:~~

~~[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that locating boundaries and physical features, not under the purview of other licensed professions, on maps pursuant to this Paragraph constitutes practicing surveying under G.S. 89C.]~~

- ~~(1) — a sealed map of the site, with topographic contour intervals not exceeding 10 feet or 25 percent of total site relief and showing all facility-related structures and fences within the treatment, storage and utilization areas, soil mapping units shown on all utilization sites;~~
- ~~(2) — the location of all wells (including usage and construction details if available), streams (ephemeral, intermittent, and perennial), springs, lakes, ponds, and other surface drainage features within 500 feet of all waste treatment, storage, and utilization site(s) and delineation of the review and compliance boundaries;~~
- ~~(3) — setbacks as required by Rule .0912 of this Section; and~~
- ~~(4) — site property boundaries within 500 feet of all waste treatment, storage, and utilization site(s).~~

~~(e) — A hydrogeologic description prepared by a Licensed Geologist, License Soil Scientist, or Professional Engineer if required by Chapters 89E, 89F, or 89C respectively of the subsurface to a depth of 20 feet or bedrock, whichever is less, shall be provided to the Division for systems treating industrial waste and any system with a design flow of over 25,000 gallons per day. A greater depth of investigation is required if the respective depth is used in predictive calculations. This evaluation shall be based on borings for which the numbers, locations, and depths are sufficient to define the components of the hydrogeologic evaluation. In addition to borings, other techniques may be used to investigate the subsurface conditions at the site. These techniques may include geophysical well logs, surface geophysical surveys, and tracer studies. This evaluation shall be presented in a report that includes the following components:~~

~~[Note: The North Carolina Board for Licensing of Geologists, via letter dated April 6, 2006, North Carolina Board for Licensing of Soil Scientists, via letter dated December 1, 2005, and North Carolina Board of Examiners for Engineers and Surveyors, via letter dated December 1, 2005, have determined that preparation of hydrogeologic description documents pursuant to this Paragraph constitutes practicing geology under G.S. 89E, soil science under G.S. 89F, or engineering under G.S. 89C.]~~

- ~~(1) — a description of the regional and local geology and hydrogeology based on research of available literature for the area;~~
- ~~(2) — a description, based on field observations of the site, of the site topographic setting, streams, springs and other groundwater discharge features, drainage features, existing and abandoned wells, rock outcrops, and other features that may affect the movement of the contaminant plume and treated wastewater;~~
- ~~(3) — changes in lithology underlying the site;~~
- ~~(4) — depth to bedrock and occurrence of any rock outcrops;~~
- ~~(5) — the hydraulic conductivity and transmissivity of the affected aquifer(s);~~
- ~~(6) — depth to the seasonal high water table;~~
- ~~(7) — a discussion of the relationship between the affected aquifers of the site to local and regional geologic and hydrogeologic features;~~
- ~~(8) — a discussion of the groundwater flow regime of the site prior to operation of the proposed facility and post operation of the proposed facility focusing on the relationship of the system to groundwater receptors, groundwater discharge features, and groundwater flow media; and~~
- ~~(9) — if the SHWT is within 6 feet of the surface, a mounding analysis to predict the level of the SHWT after wastewater application.~~

~~(f) Property Ownership Documentation shall be provided to the Division consisting of:~~

- ~~(1) — legal documentation of ownership (i.e., contract, deed or article of incorporation);~~

- (2) ~~written notarized intent to purchase agreement signed by both parties, accompanied by a plat or survey map; or~~
- (3) ~~written notarized lease agreement signed by both parties, specifically indicating the intended use of the property, as well as a plat or survey map. Lease agreements shall adhere to the requirements of 15A NCAC 02L .0107. Where a lease is not required, a compliance boundary for the site will shall not be established by the Division.~~

~~(g) Public utilities shall submit a Certificate of Public Conveyance and Necessity or a letter from the NC Utilities Commission stating that a franchise application has been received.~~

~~(h) A complete chemical analysis of the typical reclaimed water to be utilized shall be provided to the Division for industrial waste. The analysis may include Total Organic Carbon, 5-day Biochemical Oxygen Demand (BOD<sub>5</sub>), Chemical Oxygen Demand (COD), Nitrate Nitrogen (NO<sub>3</sub>-N), Ammonia Nitrogen (NH<sub>3</sub>-N), Total Kjeldahl Nitrogen (TKN), pH, Chloride, Total Phosphorus, Phenol, Total Volatile Organic Compounds, Fecal Coliform, Calcium, Sodium, Magnesium, Sodium Adsorption Ratio (SAR), Total Trihalomethanes, Toxicity Test Parameters and Total Dissolved Solids.~~

~~(i) A project evaluation and a receiver site agronomic management plan (if applicable) and recommendations concerning cover crops and their ability to accept the proposed application rates of liquid, solids, minerals and other constituents of the wastewater shall be provided to the Division.~~

~~(j) A residuals management plan as required by Rule .0914 of this Section shall be provided to the Division. A written commitment is not required at the time of application; however, it must be provided prior to operation of the permitted system.~~

~~(k) A water balance shall be provided to the Division that determines required storage based upon the most limiting factor of the hydraulic loading based on either the most restrictive horizon or groundwater mounding analysis; or nutrient management based on either agronomic rates for a specified cover crop or crop management requirements.~~

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

#### **15A NCAC 02T .0906 RECLAIMED WATER EFFLUENT STANDARDS**

~~(a) The reclaimed water treatment process shall be documented to produce a tertiary quality effluent (filtered or equivalent) prior to storage, distribution, or irrigation that meets the parameter limits listed below:~~

- (1) ~~monthly average BOD<sub>5</sub> of less than or equal to 10 mg/l and a daily maximum BOD<sub>5</sub> of less than or equal to 15 mg/l;~~
- (2) ~~monthly average TSS of less than or equal to 5 mg/l and a daily maximum TSS of less than or equal to 10 mg/l;~~
- (3) ~~monthly average NH<sub>3</sub> of less than or equal to 4 mg/l and a daily maximum NH<sub>3</sub> of less than or equal to 6 mg/l;~~

- (4) ~~monthly geometric mean fecal coliform level of less than or equal to 14/100 ml and a daily maximum fecal coliform of less than or equal to 25/100 ml; and~~
- (5) ~~maximum turbidity of 10 NTUs.~~

~~(b) Reclaimed water produced by industrial facilities shall not be required to meet the above criteria if the reclaimed water is used in the industry's process and the area of use has no public access.~~

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

#### **15A NCAC 02T .0907 DESIGN CRITERIA FOR WASTEWATER TREATMENT FACILITIES – CONJUNCTIVE SYSTEMS**

~~(a) The requirements in this Rule apply to all new and expanding conjunctive facilities, as applicable.~~

~~(b) Continuous on-line monitoring and recording for turbidity or particle count and flow shall be provided prior to storage, distribution or irrigation.~~

~~(c) Effluent from the treatment facility shall not be discharged to the storage, distribution or irrigation system if either the turbidity exceeds 10 NTU or if the permitted fecal coliform levels cannot be met. The facility must have the ability to utilize alternate wastewater management options when the effluent quality is not sufficient.~~

~~(d) An automatically activated standby power source or other means to prevent improperly treated wastewater from entering the storage, distribution or irrigation system shall be provided.~~

~~(e) There shall be a certified operator of a grade equivalent or greater than the facility classification on call 24 hours/day.~~

~~(f) No storage facilities are required as long as it can be demonstrated that other permitted means of disposal are available if the reclaimed water cannot be completely utilized.~~

~~(g) Irrigation system design shall not exceed the recommended precipitation rates in the soils report prepared pursuant to Rule .0904 of this Section.~~

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

#### **15A NCAC 02T .0908 DESIGN CRITERIA FOR WASTEWATER TREATMENT FACILITIES – NON-CONJUNCTIVE SYSTEMS**

~~(a) The requirements in this Rule apply to all new and expanding non-conjunctive facilities, as applicable.~~

~~(b) Aerated flow equalization facilities shall be provided with a capacity based upon either a representative diurnal hydrograph or at least 25 percent of the daily system design flow.~~

~~(c) Dual facilities shall be provided for all essential treatment units.~~

~~(d) Continuous on-line monitoring and recording for turbidity or particle count and flow shall be provided prior to storage, distribution, or irrigation.~~

~~(e) Effluent from the treatment facility shall be discharged to a five day side stream detention pond if either the turbidity exceeds 10 NTU or if the permitted fecal coliform levels cannot be met. The facility must have the ability to return the effluent in the five day side stream detention pond back to the head of the treatment facility.~~

~~(f) There must be no public access to the wastewater treatment facility or the five day side stream detention pond. The five day side stream detention pond shall have either a liner of natural material at least one foot in thickness and having a hydraulic conductivity of no greater than  $1 \times 10^{-6}$  centimeters per second when compacted, or a synthetic liner of sufficient thickness to exhibit structural integrity and an effective hydraulic conductivity no greater than that required of the natural material liner. Liner requirements of the five day side stream detention pond or separation distances between the bottom of the five day side stream detention pond and the groundwater table may be reduced if it can be demonstrated by predictive calculations or modeling methods acceptable to the Director, that construction and use of the five day side stream detention pond will not result in contravention of assigned groundwater standards at the compliance boundary.~~

~~(g) The storage basin shall have either a liner of natural material at least one foot in thickness and having a hydraulic conductivity of no greater than  $1 \times 10^{-6}$  centimeters per second when compacted, or a synthetic liner of sufficient thickness to exhibit structural integrity and an effective hydraulic conductivity no greater than that required of the natural material liner. Liner requirements of the storage basin or separation distances between the bottom of storage basin and the groundwater table may be reduced if it can be demonstrated by predictive calculations or modeling methods acceptable to the Director, that construction and use of the storage basin will not result in contravention of assigned groundwater standards at the compliance boundary.~~

~~(h) Automatically activated standby power supply onsite, capable of powering all essential treatment units under design conditions shall be provided.~~

~~(i) There shall be a certified operator of a grade equivalent or greater than the facility classification on call 24 hours/day.~~

~~(j) By pass and overflow lines shall be prohibited.~~

~~(k) Multiple pumps shall be provided if pumps are used.~~

~~(l) A water tight seal on all treatment/storage units or minimum of two feet protection from 100 year flood shall be provided.~~

~~(m) Irrigation system design shall not exceed the recommended precipitation rates in the soils report prepared pursuant to Rule .0905 of this Section.~~

~~(n) A minimum of 30 days of residual storage shall be provided.~~

~~(o) Disposal areas shall be designed to maintain a one foot vertical separation between the seasonal high water table and the ground surface.~~

~~(p) Influent pump stations shall meet the sewer minimum design criteria as provided in Section .0300 of this Subchapter.~~

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

## **15A NCAC 02T .0909 DESIGN CRITERIA FOR DISTRIBUTION LINES**

~~(a) The requirements in this Rule apply to all new distribution lines.~~

~~(b) All reclaimed water valves, storage facilities and outlets shall be tagged or labeled to warn the public or employees that the water is not intended for drinking.~~

~~(c) All reclaimed water piping, valves, outlets and other appurtenances shall be color coded, taped, or otherwise marked~~

~~to identify the source of the water as being reclaimed water as follows:~~

~~(1) All reclaimed water piping and appurtenances shall be either colored purple (Pantone 522) and embossed or integrally stamped or marked "CAUTION: RECLAIMED WATER DO NOT DRINK" or be installed with a purple (Pantone 522) identification tape or polyethylene vinyl wrap. The warning shall be stamped on opposite sides of the pipe and repeated every 3 feet or less.~~

~~(2) Identification tape shall be at least 3 inches wide and have white or black lettering on purple (Pantone 522) field stating "CAUTION: RECLAIMED WATER DO NOT DRINK". Identification tape shall be installed on top of reclaimed water pipelines, fastened at least every 10 feet to each pipe length and run continuously the entire length of the pipe.~~

~~(3) Existing underground distribution systems retrofitted for the purpose of utilizing reclaimed water shall be taped or otherwise identified as in Subparagraphs (1) or (2) of this Paragraph. This identification need not extend the entire length of the distribution system but shall be incorporated within 10 feet of crossing any potable water supply line or sanitary sewer line.~~

~~(d) All reclaimed water valves and outlets shall be of a type, or secured in a manner, that permits operation by authorized personnel only.~~

~~(e) Hose bibs shall be located in locked, below grade vaults that shall be labeled as being of nonpotable quality. As an alternative to the use of locked vaults with standard hose bib services, hose bibs which can only be operated by a tool may be placed above ground and labeled as nonpotable water.~~

~~(f) Cross Connection Control~~

~~(1) There shall be no direct cross connections between the reclaimed water and potable water systems.~~

~~(2) Where both reclaimed water and potable water are supplied to a reclaimed water use area, a reduced pressure principle backflow prevention device or an approved air gap separation pursuant to 15A NCAC 18C shall be installed at the potable water service connection to the use area. The installation of the reduced pressure principal backflow prevention device shall allow proper testing.~~

~~(3) Where potable water is used to supplement a reclaimed water system, there shall be an air gap separation, approved and regularly inspected by the potable water supplier, between the potable water and reclaimed water systems.~~

~~(g) Irrigation system piping shall be considered part of the distribution system for the purposes of this Rule.~~

~~(h) Reclaimed water distribution lines shall be located 10 feet horizontally from and 18 inches below any water line where~~

practicable. Where these separation distances can not be met, the piping and integrity testing procedures shall meet water main standards in accordance with 15A NCAC 18C.

(i) Reclaimed water distribution lines shall not be less than 100 feet from a well unless the piping and integrity testing procedures meet water main standards in accordance with 15A NCAC 18C, but no case shall they be less than 25 feet from a private well or 50 feet from a public well.

(j) Reclaimed water distribution lines shall meet the separation distances to sewer lines in accordance with Rule .0305 of this Subchapter.

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

## **15A NCAC 02T .0910 RECLAIMED WATER UTILIZATION**

(a) Reclaimed water for land application to areas intended to be accessible to the public such as residential lawns, golf courses, cemeteries, parks, school grounds, industrial or commercial site grounds, landscape areas, highway medians, roadways and other similar areas shall meet the following criteria:

- (1) Notification shall be provided by the permittee or its representative to inform the public of the use of reclaimed water (Non Potable Water) and that the reclaimed water is not intended for drinking.
- (2) The generator of the reclaimed water shall develop and maintain a program of record keeping for distribution of reclaimed water.
- (3) The generator of the reclaimed water shall develop and maintain a program of education and approval for all use of reclaimed wastewater on property not owned by the generator.
- (4) The generator of the reclaimed water shall develop and maintain a program of routine review and inspection of all use of reclaimed water not on property owned by the generator.
- (5) The compliance boundary and the review boundary for groundwater shall be established at the irrigation area boundaries. No deed restrictions or easements shall be required to be filed on adjacent properties. Land application of effluents must be on property controlled by the generator unless a contractual agreement is provided in accordance with 15A NCAC 02L .0107 except in cases where a compliance boundary is not established.

(b) Reclaimed water used for purposes such as industrial process water or cooling water, aesthetic purposes such as decorative ponds or fountains, fire fighting or extinguishing, dust control, soil compaction for construction purposes, street sweeping (not street washing), and individual vehicle washing for personal purposes shall meet the criteria below:

- (1) Notification shall be provided by the permittee or its representative to inform the public or employees of the use of reclaimed water (Non

Potable Water) and that the reclaimed water is not intended for drinking.

- (2) Use of reclaimed water in decorative ponds or fountains shall require regular inspection by the Permittee to ensure permanent signs/notification and to ensure no discharge occurs from the fountains/ponds.
- (3) Use of reclaimed water for vehicle washing shall be conducted in a manner to ensure minimal surface runoff and the Permittee shall provide educational information to the users of reclaimed water for vehicle washing.
- (4) The generator of the reclaimed water shall develop and maintain a program of education and approval for all reclaimed water users.
- (5) The generator of the reclaimed water shall develop and maintain a program of record keeping for distribution of reclaimed water.
- (6) The generator of the reclaimed water shall develop and maintain a program of routine review and inspection of reclaimed water users.

(c) Reclaimed water used for urinal and toilet flushing or fire protection in sprinkler systems located in commercial or industrial facilities shall be approved by the Director if the applicant can demonstrate to the Division that public health and the environment will be protected.

(d) Reclaimed water shall not be used for irrigation of direct food chain crops.

(e) Reclaimed water shall not be used for swimming pools, hot-tubs, spas or similar uses.

(f) Reclaimed water shall not be used for direct reuse as a raw potable water supply.

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

## **15A NCAC 02T .0911 BULK DISTRIBUTION OF RECLAIMED WATER**

(a) Tank trucks and other equipment used to distribute reclaimed water shall be identified with advisory signs.

(b) Tank trucks used to transport reclaimed water shall not be used to transport potable water that is used for drinking or other potable purposes.

(c) Tank trucks used to transport reclaimed water shall not be filled through on-board piping or removable hoses that may subsequently be used to fill tanks with water from a potable water supply.

(d) The generator of the reclaimed water shall develop and maintain a program of education and approval for all reclaimed water users.

(e) The generator of the reclaimed water shall develop and maintain a program of record keeping for bulk distribution of reclaimed water.

(f) The generator of the reclaimed water shall develop and maintain a program of routine review and inspection of reclaimed water users.

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

**15A NCAC 02T .0912 SETBACKS**

~~(a) Treatment and storage facilities associated with systems permitted under this Section shall adhere to the setback requirements in Section .0500 of this Subchapter except as provided in this Rule.~~

~~(b) The setbacks for Irrigation and utilization areas shall be as follows:~~

	feet
Surface waters (streams — intermittent and perennial, perennial waterbodies, and wetlands) not classified SA	25
Surface waters (streams — intermittent and perennial, perennial waterbodies, and wetlands) classified SA	100
Any well with exception to monitoring wells	100

~~(c) No setback between the application area and property lines shall be required.~~

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

**15A NCAC 02T .0913 OPERATION AND MAINTENANCE PLAN**

~~An Operation and Maintenance Plan shall be maintained by the permittee for all reclaimed water systems. The plan shall:~~

- ~~(1) describe the operation of the system in sufficient detail to show what operations are necessary for the system to function and by whom the functions are to be conducted;~~
- ~~(2) provide a map of all distribution lines and record drawings of all irrigation systems under the permittee's control;~~
- ~~(3) describe anticipated maintenance of the system;~~
- ~~(4) include provisions for safety measures including restriction of access to the site and equipment, as appropriate; and~~
- ~~(5) include spill control provisions including:~~
  - ~~(a) response to upsets and bypasses including control, containment, and remediation; and~~
  - ~~(b) contact information for plant personnel, emergency responders, and regulatory agencies.~~

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

**15A NCAC 02T .0914 RESIDUALS MANAGEMENT PLAN**

~~A Residuals Management Plan shall be maintained for all reclaimed water systems that generate residuals. The plan must include the following:~~

- ~~(1) a detailed explanation as to how the residuals will be collected, handled, processed, stored and disposed;~~
- ~~(2) an evaluation of the residuals storage requirements for the treatment facility based upon the maximum anticipated residuals~~

~~production rate and ability to remove residuals;~~

- ~~(3) a permit for residuals utilization, a written commitment to the Permittee of a Division approved residuals disposal/utilization program accepting the residuals which demonstrates that the program has adequate capacity to accept the residuals, or that an application for approval has been submitted; and~~
- ~~(4) if oil, grease, grit, or screenings removal and collection is a designed unit process, a detailed explanation as to how the oil/grease will be collected, handled, processed, stored and disposed.~~

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

**15A NCAC 02T .0915 LOCAL PROGRAM APPROVAL**

~~(a) Municipalities, counties, local boards or commissions, water and sewer authorities, or groups of municipalities and counties may apply to the Division for approval of programs for permitting construction, modification, and operation of reclaimed water distribution lines and permitting users under their authority. Construction of and modifications to treatment works, including pump stations for reclaimed water distribution, require Division approval. Permits issued by approved local programs serve in place of permits issued by the Division.~~

~~(b) Applications. Applications for approval of local programs must provide adequate information to assure compliance with the requirements of this Subchapter and the following:~~

- ~~(1) The program application shall include two copies of the permit application forms, intended permits including types of uses, minimum design criteria (specifications), flow chart of permitting, inspection and certification procedures, and other relevant documents to be used in administering the local program.~~
- ~~(2) Certification that the local authority has procedures in place for processing permit applications, setting permit requirements, enforcement, and penalties that are compatible with those for permits issued by the Division.~~
- ~~(3) Any future amendments to the requirements of this Subchapter shall be incorporated into the local program within 60 days of the effective date of the amendments.~~
- ~~(4) A North Carolina registered Professional Engineer shall be on the staff of the local program or retained as a consultant to review unusual situations or designs and to answer questions that arise in the review of proposed projects. The local program shall also provide staff or retain a consultant to review all other non-engineering related program areas.~~
- ~~(5) Each project permitted by the local program shall be inspected for compliance with the requirements of the local program at least once during construction.~~

~~(c) Approval of Local Programs. The staff of the Division shall acknowledge receipt of an application for a local program in writing, review the application, notify the applicant of additional information that may be required, and make a recommendation to the Commission on the acceptability of the proposed local program.~~

~~(d) All permitting actions, bypasses from distribution lines, enforcement actions, and monitoring of the distribution system shall be summarized and submitted to the Division on a quarterly basis on forms provided by the Division. The report shall also provide a listing and summary of all enforcement actions taken or pending during the quarter. The quarters begin on January 1, April 1, July 1 and October 1. The report shall be submitted within 30 days after the end of each quarter.~~

~~(e) A copy of all program documents such as specifications, permit applications, permit shells and shell certification forms shall be submitted to the Division on an annual basis along with a summary of any other program changes. Program changes to note include staffing, processing fees, and ordinance revisions.~~

~~(f) Modification of a Local Program. After a local program has been approved by the Commission, any modification of the program procedures or requirements specified in this Rule must be approved by the Director to assure that the procedures and requirements remain at least as stringent as the state-wide requirements in this Subchapter.~~

~~(g) Appeal of Local Decisions. Appeal of individual permit denials or issuance with conditions the permit applicant finds unacceptable shall be made according to the approved local ordinance. The Commission shall not consider individual permit denials or issuance with conditions to which a Permittee objects. This Paragraph does not alter the enforcement authority of the Commission as specified in G.S. 143-215.1(f).~~

*Authority G.S. 143-215.1; 143-215.3(a); S.L. 2006-250.*

## SUBCHAPTER 02U – RECLAIMED WATER

### SECTION .0100 – GENERAL REQUIREMENTS

#### 15A NCAC 02U .0101 PURPOSE

It is the public policy of the State that the reuse of reclaimed water is critical to meeting the existing and future water supply needs of the State. Reclaimed water systems permitted and operated under G.S. 143-215.1 in an approved wastewater reuse program can provide water for many beneficial purposes in a way that is both environmentally acceptable and protective of public health. The rules in this Section apply to reclaimed water systems; the generation and utilization of tertiary treated wastewater effluent, meeting the standards in Rule .0301 of this Subchapter, used in a beneficial manner and for the purpose of conservation of the State's water resources by reducing the use of a water resource (potable water, surface water, groundwater). The disposal of treated wastewater effluent that does not serve in place of the use of a water resource shall be covered by Subchapter 02T. Requirements for closed-loop recycle systems are provided in Section .1000 of Subchapter 02T. The rules in this Subchapter set forth the requirements and procedures for application and issuance of permits for the following reclaimed water systems:

- (1) treatment works;
- (2) utilization systems;
- (3) bulk distribution programs; and
- (4) local program approval.

*Authority G.S. 143-215.1; 143-215.3(a)(1); S.L. 2006-250.*

#### 15A NCAC 02U .0102 SCOPE

The rules in this Subchapter apply to all persons proposing to construct, alter, extend, or operate any reclaimed water treatment works, or utilization system. The rules in this Section are general requirements that apply to all program rules (found in individual sections) in this Subchapter.

*Authority G.S. 130A-335; 143-215.1; 143-215.3(a)(1).*

#### 15A NCAC 02U .0103 DEFINITIONS

The terms used in this Subchapter shall be as defined in G.S. 143-212 and 143-213, and 15A NCAC 02T .0103 except as provided in this Rule as follows:

- (1) "Beneficial manner" means the use of water as a necessary and beneficial part of an activity or process to which the water is being added.
- (2) "Beneficial Reuse" means the utilization of reclaimed water in a beneficial manner and for the purpose of conservation of the State's water resources by reducing the use of other water resources (potable water, surface water, groundwater).
- (3) "Conjunctive system" means a system where the reclaimed water option is not necessary to meet the wastewater disposal needs of the facility and where other wastewater utilization or disposal methods (e.g., NPDES permit) are available to the facility at all times.
- (4) "Direct contact irrigation" shall mean application methods that result in the direct contact of reclaimed water on the portion of the crop intended for human consumption.
- (5) "Indirect contact irrigation" shall mean application methods that will preclude direct contact of reclaimed water on the portion of the crop intended for human consumption. This system may include ridge and furrow irrigation, drip irrigation, or a subsurface distribution system.
- (6) "Net environmental benefit" associated with wetlands augmentation sites shall be documented evidence supporting continued maintenance of natural conditions, and the protection of endangered species as required in Rule .0105(c)(10). Wetland augmentation systems shall provide documentation of the protection of existing wetland uses per 15A NCAC 02B .0201(f) and .0231 and shall not result in net degradation of the wetland.
- (7) "Reclaimed Water" means treated wastewater effluent, meeting specific effluent standards



established pursuant to Rule .0301 of this Subchapter, and used for beneficial reuse.

*Authority G.S. 130A-335; 143-213; 143-215.3(a)(1).*

#### **15A NCAC 02U .0104 ACTIVITIES WHICH REQUIRE A PERMIT**

No person shall do any of the things or carry out any of the activities contained in G.S. 143-215.1(a) until or unless the person shall have applied for and received a permit from the Division (or if appropriate a local program approved by the Division pursuant to this Subchapter) and shall have complied with the conditions prescribed in the permit or is deemed permitted by rules in this Subchapter.

*Authority G.S. 130A-335; 143-215.1; 143-215.3(a)(1).*

#### **15A NCAC 02U .0105 GENERAL REQUIREMENTS**

(a) Jurisdiction. Applications for permits from the Division shall be made in accordance with this Rule. Applications for permits under the jurisdiction of a local program shall be made in accordance with the requirements of the Division approved program.

(b) Applications. Application for a permit must be made on Division forms completely filled out, where applicable, and fully executed in the manner set forth in Rule .0106 of this Section. A processing fee as described in G.S. 143-215.3D must be submitted with each application in the form of a check or money order made payable to the Department. Applications shall be returned if incomplete. Distribution line extensions shall be applied for separately from treatment and utilization systems. The applicant shall provide adequate documentation to the Division to ensure that the proposed system will meet all design and performance criteria as required under this Subchapter and other applicable rules, be operated as reclaimed water system, and protect surface water and groundwater standards. Variances to this Subchapter or adopted design criteria must be specifically requested in the application and, if approved pursuant to Paragraph (n) of this Rule, incorporated into the permit. The Division may accept certification from a licensed or certified professional (e.g. Professional Engineer, Licensed Soil Scientist, Licensed Geologist) that the design meets or exceeds minimum design criteria applicable to the project. Division acceptance of certifications by the applicant or by licensed or certified professionals preparing reports for the application shall not constitute approval of a variance to this Subchapter or applicable minimum design and performance criteria unless specifically requested in the application and approved in the permit.

(c) Application packages for new and expanding facilities shall include the following items:

- (1) The number of executed copies shall include the number necessary for each review office and one additional copy. Additional copies shall be required if needed for federal and state grant and loan projects.
- (2) Reports, engineering plans, specifications, and calculations as required by the applicable rules of this Subchapter. If prepared by licensed or certified professionals these reports shall be

submitted in accordance with the respective statutes and rules governing that profession.

- (3) Operational agreements as required by Rule .0115 of this Section.
- (4) For projects that require environmental documentation pursuant to the North Carolina Environmental Policy Act, a final environmental document (Finding of No Significant Impact or Record of Decision).
- (5) A general scaled location map, showing orientation of the facility with reference to at least two geographic references (e.g. numbered roads, named streams/ivers).
- (6) Documentation that other directly related (i.e. needed to properly construct and operate the facilities permitted under this Subchapter) environmental permit or certification applications are being prepared, have been applied for, or have been obtained (e.g. 401 certifications, erosion and sedimentation control plans, stormwater management plans). The Division shall consider the application incomplete or issue the permit contingent on issuance of the dependent permits if issuance of other permits or certifications impact the system permitted under this Subchapter.
- (7) A description of the project including the origin, type and flow of waste to be treated. For industrial processing facilities, a waste analysis extensive enough to allow a complete evaluation of the system's capability to treat the waste and any potential impacts on the waters of the state shall be included.
- (8) Documentation of compliance with Article 21 Part 6 (Floodway Regulations) of Chapter 143 of the General Statutes.
- (9) Documentation as required by other applicable rule(s) in this Subchapter.
- (10) Documentation of the presence or absence of threatened or endangered aquatic species utilizing information provided by the Natural Heritage Program of the Department. This shall only apply to the area whose boundary is encompassed by and for the purpose of installation, operation, and maintenance of facilities permitted herein (wastewater collection, treatment, storage, or utilization). This documentation shall provide information on the need for permit conditions pursuant to Paragraph (i) of this Rule. The Natural Heritage Program can be contacted at <http://www.ncnhp.org> or write to Natural Heritage Program, 1601 Mail Service Center, Raleigh, NC 27699-1601.

(d) Application packages for renewals shall include updated site plans (if required as part of original submittal).

(e) Application and annual Fees.

- (1) Application Fee. For every application for a new or major modification of a permit under

this Section, a nonrefundable application processing fee in the amount provided in G.S. 143-215.3D shall be submitted to the Division by the applicant at the time of application. For a facility with multiple treatment units under a single permit, the application fee shall be set by the total design treatment capacity. Modification fees shall be based on the projected annual fee for the facility.

- (2) Annual Fees. An annual fee for administering and compliance monitoring shall be charged in each year of the term of every renewable permit according to the schedule in G.S. 143-215.3D(a). Annual fees must be paid for any facility operating on an expired permit that has not been rescinded or revoked by the Division. Permittees shall be billed annually by the Division. A change in the facility which changes the annual fee shall result in the revised annual fee being billed effective with the next anniversary date.

- (3) Failure to pay an annual fee within 30 days after being billed shall be cause for the Division to revoke the permit.

(f) Designs for facilities permitted under this Section shall use the practicable waste treatment and utilization alternative with the least adverse impact on the environment in accordance with G.S. 143-215.1(b)(2).

(g) In order to protect Publicly Owned Treatment Works, the Division shall incorporate pretreatment requirements under 15A NCAC 2H .0900 into the permit.

(h) Setbacks and required separation distances shall be provided as required by individual rules in this Subchapter. Setbacks to streams (perennial and intermittent), perennial waterbodies, and wetlands shall be determined using the methodology set forth in 15A NCAC 02B .0233(4)(a). Setbacks to wells are for those wells outside the compliance boundary. Where wells would otherwise be inside the compliance boundary as established in 15A NCAC 02L .0107, the applicant may request the compliance boundary be established closer to the waste disposal area and this shall be granted provided the groundwater standards can be met at the newly established compliance boundary.

(i) Permits may provide specific conditions to address the protection of threatened or endangered aquatic species as provided in plans developed pursuant in 15A NCAC 02B .0110 if the construction and operation of the facility directly impacts such species.

(j) The permittee shall keep permits active until the waste treatment systems authorized by the permit are properly closed or subsequently permitted under another permit issued by the appropriate permitting authority for that activity.

(k) Monitoring of waste and surface waters shall be in accordance with 15A NCAC 02B .0505 except as otherwise provided by specific rules in this Subchapter.

(l) Reporting shall be in accordance with 15A NCAC 02B .0506 except as otherwise provided by specific rules in this Subchapter.

(m) Monitoring of groundwater shall be in accordance with Sections 15A NCAC 02L .0100 and 15A NCAC 02C .0100 except as otherwise provided by specific rules in this Subchapter.

(n) The Director shall approve alternative Design Criteria in cases where the applicant can demonstrate that the alternative design criteria will provide the following:

- (1) equal or better treatment of the waste;
- (2) equal or better protection of the waters of the state; and
- (3) no increased potential for nuisance conditions from noise, odor or vermin.

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

#### **15A NCAC 02U .0106 SUBMISSION OF PERMIT APPLICATIONS**

Submission of permit applications shall be in accordance with 15A NCAC 02T .0106.

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

#### **15A NCAC 02U .0107 STAFF REVIEW AND PERMIT PREPARATION**

Staff review and permit preparation shall be in accordance with 15A NCAC 02T .0107.

*Authority G.S. 143-215.1(b); 143-215.1(d); 143-215.3(a)(1); 143-215.3(a)(4).*

#### **15A NCAC 02U .0108 FINAL ACTION ON PERMIT APPLICATIONS TO THE DIVISION**

Final action on permit applications to the Division shall be in accordance with 15A NCAC 02T .0108.

*Authority G.S. 143-215.1(a); 143-215.1(b); 143-215.1(d); 143-215.3(a)(1).*

#### **15A NCAC 02U .0109 PERMIT RENEWALS**

Requests for permit renewals shall be submitted to the Director at least 180 days prior to expiration unless the permit has been revoked by the Director in accordance with Rule .0110 of this Section or a request has been made to rescind the permit. Renewal requests shall be made in accordance with Rule .0105 and Rule .0106 of this Section.

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

#### **15A NCAC 02U .0110 MODIFICATION AND REVOCATION OF PERMITS**

Modification and revocation of permits shall be in accordance with 15A NCAC 02T .0110.

*Authority G.S. 143-215.1(b)(2.); 143-215.3(a)(1).*

#### **15A NCAC 02U .0111 CONDITIONS FOR ISSUING GENERAL PERMITS**

Conditions for issuing general permits are established in 15A NCAC 02T .0111.

*Authority G.S. 143-215.1; 143-215.3(a)(1); 143-215.10C.*

**15A NCAC 02U .0112 DELEGATION OF AUTHORITY**  
Delegation of authority shall be in accordance with 15A NCAC 02T .0112.

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

**15A NCAC 02U .0113 PERMITTING BY REGULATION**

(a) The following utilizations of reclaimed water are deemed to be permitted pursuant to G.S. 143-215.1(b) and it shall not be necessary for the Division to issue individual permits or coverage under a general permit for construction or operation of the following utilization systems provided the system does not result in any violations of surface water or groundwater standards, there is no unpermitted direct discharge to surface waters, and all criteria required for the specific system is met:

- (1) Discharges to the land surface from flushing and hydrostatic testing water associated with utility distribution systems, new sewer extensions or new reclaimed water distribution lines.
- (2) Overflow from elevated reclaimed water storage facilities where no viable alternative exists and all possible measures are taken to reduce the risk of overflow.
- (3) Any de minimus runoff from reclaimed water used during fire fighting or extinguishing, dust control, soil compaction for construction purposes, street sweeping, overspray on yard inlets, overspray on golf cart paths, or vehicle washing provided the use is approved in a permit issued by the Division.
- (4) Rehabilitation, repair, or replacement of reclaimed water lines in kind (i.e., size) with the same horizontal and vertical alignment.
- (5) In accordance to 15A NCAC 02H .0106(f)(5), flushing (including air release valve discharge) and hydrostatic testing water discharges associated with reclaimed water distribution systems are deemed to be permitted pursuant to G.S. 143-215.1(c), provided that no water quality standards are contravened.
- (6) Utilization of reclaimed water received from a reclaimed water bulk distribution program permitted under Rule.0601 of this Subchapter.
- (7) Irrigation of single-family residential lots supplied with reclaimed water as part of a conjunctive use reclaimed water system meeting the requirements of Rule .0201(e) of this Subchapter, Chapter 89G of the General Statutes, and approved by the local building inspection department.
- (8) Irrigation of agricultural crops supplied with reclaimed water as part of a conjunctive use reclaimed water system meeting the requirements of this Subchapter and approved by the reclaimed water provider.

- (9) Drip irrigation sites supplied with reclaimed water as part of a conjunctive use reclaimed water system generated from an onsite wastewater treatment facility meeting the criteria of this Subchapter and where the conjunctive system has been approved by the Department and is permitted under 18A .1900.

(b) Nothing in this Rule shall be deemed to allow the violation of any assigned surface water, groundwater, or air quality standards, and in addition any such violation shall be considered a violation of a condition of a permit. Further, nothing in this Rule shall be deemed to apply to or permit utilization systems for which a state/NPDES permit is otherwise required.

(c) Any violation of this Rule or discharge to surface waters from the utilization systems listed in Paragraph (a) of this Rule or the activities listed in other Permitted By Regulation rules in this Subchapter shall be reported in accordance with 15A NCAC 02B .0506.

(d) Utilization systems deemed permitted under this Subchapter shall remain deemed permitted, notwithstanding any violations of surface water or groundwater standards or violations of this Rule or other Permitted By Regulation rules in this Subchapter, until such time as the Director determines that they should not be deemed permitted in accordance with the criteria established in this Rule.

(e) The Director may determine that a utilization system should not be deemed to be permitted in accordance with this Rule or other Permitted By Regulation rules in this Subchapter and require the utilization system to obtain an individual permit or a certificate of coverage under a general permit. This determination shall be made based on existing or projected environmental impacts, compliance with the provisions of this Rule or other Permitted By Regulation rules in this Subchapter, and the compliance history of the facility owner.

*Authority G.S. 130A-300; 143-215.1(a)(1); 143-215.1(b)(4)(e); 143-215.3(a),(d).*

**15A NCAC 02U .0114 WASTEWATER DESIGN FLOW RATES**

Wastewater design flow rates shall be determined pursuant to 15A NCAC 02T .0114.

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

**15A NCAC 02U .0115 OPERATIONAL AGREEMENTS**  
Operational agreements shall be completed pursuant to 15A NCAC 02T .0115.

*Authority G.S. 143-215.1(d1).*

**15A NCAC 02U .0116 CERTIFICATION OF COMPLETION**

Certification of completion shall be completed pursuant to 15A NCAC 02T .0116.

*Authority G.S. 143-215.1.*

**15A NCAC 02U .0117 TREATMENT FACILITY OPERATION AND MAINTENANCE**

Treatment facility operation and maintenance shall be completed pursuant to 15A NCAC 02T .0117.

*Authority G.S. 143-215.3.*

**15A NCAC 02U .0118 RESERVED FOR FUTURE CODIFICATION**

**15A NCAC 02U .0119 RESERVED FOR FUTURE CODIFICATION**

**15A NCAC 02U .0120 HISTORICAL CONSIDERATION IN PERMIT APPROVAL**

(a) The Division shall consider an applicant's compliance history in accordance with G.S. 143-215.1(b)(4)b.2. and with the requirements contained within this Rule for environmental permits and certifications issued under Article 21. Paragraph (b) of this Rule is a partial set of criteria for routine consideration under G.S. 143-215.1(b)(4)b.2. The Director may also consider other compliance information in determining compliance history.

(b) When any of the following apply, permits for new and expanding facilities shall not be granted, unless the Division determines that the permit is specifically and solely needed for the construction of facilities to resolve non-compliance with any environmental statute or rule:

- (1) The applicant or any parent, subsidiary, or other affiliate of the applicant or parent has been convicted of environmental crimes under G.S. 143-215.6B or under Federal law that would otherwise be prosecuted under G.S. 143-215.6B where all appeals have been abandoned or exhausted.
- (2) The applicant or any affiliation has previously abandoned a wastewater treatment facility without properly closing the facility in accordance with the permit or this Subchapter.
- (3) The applicant or any affiliation has not paid a civil penalty where all appeals have been abandoned or exhausted.
- (4) The applicant or any affiliation is currently not compliant with any compliance schedule in a permit, settlement agreement or order.
- (5) The applicant or any affiliation has not paid an annual fee in accordance with Rule .0105(e)(2).

(c) Any variance to this Rule shall be approved by the Director and shall be based on the current compliance status of the permittee's facilities and the magnitude of previous violations. Variance approval shall not be delegated to subordinate staff.

*Authority G.S. 143-215.1(b); 143-215.3(a).*

**SECTION .0200 – APPLICATION REQUIREMENTS**

**15A NCAC 02U .0201 APPLICATION SUBMITTAL – CONJUNCTIVE SYSTEMS**

(a) The requirements in this Rule apply to all new and expanding conjunctive facilities, as applicable.

(b) A soil evaluation of the utilization site where the reclaimed water is applied to the land surface or otherwise used in a ground absorption manner shall be provided to the Division by the applicant. Recommendations shall include loading rates of liquids, solids, and other constituents. For systems that utilize reclaimed water through irrigation, the evaluation shall also include recommended maximum irrigation precipitation rates. If required by G.S. 89F, a soil scientist shall prepare this evaluation.

[Note: The North Carolina Board for Licensing of Soil Scientists has determined, via letter dated December 1, 2005, that preparation of soils reports pursuant to this Paragraph constitutes practicing soil science under G.S. 89F.]

(c) Engineering design documents. If required by G.S. 89C, a professional engineer shall prepare these documents. The following documents shall be provided to the Division by the applicant:

[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that preparation of engineering design documents pursuant to this Paragraph constitutes practicing engineering under G.S. 89C. In addition, the North Carolina Board of Examiners for Engineers and Surveyors has determined that design of residential reclaimed irrigations systems owned by the property owner does not constitute engineering under G.S. 89C.]

- (1) engineering plans for the entire system, including treatment, storage, application, and utilization facilities and equipment except those previously permitted unless those previously permitted are directly tied into the new units or are critical to the understanding of the complete process;
- (2) specifications describing materials to be used, methods of construction, and means for ensuring quality and integrity of the finished product including leakage testing; and
- (3) engineering calculations including hydraulic and pollutant loading for each treatment unit, treatment unit sizing criteria, hydraulic profile of the treatment system, total dynamic head and system curve analysis for each pump, buoyancy calculations, and irrigation design.

(d) Site plans. If required by G.S. 89C, a professional land surveyor shall provide location information on boundaries and physical features not under the purview of other licensed professions. Site plans or maps shall be provided for treatment and storage facilities and where the reclaimed water is applied to the land surface or otherwise used in a ground absorption manner, except where reclaimed water is utilized for irrigation to single-family residential lots, showing the location, orientation and relationship of facility components including:

[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that locating boundaries and physical features, not under

the purview of other licensed professions, on maps pursuant to this Paragraph constitutes practicing surveying under G.S. 89C.]

- (1) a scaled map of the site showing all facility-related structures and fences within the treatment, storage, and utilization areas;
- (2) for land application sites and other ground absorption uses, the site map shall include topography; and
- (3) to the extent needed to determine compliance with setbacks, the location of all features included in Rule .0701.

(e) Documentation for reclaimed water irrigation to single-family residential lots shall include:

- (1) a scaled map of the site showing all structures within the utilization areas, and to the extent needed to determine compliance with setbacks, the location of all features included in Rule .0701; and
- (2) specifications meeting the criteria of Rules .0401, .0403, and .0701 of this Section for all irrigation systems.

(f) Property Ownership Documentation shall be provided to the Division consisting of:

- (1) legal documentation of ownership (e.g., contract, deed or article of incorporation); or
- (2) written notarized intent to purchase agreement signed by both parties, accompanied by a plat or survey map;
- (3) an easement running with the land specifically indicating the intended use of the property and meeting the condition of 15A NCAC 02L .0107(f); or
- (4) written notarized lease agreement signed by both parties, specifically indicating the intended use of the property, as well as a plat or survey map. When this Subparagraph is utilized to document property ownership, groundwater standards will be met across the entire site and a compliance boundary shall not be provided.

(g) Public utilities shall submit a Certificate of Public Convenience and Necessity or a letter from the NC Utilities Commission to the Division stating that a franchise application has been received.

(h) A complete chemical analysis of the typical reclaimed water to be utilized shall be provided to the Division for industrial waste. The analysis may include Total Organic Carbon, 5-day Biochemical Oxygen Demand (BOD5), Chemical Oxygen Demand (COD), Nitrate Nitrogen (NO3-N), Ammonia Nitrogen (NH3-N), Total Kjeldahl Nitrogen (TKN), pH, Chloride, Total Phosphorus, Phenol, Total Volatile Organic Compounds, Escherichia coli (E. coli), Coliphage, Clostridium perfringens, Calcium, Sodium, Magnesium, Sodium Adsorption Ratio (SAR), Total Trihalomethanes, Toxicity Test Parameters and Total Dissolved Solids.

(i) A project evaluation and a receiver site agronomic management plan (if applicable) and recommendations concerning cover crops and their ability to accept the proposed

application rates of liquid, solids, minerals and other constituents of the wastewater shall be provided to the Division.

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

#### **15A NCAC 02U .0202 APPLICATION SUBMITTAL – NON-CONJUNCTIVE SYSTEMS**

(a) The requirements in this Rule apply to all new and expanding non-conjunctive facilities, as applicable.

(b) Soils Report. A soil evaluation of the utilization site shall be provided to the Division. This evaluation shall be presented in a report that includes the following. If required by G.S. 89F, a soil scientist shall prepare this evaluation:

[Note: The North Carolina Board for Licensing of Soil Scientists has determined, via letter dated December 1, 2005, that preparation of soils reports pursuant to this Paragraph constitutes practicing soil science under G.S. 89F.]

- (1) Field description of soil profile, based on examinations of excavation pits and auger borings, within seven feet of land surface or to bedrock describing the following parameters by individual diagnostic horizons:
  - (A) thickness of the horizon;
  - (B) texture;
  - (C) color and other diagnostic features;
  - (D) structure;
  - (E) internal drainage;
  - (F) depth, thickness, and type of restrictive horizon(s); and
  - (G) presence or absence and depth of evidence of any seasonal high water table (SHWT).

Applicants shall dig pits when necessary for proper evaluation of the soils at the site.

- (2) Recommendations concerning loading rates of liquids, solids, other wastewater constituents and amendments. Annual hydraulic loading rates shall be based on in-situ measurement of saturated hydraulic conductivity in the most restrictive horizon for each soil mapping unit. Maximum irrigation precipitation rates shall be provided for each soil mapping unit.
- (3) A soil map delineating soil mapping units within each land application site and showing all physical features, location of pits and auger borings, legends, scale, and a north arrow.
- (4) A representative soils analysis (i.e., Standard Soil Fertility Analysis) conducted on each land application site. The Standard Soil Fertility Analysis shall include the following parameters:
  - (A) acidity,
  - (B) base saturation (by calculation),
  - (C) calcium,
  - (D) cation exchange capacity,
  - (E) copper,
  - (F) exchangeable sodium percentage (by calculation),
  - (G) magnesium.

- (H) manganese,
- (I) percent humic matter,
- (J) pH,
- (K) phosphorus,
- (L) potassium,
- (M) sodium, and
- (N) zinc.

(c) Engineering design documents. If required by G.S. 89C, a professional engineer shall prepare these documents. The following documents shall be provided to the Division:

[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that preparation of engineering design documents pursuant to this Paragraph constitutes practicing engineering under G.S. 89C. In addition, the North Carolina Board of Examiners for Engineers and Surveyors has determined that design of residential reclaimed irrigations systems owned by the property owner does not constitute engineering under G.S. 89C.]

- (1) engineering plans for the entire system, including treatment, storage, application, and utilization facilities and equipment except those previously permitted unless those previously permitted are directly tied into the new units or are critical to the understanding of the complete process;
- (2) specifications describing materials to be used, methods of construction, and means for ensuring quality and integrity of the finished product including leakage testing; and
- (3) engineering calculations including hydraulic and pollutant loading for each treatment unit, treatment unit sizing criteria, hydraulic profile of the treatment system, total dynamic head and system curve analysis for each pump, buoyancy calculations, and irrigation design.

(d) Site plans. If required by G.S. 89C, a professional land surveyor shall provide location information on boundaries and physical features not under the purview of other licensed professions. Site plans or maps shall be provided to the Division where the reclaimed water is applied to the land surface or otherwise used in a ground absorption manner depicting the location, orientation and relationship of facility components including:

[Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated December 1, 2005, that locating boundaries and physical features, not under the purview of other licensed professions, on maps pursuant to this Paragraph constitutes practicing surveying under G.S. 89C.]

- (1) a scaled map of the site, with topographic contour intervals not exceeding 10 feet or 25 percent of total site relief and showing all facility-related structures and fences within the treatment, storage and utilization areas, soil mapping units shown on all utilization sites;
- (2) the location of all wells (including usage and construction details if available), streams (ephemeral, intermittent, and perennial), springs, lakes, ponds, and other surface drainage features within 500 feet of all waste

treatment, storage, and utilization site(s) and delineation of the review and compliance boundaries;

- (3) setbacks as required by Rule .0701 of this Section; and

- (4) site property boundaries within 500 feet of all waste treatment, storage, and utilization site(s).

(e) A hydrogeologic description prepared by a licensed geologist, licensed soil scientist, or professional engineer if required by Chapters 89E, 89F, or 89C respectively of the subsurface to a depth of 20 feet or bedrock, whichever is less, shall be provided to the Division for systems treating industrial waste and any system with a design flow of over 25,000 gallons per day. A greater depth of investigation is required if the respective depth is used in predictive calculations. This evaluation shall be based on borings for which the numbers, locations, and depths are sufficient to define the components of the hydrogeologic evaluation. In addition to borings, other techniques may be used to investigate the subsurface conditions at the site. These techniques may include geophysical well logs, surface geophysical surveys, and tracer studies. This evaluation shall be presented in a report that includes the following components:

[Note: The North Carolina Board for Licensing of Geologists, via letter dated April 6, 2006, North Carolina Board for Licensing of Soil Scientists, via letter dated December 1, 2005, and North Carolina Board of Examiners for Engineers and Surveyors, via letter dated December 1, 2005, have determined that preparation of hydrogeologic description documents pursuant to this Paragraph constitutes practicing geology under G.S. 89E, soil science under G.S. 89F, or engineering under G.S. 89C.]

- (1) a description of the regional and local geology and hydrogeology based on research of available literature for the area;
- (2) a description, based on field observations of the site, of the site topographic setting, streams, springs and other groundwater discharge features, drainage features, existing and abandoned wells, rock outcrops, and other features that may affect the movement of the contaminant plume and treated wastewater;
- (3) changes in lithology underlying the site;
- (4) depth to bedrock and occurrence of any rock outcrops;
- (5) the hydraulic conductivity and transmissivity of the affected aquifer(s);
- (6) depth to the seasonal high water table;
- (7) a discussion of the relationship between the affected aquifers of the site to local and regional geologic and hydrogeologic features;
- (8) a discussion of the groundwater flow regime of the site prior to operation of the proposed facility and post operation of the proposed facility focusing on the relationship of the system to groundwater receptors, groundwater discharge features, and groundwater flow media; and

- (9) if the SHWT is within six feet of the surface, a mounding analysis to predict the level of the SHWT after wastewater application.
- (f) Property Ownership Documentation shall be provided to the Division consisting of:
- (1) legal documentation of ownership (i.e., contract, deed or article of incorporation);
  - (2) written notarized intent to purchase agreement signed by both parties, accompanied by a plat or survey map;
  - (3) an easement running with the land specifically indicating the intended use of the property and meeting the condition of 15A NCAC 02L .0107(f); or
  - (4) written notarized lease agreement signed by both parties, specifically indicating the intended use of the property, as well as a plat or survey map. Groundwater standards shall be met across the entire site, and a compliance boundary shall not be provided.
- (g) Public utilities shall submit a Certificate of Public Convenience and Necessity or a letter from the NC Utilities Commission stating that a franchise application has been received.
- (h) A complete chemical analysis of the typical reclaimed water to be utilized shall be provided to the Division for industrial waste. The analysis may include: Total Organic Carbon, 5-day Biochemical Oxygen Demand (BOD5), Chemical Oxygen Demand (COD), Nitrate Nitrogen (NO<sub>3</sub>-N), Ammonia Nitrogen (NH<sub>3</sub>-N), Total Kjeldahl Nitrogen (TKN), pH, Chloride, Total Phosphorus, Phenol, Total Volatile Organic Compounds, Escherichia coli (E. coli), Coliphage, Clostridium perfringens, Calcium, Sodium, Magnesium, Sodium Adsorption Ratio (SAR), Total Trihalomethanes, Toxicity Test Parameters and Total Dissolved Solids.
- (i) A project evaluation and a receiver site agronomic management plan (if applicable) and recommendations concerning cover crops and their ability to accept the proposed application rates of liquid, solids, minerals and other constituents of the wastewater shall be provided to the Division.
- (j) A residuals management plan as required by Rule .0802 of this Subchapter shall be provided to the Division. A written commitment is not required at the time of application; however, it shall be provided prior to operation of the permitted system.
- (k) A water balance shall be provided to the Division that determines required storage based upon the most limiting factor of the hydraulic loading based on either the most restrictive horizon or groundwater mounding analysis; or nutrient management based on either agronomic rates for a specified cover crop or crop management requirements.

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

#### **SECTION .0300 – EFFLUENT STANDARDS**

##### **15A NCAC 02U .0301 RECLAIMED WATER EFFLUENT STANDARDS**

(a) Expanded Use Class A reclaimed water treatment processes shall be documented to produce a tertiary quality effluent prior

to storage, distribution, or utilization that meets the parameter limits listed below:

- (1) monthly average BOD5 of less than or equal to 5 mg/l and a daily maximum BOD5 of less than or equal to 10 mg/l;
- (2) monthly average TSS of less than or equal to 5 mg/l and a daily maximum TSS of less than or equal to 10 mg/l;
- (3) monthly average NH<sub>3</sub> of less than or equal to 1 mg/l and a daily maximum NH<sub>3</sub> of less than or equal to 2 mg/l;
- (4) monthly geometric mean Escherichia coli (E. coli) level of less than or equal to 3/100 ml and a daily maximum E. coli level of less than or equal to 25/100 ml;
- (5) monthly geometric mean Coliphage level of less than or equal to 5/100 ml and a daily maximum Coliphage level of less than or equal to 25/100 ml;
- (6) monthly geometric mean Clostridium perfringens level of less than or equal to 5/100 ml and a daily maximum Clostridium perfringens level of less than or equal to 25/100 ml; and
- (7) maximum Turbidity of 5 Nephelometric Turbidity Units (NTUs).

(b) General Use Class B reclaimed water treatment process shall be documented to produce a tertiary quality effluent (filtered or equivalent) prior to storage, distribution, or utilization that meets the parameter limits listed below:

- (1) monthly average BOD5 of less than or equal to 10 mg/l and a daily maximum BOD5 of less than or equal to 15 mg/l;
- (2) monthly average TSS of less than or equal to 5 mg/l and a daily maximum TSS of less than or equal to 10 mg/l;
- (3) monthly average NH<sub>3</sub> of less than or equal to 4 mg/l and a daily maximum NH<sub>3</sub> of less than or equal to 6 mg/l;
- (4) monthly geometric mean E. coli level of less than or equal to 14/100 ml and a daily maximum E. coli level of less than or equal to 25/100 ml; and
- (5) maximum Turbidity of 10 NTUs.

(c) Reclaimed water produced by industrial facilities shall not be required to meet the above criteria if the reclaimed water is used in the industry's process and the area of use has no public access.

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

#### **SECTION .0400 – DESIGN STANDARDS**

##### **15A NCAC 02U .0401 DESIGN CRITERIA FOR WASTEWATER TREATMENT FACILITIES CONJUNCTIVE SYSTEMS**

(a) The requirements in this Rule apply to all new and expanding conjunctive facilities, as applicable.

(b) Continuous on-line monitoring and recording for Turbidity or particle count and flow shall be provided prior to storage, distribution or utilization.

(c) Effluent from the treatment facility shall not be discharged to the storage, distribution or utilization system if either the Turbidity exceeds 10 NTUs or if the permitted pathogen levels cannot be met. The facility shall have the ability to utilize alternate wastewater management options when the effluent quality is not sufficient.

(d) An automatically activated standby power source or other means to prevent improperly treated wastewater from entering the storage, distribution or utilization system shall be provided.

(e) There shall be a certified operator of a grade equivalent or greater than the facility classification on call 24 hours/day.

(f) No storage facilities are required as long as it can be demonstrated that other permitted means of disposal are available if the reclaimed water cannot be completely utilized. When provided, storage basins shall meet the design requirements in Rule .0402(g) of this Section.

(g) Reclaimed water irrigation system design shall not exceed the recommended precipitation rates in the soils report prepared pursuant to Rule .0201 of this Subchapter.

(h) Class A reclaimed water treatment facilities shall provide dual disinfection systems containing UV disinfection and chlorination or equivalent dual disinfection processes to meet pathogen control requirements.

(i) Class A reclaimed water treatment facilities shall provide documentation that the combined treatment and disinfection processes are capable of the following:

- (1) log 6 or greater reduction of E. coli;
- (2) log 5 or greater reduction of Coliphage; and
- (3) log 4 or greater reduction of Clostridium perfringens.

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

#### **15A NCAC 02U .0402 DESIGN CRITERIA FOR WASTEWATER TREATMENT FACILITIES – NON-CONJUNCTIVE SYSTEMS**

(a) The requirements in this Rule apply to all new and expanding non-conjunctive facilities, as applicable.

(b) Aerated flow equalization facilities shall be provided with a capacity based upon either a representative diurnal hydrograph or at least 25 percent of the daily system design flow.

(c) Dual facilities shall be provided for all essential treatment units.

(d) Continuous on-line monitoring and recording for Turbidity or particle count and flow shall be provided prior to storage, distribution, or utilization.

(e) Effluent from the treatment facility shall be discharged to a five-day side-stream detention pond if either the Turbidity exceeds 10 NTUs or if the permitted pathogen levels cannot be met. The facility shall have the ability to return the effluent in the five-day side-stream detention pond back to the head of the treatment facility.

(f) There shall be no public access to the wastewater treatment facility or the five-day side-stream detention pond. The five day side-stream detention pond shall have either a liner of natural material at least one foot in thickness and having a hydraulic

conductivity of no greater than 1 x 10<sup>-6</sup> centimeters per second when compacted, or a synthetic liner of sufficient thickness to exhibit structural integrity and an effective hydraulic conductivity no greater than that required of the natural material liner. Liner requirements of the five day side-stream detention pond or separation distances between the bottom of the five day side-stream detention pond and the groundwater table may be reduced if it can be demonstrated by predictive calculations or modeling methods acceptable to the Director, that construction and use of the five day side-stream detention pond will not result in contravention of assigned groundwater standards at the compliance boundary.

(g) The storage basin shall have either a liner of natural material at least one foot in thickness and having a hydraulic conductivity of no greater than 1 x 10<sup>-6</sup> centimeters per second when compacted, or a synthetic liner of sufficient thickness to exhibit structural integrity and an effective hydraulic conductivity no greater than that required of the natural material liner. Liner requirements of the storage basin or separation distances between the bottom of storage basin and the groundwater table may be reduced if it can be demonstrated by predictive calculations or modeling methods acceptable to the Director, that construction and use of the storage basin will not result in contravention of assigned groundwater standards at the compliance boundary.

(h) Automatically activated standby power supply onsite, capable of powering all essential treatment units under design conditions shall be provided.

(i) There shall be a certified operator of a grade equivalent or greater than the facility classification on call 24 hours/day.

(j) By-pass and overflow lines shall be prohibited.

(k) Multiple pumps shall be provided if pumps are used.

(l) A water-tight seal on all treatment/storage units or minimum of two feet protection from 100-year flood shall be provided.

(m) Reclaimed water irrigation system design shall not exceed the recommended precipitation rates in the soils report prepared pursuant to Rule .0202 of this Subchapter.

(n) A minimum of 30 days of residual storage shall be provided.

(o) Utilization areas shall be designed to maintain a one-foot vertical separation between the seasonal high water table and the ground surface.

(p) Influent pump stations shall meet the sewer minimum design criteria as provided in Section .0300 of Subchapter 02T.

(q) Class A reclaimed water treatment facilities shall provide dual disinfection systems containing UV disinfection or equivalent and chlorination or equivalent to provide pathogen control.

(r) Class A reclaimed water treatment facilities shall provide documentation that the combined treatment and disinfection processes are capable of the following:

- (1) log 6 or greater reduction of E. coli;
- (2) log 5 or greater reduction of Coliphage; and
- (3) log 4 or greater reduction of Clostridium perfringens.

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



**15A NCAC 02U .0403 DESIGN CRITERIA FOR DISTRIBUTION LINES**

(a) The requirements in this Rule apply to all new distribution lines.

(b) All reclaimed water valves, storage facilities and outlets shall be tagged or labeled to warn the public or employees that the water is not intended for drinking.

(c) All reclaimed water piping, valves, outlets and other appurtenances shall be color-coded, taped, or otherwise marked to identify the source of the water as being reclaimed water as follows:

(1) All reclaimed water piping and appurtenances shall be either colored purple (Pantone 522 or equivalent) and embossed or integrally stamped or marked "CAUTION: RECLAIMED WATER - DO NOT DRINK" or be installed with a purple (Pantone 522 or equivalent) identification tape or polyethylene vinyl wrap. The warning shall be stamped on opposite sides of the pipe and repeated every three feet or less.

(2) Identification tape shall be at least three inches wide and have white or black lettering on purple (Pantone 522 or equivalent) field stating "CAUTION: RECLAIMED WATER - DO NOT DRINK". Identification tape shall be installed on top of reclaimed water pipelines, fastened at least every 10 feet to each pipe length and run continuously the entire length of the pipe.

(3) Existing underground distribution systems retrofitted for the purpose of utilizing reclaimed water shall be taped or otherwise identified as in Subparagraphs (1) or (2) of this Paragraph. This identification need not extend the entire length of the distribution system but shall be incorporated within 10 feet of crossing any potable water supply line or sanitary sewer line.

(d) All reclaimed water valves and outlets shall be of a type, or secured in a manner, that permits operation by authorized personnel only.

(e) Hose bibs shall be located in locked, below grade vaults that shall be labeled as being of nonpotable quality. As an alternative to the use of locked vaults with standard hose bib services, hose bibs which can only be operated by a tool may be placed above ground and labeled as nonpotable water.

(f) Cross-Connection Control

(1) There shall be no direct cross-connections between the reclaimed water and potable water systems.

(2) Where both reclaimed water and potable water are supplied to a reclaimed water use area, a reduced pressure principle backflow prevention device or an approved air gap separation pursuant to 15A NCAC 18C shall be installed at the potable water service connection to the use area. The installation of

the reduced pressure principal backflow prevention device shall allow proper testing.

(3) Where potable water is used to supplement a reclaimed water system, there shall be an air gap separation, approved and regularly inspected by the potable water supplier, between the potable water and reclaimed water systems.

(g) Irrigation system piping shall be considered part of the distribution system for the purposes of this Rule.

(h) Reclaimed water distribution lines shall be located 10 feet horizontally from and 18 inches below any water line where practicable. Where these separation distances can not be met, the piping and integrity testing procedures shall meet water main standards in accordance with 15A NCAC 18C.

(i) Reclaimed water distribution lines shall not be less than 50 feet from a well unless the piping and integrity testing procedures meet water main standards in accordance with 15A NCAC 18C, but no case shall they be less than 25 feet from a private well.

(j) Reclaimed water distribution lines shall meet the separation distances to sewer lines in accordance with Rule .0305 of Subchapter 02T.

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

**SECTION .0500 – GENERAL UTILIZATION REQUIREMENTS**

**15A NCAC 02U .0501 RECLAIMED WATER UTILIZATION**

(a) Reclaimed water for land application to areas intended to be accessible to the public such as residential lawns, golf courses, cemeteries, parks, school grounds, industrial or commercial site grounds, landscape areas, highway medians, roadways and other similar areas shall meet the following criteria:

(1) The reclaimed water shall meet requirements for Class B reclaimed water in Rule .0301(b) of this Subchapter.

(2) Notification shall be provided by the permittee or its representative to inform the public of the use of reclaimed water (Non Potable Water) and that the reclaimed water is not intended for drinking.

(3) The reclaimed water generator shall develop and maintain a record keeping program for distribution of reclaimed water.

(4) The reclaimed water generator shall develop and maintain an education and approval program for all use of reclaimed water on property not owned by the generator.

(5) The reclaimed water generator shall develop and maintain a routine review and inspection program for all uses of reclaimed water on property not owned by the generator.

(6) The compliance boundary and the review boundary for groundwater shall be established at the irrigation area boundaries. No deed restrictions or easements shall be required to

be filed on adjacent properties. Land application of effluent shall be on property controlled by the generator unless an easement is provided in accordance with 15A NCAC 02L .0107 except in cases where a compliance boundary is not established.

- (7) Reclaimed water irrigated on designed soil matrix, such as artificial or natural turf athletic fields with subsurface drainage shall meet the following conditions:

(A) Annual hydraulic loading and maximum precipitation rates shall be designed to irrigate a volume not to exceed the design water capacity of the designed soil matrix above the drainage system.

(B) Outlets of the drainage system shall not be allowed to discharge directly to surface waters (intermittent or perennial) or to storm water conveyance systems that do not allow for infiltration prior to discharging to surface waters.

(b) Reclaimed water used for purposes such as industrial process water or cooling water, aesthetic purposes such as decorative ponds or fountains, fire fighting or extinguishing, make up water for chemical solutions, dust control, soil compaction for construction purposes, subsurface directional boring (not well drilling), street sweeping (not street washing), and individual vehicle washing for personal purposes shall meet the criteria below:

- (1) The reclaimed water shall meet requirements for Class B reclaimed water.
- (2) Notification shall be provided by the permittee or its representative to inform the public or employees of the use of reclaimed water (Non Potable Water) and that the reclaimed water is not intended for drinking.
- (3) Use of reclaimed water in decorative ponds or fountains shall require regular inspection by the Permittee to ensure permanent signs/notification and to ensure no discharge occurs from the fountains/ponds.
- (4) Use of reclaimed water for vehicle washing shall be conducted in a manner to ensure minimal surface runoff and the Permittee shall

provide educational information to the users of reclaimed water for vehicle washing.

- (5) The reclaimed water generator shall develop and maintain an education and approval program for all reclaimed water users.

- (6) The reclaimed water generator shall develop and maintain a record keeping program for distribution of reclaimed water.

- (7) The reclaimed water generator shall develop and maintain a routine review and inspection program for all reclaimed water users.

(c) Reclaimed water used for urinal and toilet flushing or fire protection in sprinkler systems located in commercial or industrial facilities shall be approved by the Director if the applicant can demonstrate to the Division that public health and the environment will be protected.

(d) Reclaimed water shall not be used for swimming pools, hot-tubs, spas or similar uses.

(e) Reclaimed water shall not be used for direct reuse as a raw potable water supply.

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

## **SECTION .0600 – BULK DISTRIBUTION OF RECLAIMED WATER**

### **15A NCAC 02U .0601 BULK DISTRIBUTION OF RECLAIMED WATER**

(a) Tank trucks and other equipment used to distribute reclaimed water shall be identified with advisory signs.

(b) Tank trucks used to transport reclaimed water shall not be used to transport potable water that is used for drinking or other potable purposes.

(c) Tank trucks used to transport reclaimed water shall not be filled through on-board piping or removable hoses that may subsequently be used to fill tanks with water from a potable water supply.

(d) The reclaimed water generator shall develop and maintain an education and approval program for all reclaimed water users.

(e) The reclaimed water generator shall develop and maintain a record keeping program for bulk distribution of reclaimed water.

(f) The reclaimed water generator shall develop and maintain a routine review and inspection program for all reclaimed water users.

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

## **SECTION .0700 – SETBACKS**

### **15A NCAC 02U .0701 SETBACKS**

(a) Treatment and storage facilities associated with systems permitted under this Subchapter shall adhere to the setback requirements in Section .0500 of Subchapter 02T except as provided in this Rule.

(b) Final effluent storage facilities meeting the design criteria of Rule .0402(g) shall meet all setback requirements for riparian buffer rules pursuant to 15A NCAC 02B as well as the following setbacks:

<u>Any private or public water supply source</u>	<u>feet</u> <u>100</u>
<u>Surface waters (streams – intermittent and perennial, perennial waterbodies and wetlands)</u>	<u>50</u>
<u>Any well with exception of monitoring wells</u>	<u>100</u>

- Any property line 50  
Otherwise storage facilities shall meet the provisions of Paragraph (a) of this Rule.  
(c) The setbacks for utilization areas where reclaimed water is discharged to the ground shall be as follows:  
feet  
Surface waters (streams – intermittent and perennial, perennial waterbodies, and wetlands) not classified SA 25  
Surface waters (streams – intermittent and perennial, perennial waterbodies, and wetlands) classified SA 100  
Any well with exception to monitoring wells 100  
(d) No setback between the application area and property lines shall be required.

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

## **SECTION .0800 – OPERATIONAL PLANS**

### **15A NCAC 02U .0801 OPERATION AND MAINTENANCE PLAN**

An Operation and Maintenance Plan shall be maintained by the permittee for all reclaimed water systems. The plan shall:

- (1) describe the operation of the system in sufficient detail to show what operations are necessary for the system to function and by whom the functions are to be conducted;
- (2) provide a map of all distribution lines and record drawings of all utilization systems under the permittee's control;
- (3) describe anticipated maintenance of the system;
- (4) include provisions for safety measures including restriction of access to the site and equipment, as appropriate; and
- (5) include spill control provisions including:
  - (a) response to upsets and bypasses including control, containment, and remediation; and
  - (b) contact information for plant personnel, emergency responders, and regulatory agencies.

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

### **15A NCAC 02U .0802 RESIDUALS MANAGEMENT PLAN**

A Residuals Management Plan shall be maintained for all reclaimed water systems that generate residuals. The plan shall include the following:

- (1) a detailed explanation as to how the residuals will be collected, handled, processed, stored and disposed;
- (2) an evaluation of the residuals storage requirements for the treatment facility based upon the maximum anticipated residuals production rate and ability to remove residuals;
- (3) a permit for residuals utilization, a written commitment to the Permittee of a Division approved residuals disposal/utilization program accepting the residuals which

demonstrates that the program has adequate capacity to accept the residuals, or that an application for approval has been submitted; and

- (4) if oil, grease, grit, or screenings removal and collection is a designed unit process, a detailed explanation as to how the oil/grease will be collected, handled, processed, stored and disposed.

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

## **SECTION .0900 – LOCAL PROGRAM APPROVAL**

### **15A NCAC 02U .0901 LOCAL PROGRAM APPROVAL**

(a) Municipalities, counties, local boards or commissions, water and sewer authorities, or groups of municipalities and counties may apply to the Division for approval of programs for permitting construction, modification, and operation of reclaimed water distribution lines and permitting users under their authority, with the exception of wetland augmentation systems. Construction of and modifications to treatment works, including pump stations for reclaimed water distribution, shall require Division approval. Permits issued by approved local programs shall serve in place of permits issued by the Division.  
(b) Applications. Applications for approval of local programs shall provide adequate information to assure compliance with the requirements of this Subchapter and the following:

- (1) The program application shall include two copies of the permit application forms, intended permits including types of uses, minimum design criteria (specifications), flow chart of permitting, inspection and certification procedures, and other relevant documents to be used in administering the local program.
- (2) Certification that the local authority has procedures in place for processing permit applications, setting permit requirements, enforcement, and penalties that are compatible with those for permits issued by the Division.
- (3) Any future amendments to the requirements of this Subchapter shall be incorporated into the local program within 60 days of the effective date of the amendments.
- (4) A North Carolina registered Professional Engineer shall be on the staff of the local

program or retained as a consultant to review unusual situations or designs and to answer questions that arise in the review of proposed projects. The local program shall also provide staff or retain a consultant to review all other non-engineering related program areas.

- (5) Each project permitted by the local program shall be inspected for compliance with the requirements of the local program at least once during construction.

(c) Approval of Local Programs. The Division staff shall acknowledge receipt of an application for a local program in writing, review the application, notify the applicant of additional information that may be required, and make a recommendation to the Commission on the acceptability of the proposed local program.

(d) All permitting actions, bypasses from distribution lines, enforcement actions, and monitoring of the distribution system shall be summarized and submitted to the Division at a minimum on an annual basis on forms provided by the Division. The report shall also provide a listing and summary of all enforcement actions taken or pending during the year. The report shall be submitted within 30 days after the end of each year.

(e) A copy of all program documents such as specifications, permit applications, permit shells and shell certification forms shall be submitted to the Division on an annual basis along with a summary of any other program changes. Program changes to note include staffing, processing fees, and ordinance revisions.

(f) Modification of a Local Program. After a local program has been approved by the Commission, any modification of the program procedures or requirements specified in this Rule shall be approved by the Director to assure that the procedures and requirements remain at least as stringent as the state-wide requirements in this Subchapter.

(g) Appeal of Local Decisions. Appeal of individual permit denials or issuance with conditions the permit applicant finds unacceptable shall be made according to the approved local ordinance. The Commission shall not consider individual permit denials or issuance with conditions to which a Permittee objects. This Paragraph does not alter the enforcement authority of the Commission as specified in G.S. 143-215.1(f).

*Authority G.S. 143-215.1; 143-215.3(a); S.L. 2006-250.*

## SECTION .1000 – RESERVED FOR FUTURE CODIFICATION

## SECTION .1100 – WETLANDS AUGMENTATION

### 15A NCAC 02U .1101 WETLANDS AUGMENTATION

(a) Wetland augmentation shall be limited as follows:

- (1) Wetland augmentation shall be limited to pine flat and hardwood flat wetlands as defined in the most current version of the N.C. Wetland Assessment Method (NC WAM) User Manual, excluding riparian zones.
- (2) Reclaimed water discharge to Salt Water Wetlands (SWL) or Unique Wet Lands

(UWL), as defined in 15A NCAC 02B .0101, is not permitted under these rules.

- (3) Reclaimed water discharge to wetlands areas shall be limited to times when the depth to groundwater is greater than or equal to one foot.

(b) In addition to the requirements established in 15A NCAC 02U .0201 and .0202, as applicable, all new and expanding wetlands augmentation facilities, as applicable, shall:

- (1) Identify the classification of the existing wetlands according to the most current version of the N.C. Wetlands Assessment Method (NC WAM) User Manual and the North Carolina Natural Heritage Program (NCNHP).
- (2) Identify the existing beneficial uses of the reclaimed water to the wetlands in accordance with 15A NCAC 02B .0231, and support any demonstration of net environmental benefit.
- (3) Determine the hydrologic regime of the wetlands, including depth and duration of inundation, and average monthly water level fluctuations. An estimated monthly water budget shall be provided by the applicant and compared to actual conditions during operation.
- (4) Identify class of reclaimed water to be discharged, associated parameter concentrations, and annual loading rates to the wetlands.
- (5) Determine whether the wetland occurs in a ground water recharge or discharge area.
- (6) Provide baseline monitoring information for wetlands sufficient to allow determination of reference conditions, to be performed for at least one representative year prior to initiation of discharge.
- (7) Provide a project evaluation and receiver site agronomic plan that shall include a hydraulic loading recommendation based on the soils report, hydrogeologic description, agronomic investigation, wetland type, local topography, aquatic life, wildlife, and all other investigative results to support that unacceptable changes to the biological criteria will not occur, and net environmental benefits are gained. Hydraulic loading recommendations shall reflect seasonal changes to wetlands including restrictions during times of high water table levels.
- (8) For non-conjunctive wetlands augmentation systems, the Permittee shall provide 200 percent of the land requirements based on the recommended hydraulic loading rate. After five years of operation the Permittee may request for a reduction in the additional land requirement provided that operational data supports that sufficient utilization capacity exists for the reclaimed water generator.

- (9) 10 percent of the land requirements shall remain in a natural state to be used as a basis of comparison to the wetlands receiving reclaimed water.
- (10) For application of reclaimed water exhibiting parameter concentrations greater than 100 percent of the groundwater standards, provide a site-specific hydrogeologic investigation (i.e., evaluation of wetlands/groundwater interaction, groundwater recharge/discharge, gradient, project proximity to water supply wells, etc.) to show that hydrogeologic conditions are adequate to prevent degradation of groundwater quality and demonstrate through hydrogeological modeling that groundwater standards will not be exceeded at the compliance boundary.

(c) All renewal applications for wetlands augmentation facilities, shall submit documentation that the project continues to function as designed and that the net environmental benefit aspects remain applicable.

(d) Reclaimed water utilized for wetlands augmentation shall meet the following reclaimed water effluent standards:

- (1) Reclaimed water discharged to natural wetlands shall be treated to Class B reclaimed water standards.
- (2) In addition to water quality requirements associated with Class B reclaimed water, reclaimed water discharged to wetlands shall not exceed the following concentrations, unless net environmental benefits are provided:
  - (A) Total Nitrogen (as Nitrogen) of 4.0 mg/l; and
  - (B) Total Phosphorus (as Phosphorus) of 1 mg/l.
- (3) Metal concentrations in reclaimed water discharged to wetlands shall not exceed North Carolina surface water quality standards, unless acute whole effluent toxicity testing using an appropriate organism demonstrates absence of toxicity.

(e) Reclaimed water facilities utilizing wetlands augmentation, shall meet the criteria below:

- (1) Notification shall be provided by the permittee or its representative to inform the public of the use of reclaimed water (Non Potable Water) and that the reclaimed water is not intended for drinking.
- (2) The reclaimed water generator shall develop and maintain a wetlands monitoring program. At a minimum, this monitoring will be conducted during the first five growing seasons after initiation of the application of reclaimed water, after which the applicant may apply for reduced monitoring. The monitoring requirements must include the following items:

- (A) vegetation, macroinvertebrates, amphibians, fish, birds, and threatened or endangered species surveys;
- (B) water chemistry;
- (C) continuous surface water and ground water depth readings; and
- (D) groundwater monitoring plan except for those projects receiving reclaimed water characterized by average annual parameter concentrations less than or equal to 50 percent of ground water quality criteria, and less than 50 percent of required surface water discharge concentrations.

(3) The reclaimed water generator shall develop and maintain an education program for all users of reclaimed water on property not owned by the generator.

(4) The reclaimed water generator shall develop and maintain a routine review and inspection program for the wetlands augmentation system.

(5) The compliance boundary and the review boundary for groundwater shall be established at the property line. No deed restrictions or easements shall be required to be filed on adjacent properties. Land application of reclaimed water shall be on property controlled by the generator unless a contractual agreement is provided in accordance with 15A NCAC 02L .0107 except in cases where a compliance boundary is not established.

*Authority G.S. 143-215.1; 143-215.3(a); S.L. 2006-250;*

## **SECTION .1200 – RESERVED FOR FUTURE CODIFICATION**

## **SECTION .1300 – RESERVED FOR FUTURE CODIFICATION**

## **SECTION .1400 – IRRIGATION TO FOOD CHAIN CROPS**

### **15A NCAC 02U .1401 IRRIGATION TO FOOD CHAIN CROPS**

(a) Irrigation to food chain crops shall be limited as follows:

- (1) Reclaimed water utilized for direct or indirect contact irrigation of food chain crops that will be peeled, skinned, cooked or thermally processed before consumption shall be treated to at least Class B reclaimed water standards.
- (2) For the purposes of this Rule, tobacco is not considered a food chain crop.
- (3) Reclaimed water shall not be utilized for direct contact irrigation of food chain crops that will not be peeled, skinned, cooked or thermally

processed before consumption except as approved in Subparagraph (5) of this Paragraph.

(4) Reclaimed water utilized for indirect contact irrigation of food chain crops that will not be peeled, skinned, cooked or thermally processed before consumption shall be treated to Class A reclaimed water standards.

(5) If requested, the Department shall authorize special demonstration projects to collect and present data related to the direct application of reclaimed water on crops that are not peeled, skinned, cooked, or thermally processed before consumption. Crops produced during such demonstration projects may be used as animal feed or may be thermally processed or cooked for human consumption. If the applicant, based on the data collected, demonstrates to the Department that public health will be protected if their reclaimed water is directly applied to crops which are not peeled, skinned, cooked, or thermally processed, the Department shall waive the prohibition described in Subparagraph (3) of this Paragraph for that project. When considering such demonstration projects, the Department shall seek the advice of the Department of Agriculture.

(b) In addition to the requirements established in Rule .0201 or Rule .0202, as applicable, all new and expanding irrigation to food chain crops systems shall:

(1) Submit a representative soil analysis for standard soil fertility for each field to be irrigated. A Standard Soil Fertility Analysis shall include the following parameters: Acidity, Base Saturation (by calculation), Calcium, Cation Exchange Capacity, Copper, Exchangeable Sodium Percentage (by calculation), Magnesium, Manganese, Percent Humic Matter, pH, Phosphorus, Potassium, Sodium, and Zinc.

(2) When a water balance is required by Rule .0202(k), the water balance shall include seasonal water requirements for the crops.

(3) For irrigation sites not owned by the Permittee, a notarized land owner agreement shall be provided to the Division. The land owner agreement shall include the following:

(A) a description of the approved uses and conditions for use of the reclaimed water consistent with the requirements of this Rule;

(B) a condition requiring the reclaimed water supplier shall provide the landowner with the results of sampling performed to document compliance with the reclaimed water effluent standards; and

(C) a condition requiring the landowner to report to the Permittee any use of the reclaimed water inconsistent with the uses in the agreement.

(c) All renewal applications for irrigation to food chain crop systems shall:

(1) Submit a representative soil analysis for standard soil fertility for each field to be irrigated. A Standard Soil Fertility Analysis shall include the following parameters: Acidity, Base Saturation (by calculation), Calcium, Cation Exchange Capacity, Copper, Exchange Sodium Percentage (by calculation), Magnesium, Manganese, Percent Humic Matter, pH, Phosphorus, Potassium, Sodium, and Zinc.

(2) Submit the inventory of commercial agricultural operations using reclaimed water to irrigate food chain crops required in Subparagraph (d)(7) of this Rule.

(3) For irrigation sites not owned by the Permittee, a notarized land owner agreement pursuant to Subparagraph (b)(3) of this Rule,

(d) Reclaimed water facilities providing reclaimed water for the irrigation of food chain crops shall meet the criteria below:

(1) Crops irrigated by direct contact with reclaimed water shall not be harvested within 24 hours of irrigation with reclaimed water.

(2) Notification at the utilization site shall be provided by the permittee or its representative to inform the public of the use of reclaimed water (Non Potable Water) and that the reclaimed water is not intended for drinking.

(3) The reclaimed water generator shall develop and maintain a record keeping program for distribution of reclaimed water.

(4) The permittee shall develop and maintain an education program for users of reclaimed water for irrigation to food chain crops.

(5) The reclaimed water generator shall provide all landowners receiving reclaimed water for irrigation of food chain crops a summary of all reclaimed water system performance as required in G.S. 143-215.1C.

(6) The reclaimed water generator shall develop and maintain a routine review and inspection program for all irrigation to food chain crop systems.

(7) The Permittee shall maintain an inventory of commercial agricultural operations using reclaimed water to irrigate food chain crops for each year of operation. The inventory shall be maintain be for a minimum of five years. The inventory of food chain crop irrigation shall include the following:

(A) name of the agricultural operation;

(B) name and telephone number of the owner or operator of the agricultural operation;

- (C) address of the agricultural operation;
- (D) food chain crops irrigated with reclaimed water;
- (E) type of application (e.g., irrigation) method used; and
- (F) approximate area under irrigation on which food chain crops are grown.

*Authority G.S. 143-215.1; 143-215.3(a); S.L. 2006-250.*

## TITLE 19A – DEPARTMENT OF TRANSPORTATION

*Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Transportation intends to amend the rule cited as 19A NCAC 02D .0607.*

**Proposed Effective Date:** June 1, 2010

**Public Hearing:**

**Date:** March 2, 2010

**Time:** 2:00 p.m. – 3:00 p.m.

**Location:** North Carolina Department of Transportation, 750 North Greenfield Parkway, Room 161, Garner, NC 27529

**Reason for Proposed Action:** *The purpose of the proposed revision to the Administrative Code is to allow for Sunday travel, update the code to reflect changes in operating procedures, and to make clarifications and technical corrections.*

**Procedure by which a person can object to the agency on a proposed rule:** *Any person objecting to said rule change may contact Tammy C. Denning at North Carolina Department of Transportation, Oversize/Overweight Permit Unit, 1425 Rock Quarry Road, Suite 109, Raleigh, NC 27610 or tcdenning@ncdot.gov.*

**Comments may be submitted to:** *Tammy C. Denning, North Carolina Department of Transportation, Oversize/Overweight Permit Unit, 1425 Rock Quarry Road, Suite 109, Raleigh, NC 27610; phone (919) 733-4740; fax (919) 715-7363; email tcdenning@ncdot.gov*

**Comment period ends:** April 16, 2010

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 02 - DIVISION OF HIGHWAYS

### SUBCHAPTER 02D - HIGHWAY OPERATIONS

#### SECTION .0600 – OVERSIZE-OVERWEIGHT PERMITS

##### 19A NCAC 02D .0607 PERMITS-WEIGHT, DIMENSIONS AND LIMITATIONS

(a) Vehicle/vehicle combinations with non-divisible overwidth loads are limited to a maximum width of 15 feet. After review of documentation of variances, the State Highway Administrator or his designee may authorize the issuance of a permit for movement of loads in excess of 15 feet wide in accordance with 19A NCAC 02D .0600 et seq. Exception: A mobile/modular unit with maximum measurements of 16' wide unit and a 3" gutter edge may be issued a permit. If blades of construction equipment or front end loader buckets cannot be angled to extend no more than 14' across the roadway, they shall be removed. A blade, bucket or other attachment that is an original part of the equipment as manufactured may be hauled with the equipment without being considered a divisible load ~~except as provided in this Rule. load-load.~~ A 14' wide mobile/modular home unit with a roof overhang not to exceed a total of 12" may be transported with a bay window, room extension, or porch providing the protrusion does not extend beyond the maximum 12" of roof overhang or the total width of overhang on the appropriate side of the home. An extender shall be placed on the front and rear of the mobile home with a length to extend horizontally equal to but not beyond the extreme outermost edge of the home's extension. The extenders shall have retro-reflective sheeting, a minimum of 4", which is required to be Type III high intensity (encapsulated lens) or Type IV high performance (prismatic) with alternating fluorescent yellow and black diagonal stripes sloping towards the outside of the home with a minimum area of 288 square inches. The bottom of the extenders shall be 6' to 8' above the road surface with a 5" amber flashing beacon mounted on the top of each extender. Authorization to move commodities wider than 15 feet in width may be denied if considered by the issuing agent to be unsafe to the traveling public or if the highway cannot accommodate the move due to width.

(b) A single trip permit shall ~~not~~ be issued vehicle specific not to exceed a width in excess of 15 feet for all movements unless authorized by the State Highway Administrator or his designee after analysis of the proposed load and evaluation of the proposed route of travel. Exception: A mobile/modular unit with maximum measurements of 16' wide unit and a 3" gutter edge may be issued a permit. Permits for house moves may be issued as specified in G.S. 20-356 through G.S. 20-372.

(c) An annual oversize/overweight permit may be issued as follows:

- (1) for unlimited movement without an escort on all North Carolina highways, where permitted by the posted road and bridge limits, for vehicle/vehicle combinations transporting general non-divisible commodities which has a minimum extreme wheelbase of 51 feet and which does not exceed: width of 12 feet; height of 13 feet, 6 inches; length of 75 feet; gross weight of 90,000 pounds; and axle weights of 12,000 pounds steer axle, 25,000 pounds single axle, 50,000 pounds tandem axle, and 60,000 pounds for a three or more axle grouping.
- (2) for unlimited movement without the requirement of an escort on all North Carolina highways, where permitted by the posted road and bridge limits, for four or five axle self-propelled equipment or special mobile equipment capable of traveling at a highway speed of 45 miles per hour which has a minimum wheel base of 30 feet and which does not exceed: width of 10 feet; height of 13 feet, 6 inches; length of 45 feet with front and rear overhang not to exceed a total of 10 feet; gross weight of 90,000 pounds; axle weights of 20,000 pounds single axle; 50,000 pounds tandem axle; and 60,000 pounds for a three or more axle grouping.
- (3) for unlimited movement with the requirement of an escort vehicle on all North Carolina highways, where permitted by the posted bridge and load limits, for vehicles/vehicle combinations transporting farm equipment and which does not exceed: a width of 14 feet; a height of 13 feet 6 inches; and a weight as set forth in G.S. 20-118(b)(3).
- (4) for mobile/modular homes with a maximum height of 13' 6" being transported from the manufacturer to an authorized North Carolina mobile/modular home dealership are an exception and shall be permitted for a width not to exceed a 14' unit with an allowable roof overhang not to exceed a total of 12" or a 16' wide unit with a 3" gutter edge. These mobile/modular homes shall be authorized to travel on designated routes approved by the Department of Transportation considering construction work zones, highway lane widths, origin and destination or other factors to ensure safe movement.
- (5) to the North Carolina licensed mobile/modular home retail dealer and the transporter for delivery of mobile/modular homes not to exceed a maximum width of a 14' unit with a total roof overhang not to exceed 12" and a height of 13' 6". The annual permit shall be valid for delivery of mobile/modular homes

within a maximum 25-mile radius of the dealer location. Confirmation of destination for delivery is to be carried in the permitted towing unit readily available for law enforcement inspection.

(d) The maximum weight permitted on a designated route is determined by the bridge capacity of bridges to be crossed during movement. The route traveled from a specific origin to a specific destination must be included within ~~a single one~~ permitted route of travel. Moves exceeding weight limits for highways or bridge structures may be denied if considered by the issuing agent to be unsafe or if they may cause damage to such highway or structure. A surety bond may be required as determined by the issuing agent to cover the cost of potential damage to pavement, bridges or other damages incurred during the permitted move.

(e) The standards for analysis, extreme wheelbase requirements, weight distribution and axle configuration requirements are based on a Department of Transportation engineering study with consideration of the infrastructure being crossed along the permitted route of travel. The maximum permissible weights are as follows:

- (1) The maximum single trip and annual permit weight allowed for a specific vehicle or vehicle combination not including off highway construction equipment without an engineering study is:

Steer Axle	12,000 lbs.
Single axle	25,000 lbs.
2 axle tandem	50,000 lbs.
3 or more axle group	60,000 lbs.
3 axle single vehicle may have a maximum gross weight up to 70,000 lbs. based on the engineering study.	
4 axle single vehicle may have a maximum gross weight up to 90,000 lbs. based on the engineering study.	
5 axle single vehicle may have a maximum gross weight up to 94,500 lbs. based on the engineering study.	
5 axle vehicle combination may have a maximum gross weight up to 112,000 lbs. based on the engineering study.	
6 axle single vehicle may have a maximum gross weight up to 108,000 lbs. based on the engineering study.	
6 axle vehicle combination may have a maximum gross weight up to 120,000 lbs. based on the engineering study.	
7 axle single vehicle may have a maximum gross weight up to 122,000 lbs. based on the engineering study.	
7 axle vehicle combination may have a maximum gross weight up to 132,000 lbs. based on the engineering study.	
7 or more axle vehicle combination with a gross weight exceeding 132,000 lbs. requires the engineering study.	



- (2) The maximum permit weight allowed for self propelled off highway construction equipment with low pressure/flotation tires is:

Single axle	37,000 pounds
Tandem axle	50,000 pounds

2 axle single vehicle may have a maximum gross weight up to 70,000 lbs. based on the engineering study.

3 axle single vehicle may have a maximum gross weight up to 80,000 lbs. based on the engineering study.

4 axle single vehicle may have a maximum gross weight up to 90,000 lbs. based on the engineering study.

- (3) A vehicle combination consisting of a power unit and trailer hauling a sealed ship container may qualify for a specific route overweight permit not to exceed 94,500 lbs. provided the vehicle:

- (A) Is going to or from a designated seaport (to include in state and out of state) and has been or shall be transported by marine shipment;
- (B) Is licensed for the maximum allowable weight for a 51' extreme wheelbase measurement specified in G.S. 20-118;
- (C) Does not exceed maximum dimensions of width, height and length specified in Chapter 20 of the Motor Vehicle Law;
- (D) Is a vehicle combination with at least five axles;
- (E) Has proper documentation (shippers bill of lading or trucking bill of lading) of sealed commodity being transported available for law enforcement officer inspection.

(f) Overlength permits shall be limited as follows:

- (1) Single trip permits are limited to 105 feet inclusive of the towing vehicle. Approval may be given by the Central Permit Office for permitted loads in excess of 105 feet after review of geographic route of travel, consideration of local construction projects and other dimensions of the load. Mobile/modular home units shall not exceed a length of 80 feet inclusive of a 4 foot trailer tongue. Total length inclusive of the towing vehicle is 105 feet.
- (2) Annual (blanket) permits shall not be issued for lengths to exceed 75 feet. Mobile/modular home permits may be issued for a length not to exceed 105 feet.
- (3) Front overhang may not exceed the length of 3' specified in Chapter 20 unless if transported otherwise would create a safety hazard. If the front overhang exceeds 3', an overlength permit may be issued.

(g) An Overheight Permit Application for heights in excess of 14' must be submitted in writing to the Central Permit Office at least two working days prior to the anticipated date of movement. The issuance of the permit does not imply nor guarantee the clearance for the permitted load and all vertical clearances shall be checked by the permittee prior to movement underneath.

(h) ~~The move~~ Movement is to be made between sunrise and sunset Monday through ~~Saturday with no move to be made on Sunday.~~ Saturday. Sunday travel may be authorized from sunrise to sunset after consideration of the overall permitted dimensions. Exception: A 16' wide mobile/modular home unit with a maximum three inch gutter edge is restricted to travel from 9:00 a.m. to 2:30 p.m. Monday through Saturday. A 16' wide unit is authorized to continue operation after 2:30 p.m., but not beyond sunset, when traveling on an approved route as determined by an engineering study and the unit is being exported out-of-state. Additional time restrictions may be set by the issuing office if it is in the best interest for safety or to expedite flow of traffic. No movement is permitted for a vehicle/vehicle combination after noon on the weekday preceding the six holidays of New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day and no movement is permitted until noon on the weekday following a holiday. If the observed holiday falls on the weekend, travel is restricted from 12:00 noon on the preceding Friday through 12:00 noon on the following Monday. Continuous travel (24 hr/7 day/365 days a year) is authorized for any vehicle/vehicle combination up to but not to exceed a permitted gross weight of 112,000 lbs. provided the permitted vehicle has no other over legal dimension of width, height or length included in the permitted move. Exception: self-propelled equipment may be authorized for continuous travel with overhang (front or rear or both) not to exceed a total of 10 feet provided overhang is marked with high intensity glass bead retro-reflective sheeting tape measuring 2" by 12" to be displayed on both sides and the end of the extension and on each side of the self-propelled vehicle 24" from the road surface at nearest feasible center point between the steer and drive axles. Any rear overhang must display a temporarily mounted brake light and a flashing amber light, 8" in diameter with a minimum candlepower of 800 watts. Permitted vehicles owned or leased by the same company or permitted vehicles originating at the same location shall travel at a distance of not less than two miles apart. Convoy travel is not authorized except as directed by authorized law enforcement escort.

(i) The speed of permitted moves shall be that which is reasonable and prudent for the load, considering weight and bulk, under conditions existing at the time; however, the maximum speed shall not exceed the posted speed limit. A towing unit and mobile/modular home combination shall not exceed a maximum speed of 60 miles per hour. The driver of the permitted vehicle shall avoid creating traffic congestion by periodically relinquishing the traffic way to allow the passage of following vehicles when a build up of traffic occurs.

(j) Additional safety measures are as follows:

- (1) A yellow banner measuring a total length of 7' x 18" high bearing the legend "Oversize Load" in 10" black letters 1.5 inches wide brush

stroke shall be displayed in one or two pieces totaling the required length on the front and rear bumpers of a permitted vehicle/vehicle combination with a width of ~~10' or greater~~ greater than 10' wide. A towing unit mobile/modular home combination shall display banners of the size specified bearing the legend "Oversize-----ft. Load" identifying the nominal width of the unit in transport. Escort vehicles shall display banners as previously specified with the exception of length to extend the entire width of the bumpers;

- (2) Red or orange flags measuring 18" square shall be displayed on all sides at the widest point of load for all loads in excess of 8' 6" wide but the flags shall be so mounted as to not increase the overall width of the load;
- (3) All permitted vehicles/vehicle combinations shall be equipped with tires of the size specified and the required number of axles equipped with operable brakes in good working condition as provided in North Carolina Statutes and Motor Carrier and Housing and Urban Development (HUD) regulations.
- (4) Rear view mirrors and other safety devices on towing units attached for movement of overwidth loads shall be removed or retracted to conform with legal width when unit is not towing/hauling such vehicle or load;
- (5) Flashing amber lights shall be used as determined by the issuing permit office.

(k) The object to be transported shall not be loaded or parked, day or night, on the highway right of way without specific permission from the office issuing the permit after confirmation of an emergency condition.

(l) No move shall be made when weather conditions render visibility less than 500 feet for a person or vehicle. Moves shall not be made when highway is covered with snow or ice or at any time travel conditions are considered unsafe by the Division of Highways, State Highway Patrol or other Law Enforcement Officers having jurisdiction. Movement of a mobile/modular unit exceeding a width of 10' shall be prohibited when wind velocities exceed 25 miles per hour in gusts.

(m) All obstructions, including traffic signals, signs and utility lines shall be removed immediately prior to and replaced immediately after the move at the expense of the mover, provided arrangements for and approval from the owner is obtained. In no event are trees, shrubs, or official signs to be cut, trimmed or removed without personal approval from the Division of Highways District Engineer having jurisdiction over the area involved. In determining whether to grant approval, the district engineer shall consider the species, age and appearance of the tree or shrub in question and its contribution to the aesthetics of the immediate area.

(n) The Department of Transportation may require escort vehicles to accompany oversize or overweight loads. The weight, width of load, width of pavement, height, length of

combination, length of overhang, maximum speed of vehicle, geographical route of travel, weather conditions and restricted time of travel shall be considered to determine escort requirements.

*Authority G.S. 20-119; 136-18(5); Board of Transportation Minutes for February 16, 1977 and November 10, 1978; Eff. July 1, 1978.*

## **TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS**

### **CHAPTER 46 - BOARD OF PHARMACY**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Pharmacy intends to adopt the rule cited as 21 NCAC 46 .2513.*

**Proposed Effective Date:** *June 1, 2010*

**Public Hearing:**

**Date:** *April 19, 2010*

**Time:** *4:00 p.m.*

**Location:** *North Carolina Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517*

**Reason for Proposed Action:** *To adopt rules necessary to implement the Drug, Supplies and Medical Device Repository Program adopted by Session Law 2009-423, which was effective October 1, 2009.*

**Procedure by which a person can object to the agency on a proposed rule:** *Any person may object to the proposed amendment by attending the public hearing on April 19, 2010 and/or by submitting a written objection by April 19, 2010 to Jay Campbell, Executive Director, North Carolina Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517, fax (919) 246-1056, email jcampbell@ncbop.org. The North Carolina Board of Pharmacy is interested in all comments pertaining to the proposed rule. All persons interested and potentially affected by the proposal are strongly encouraged to read this entire notice and make comments on the proposed rule.*

**Comments may be submitted to:** *Jay Campbell, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517; fax (919) 246-1056; email jcampbell@ncbop.org*

**Comment period ends:** *April 19, 2010*

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 ( $\geq$ \$3,000,000)  
☒ None

**SECTION .2500 - MISCELLANEOUS PROVISIONS**

**21 NCAC 46 .2513 DRUG, SUPPLIES AND MEDICAL DEVICE REPOSITORY PROGRAM**

(a) This Rule establishes the Drug, Supplies and Medical Device Repository Program as specified in G.S. 90-85.44.

(b) Definitions. Any term defined in G.S. 90-85.44(a) shall have the same definition under this Rule.

(c) Requirements For a Pharmacy to Participate in Accepting and Dispensing Donated Drugs, Supplies and Medical Devices.

- (1) Any pharmacy or free clinic holding a valid, current North Carolina pharmacy permit may accept and dispense donated drugs, supplies and medical devices in accordance with the requirements of this Rule and G.S. 90-85.44.
- (2) A dispensing physician registered with the Board in compliance with G.S. 90-85.21(b) and providing services to patients of a free clinic that does not hold a pharmacy permit may accept and dispense donated drugs, supplies and medical devices in accordance with the requirements of this Rule and G.S. 90-85.44.
- (3) A participating pharmacy or dispensing physician shall notify the Board in writing of such participation at the time participation begins and annually on its permit or registration renewal application.
- (4) A participating pharmacy or dispensing physician that ceases participation in the program shall notify the Board in writing within 30 days of doing so and shall submit a written report detailing the final disposition of all donated drugs, supplies and medical devices held by the participating pharmacy or dispensing physician.

(d) Drugs, Supplies and Medical Devices Eligible for Donation.

- (1) A participating pharmacy or dispensing physician may accept donation of a drug, medical device or supply meeting the criteria specified in G.S. 90-85.44(c).
- (2) The following categories of drugs, supplies and medical devices may not be accepted by a

participating pharmacy or dispensing physician:

- (A) A controlled substance, unless acceptance of a donated controlled substance is authorized by federal law.
- (B) Any prescription drug or medical device subject to a restricted distribution system mandated by the United States Food and Drug Administration.
- (C) Biologicals, unless donated by the manufacturer or a prescription drug wholesaler. A pharmacy may donate a biological if the biological has been stored according to the manufacturer's labeling and has not previously been dispensed to a patient or other person.
- (D) Compounded drugs or parenteral admixtures.
- (E) Any drug requiring refrigerated storage, unless donated by either (a) the manufacturer, (b) a prescription drug wholesaler or (c) a pharmacy that has stored the drug according to the manufacturer's labeling and has not previously dispensed the drug to a patient or other person.

(e) Required Records.

- (1) A participating pharmacy or dispensing physician shall maintain a written or electronic inventory of each donated drug, medical device and supply that shall include the following:
  - (A) The name, strength, dosage form, number of units, manufacturer's lot number and expiration date.
  - (B) The name, address and phone number of the eligible donor providing each drug, medical device or supply.
- (2) A participating pharmacy or dispensing physician shall keep all donated drugs, medical devices and supplies physically separated from other inventory. The physically separate storage area for donated drugs, medical devices and supplies shall be clearly identified.
- (3) In addition to all records required for dispensing a prescription drug or medical device under the North Carolina Pharmacy Practice Act and rules, a participating pharmacy or dispensing physician shall note – either on the face of a written prescription or in the electronic record of a prescription – that a donated prescription drug, medical device or supply was dispensed to the patient.
- (4) A participating pharmacy or dispensing physician must maintain patient-specific written or electronic documentation of any

dispensing of a donated non-prescription drug, medical device or supply.

- (5) A participating pharmacy or dispensing physician that transfers a donated drug, medical device or supply to another participating pharmacy or dispensing physician shall include in the inventory specified in Part (1)(A) of this Paragraph a record of the name, address and phone number of the recipient pharmacy, as well as the name and license number of the pharmacist or dispensing physician who accepted the transferred drug, medical device or supply.

**(f) Eligible Patient.**

- (1) A participating pharmacy or dispensing physician shall establish and maintain a written patient eligibility policy that shall conform to the priorities specified in G.S. 90-85.44(f).
- (2) Donated drugs, medical devices or supplies shall be dispensed to patients who are residents of North Carolina and meet the participating pharmacy's or dispensing physician's eligibility criteria.

**(g) Handling Fee.**

- (1) A participating pharmacy or dispensing physician may charge a prescription drug handling fee to an eligible patient that shall not exceed the co-payment established by North Carolina Medicaid and required of a North Carolina Medicaid beneficiary who receives the same prescription drug in the same quantity.
- (2) A participating pharmacy or dispensing physician may charge a medical device or supply handling fee to an eligible patient that shall not exceed the co-payment established by North Carolina Medicaid and required of a North Carolina Medicaid beneficiary to whom a brand-name prescription drug is dispensed.
- (3) Nothing in this Rule shall require a participating pharmacy or dispensing physician to charge an eligible patient a handling fee, nor should a participating pharmacy or dispensing physician charge a handling fee where doing so is otherwise prohibited by law.

**(h) Confidentiality of Records.**

- (1) A participating pharmacy or dispensing physician shall remove any labeling or other material from a donated drug, medical device or supply that could identify the patient to whom the donated product was originally dispensed.
- (2) Records required by this Rule shall be governed by the confidentiality provisions of G.S. 90-85.36 and the Health Insurance Portability and Accountability Act of 1996.

- (3) Records required by this Rule shall be maintained by the participating pharmacy or dispensing physician for a period of three years.

*Authority G.S. 90-85.6; 90-85.26; 90-85.32; 90-85.44.*

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## **CHAPTER 56 – BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Examiners for Engineers and Surveyors intends to amend the rules cited as 21 NCAC 56 .0505, .0606, .0804.*

**Proposed Effective Date:** *July 1, 2010*

**Public Hearing:**

**Date:** *March 11, 2010*

**Time:** *9:00 a.m.*

**Location:** *4601 Six Forks Road, Raleigh, NC 27609, Suite 310*

**Reason for Proposed Action:** *Increase annual license renewal fees.*

**Procedure by which a person can object to the agency on a proposed rule:** *Objections to the proposed rule amendments may be submitted, in writing, to David S. Tuttle, Board Counsel, NC Board of Examiners for Engineers and Surveyors, 4601 Six Forks Road, Suite 310, Raleigh, NC 27609. Objections may also be submitted during the public hearing. Objections shall include the specific rule citation(s), the nature of the objection(s), and the complete name(s) and contact information for the individual submitting the objection(s). Objections must be received by the end of the comment period at 5:00 p.m. on April 16, 2010.*

**Comments may be submitted to:** *David S. Tuttle, Board Counsel, NC Board of Examiners for Engineers and Surveyors, 4601 Six Forks Road, Suite 310, Raleigh, NC 27609, phone (919)791-2000 ext. 111, email dstuttle@ncbels.org*

**Comment period ends:** *April 16, 2010*

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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** ( $\geq \$3,000,000$ )  
☒ **None**

**SECTION .0500 - PROFESSIONAL ENGINEER**

**21 NCAC 56 .0505 EXPIRATIONS AND RENEWALS OF CERTIFICATES**

(a) Professional Engineer Licensure. An annual renewal fee of ~~sixty seventy-five dollars (\$60.00)~~ **(\$75.00)** for certificates of licensure for Professional Engineers shall be payable to the Board. The Board shall send to each licensed Professional Engineer a form which requires the licensee to provide the Board with both the business and residential addresses, and the professional development hours (PDH) obtained during the previous year. The licensee shall give notice to the Board of a change of business or residential address within 30 days of the change.

(b) Engineering Intern Certificate. The Engineering Intern certificate does not expire and, therefore, does not have to be renewed.

*Authority G.S. 89C-10; 89C-17.*

**SECTION .0600 - PROFESSIONAL LAND SURVEYOR**

**21 NCAC 56 .0606 EXPIRATIONS AND RENEWALS OF CERTIFICATES**

(a) Professional Land Surveyor Licensure. An annual renewal fee of ~~sixty seventy-five dollars (\$60.00)~~ **(\$75.00)** for certificates of licensure for Professional Land Surveyors is payable to the Board. The Board shall provide each Professional Land Surveyor a form which requires the licensee to provide to the Board the business and residential addresses, and the professional development hours (PDH) obtained during the previous year. The licensee shall give notice to the Board of a change of business or residential address within 30 days of the change.

(b) Surveyor Intern Certificate. The surveyor intern certificate does not expire and, therefore, does not have to be renewed.

*Authority G.S. 89C-17.*

**SECTION .0800 - FIRM REGISTRATION**

**21 NCAC 56 .0804 ANNUAL RENEWAL**

(a) Renewal. The certificate of licensure for a business entity, including a professional corporation, limited liability company, Chapter 87 corporation, or business firm shall be renewed annually.

(b) Expiration. The certificate of licensure expires on the last day of June following its issuance by the Board and becomes invalid on that date unless renewed.

(c) Written Application. Upon written application on a renewal form prescribed by the Board accompanied by the prescribed fee of ~~sixty seventy-five dollars (\$60.00)~~ **(\$75.00)** the Board shall renew the certificate of licensure providing that the firm has complied with all Rules of the Board and applicable General Statutes of North Carolina. The form shall be mailed to all licensees in good standing no later than June 1st. The licensed entity shall give notice to the Board of a change of business address within 30 days of the change.

(d) If a firm fails to renew its certificate of licensure within one year of the expiration date, the firm shall submit a new application for a new certificate of licensure in accordance with all requirements of 21 NCAC 56 .0802.

*Authority G.S. 55B-11; 57C-2-01; 89C-10; 89C-14; 89C-17; 89C-24.*

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**CHAPTER 62 – BOARD OF ENVIRONMENTAL HEALTH SPECIALIST EXAMINERS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Environmental Health Specialist Examiners intends to adopt the rule cited as 21 NCAC 62 .0415; amend the rules cited as 21 NCAC 62 .0201, .0401-.0405, .0407, .0411 and .0414; and repeal the rules cited as 21 NCAC 62 .0102, .0104, .0202-.0206, .0208, .0301-.0302, .0305-.0310, .0314-.0317, .0319 and .0408.*

**Proposed Effective Date:** July 1, 2010

**Public Hearing:**

**Date:** March 12, 2010

**Time:** 11:00 a.m.

**Location:** Catawba County Governmental Office, Meeting Room, 100 A South West Blvd., Newton, NC 28658

**Date:** March 22, 2010

**Time:** 11:00 a.m.

**Location:** 2728 Capitol Blvd., Training Room 1A-224, Raleigh, NC 27604

**Reason for Proposed Action:** Recent adoption of Session Laws 2009-443 created the need for amendments to many rules. Other amendments are to modernize the rules to current practice. One proposed adoption is to make the rules consistent with Session Laws 2009-443. Repeals are proposed to eliminate duplication with Chapter 150B of the General Statutes.

**Procedure by which a person can object to the agency on a proposed rule:** Persons with any objections to the proposed rules should forward a typed or handwritten letter indicating the specific reasons for the objections to the following address: Malcolm Blalock, 711 Page Street, Clayton, NC 27520 or email to malcolm.blalock@earthlink.net.

**Comments may be submitted to:** Malcolm Blalock, Secretary-Treasurer, NC State Board of Environmental Health Specialist

Examiners, 711 Page Street, Clayton, NC 27520; phone (919) 341-2739; email malcolm.blalock@earthlink.net

Comment period ends: April 16, 2010

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 21 NCAC 62 .0405  
☐ Substantial Economic Impact (≥\$3,000,000)  
☒ None All other rules

## SECTION .0100 - RULES OF ORGANIZATION

### 21 NCAC 62 .0102 MEETINGS

In addition to a required annual meeting in the City of Raleigh, additional meetings of the Board may be called by the Chairman at any time and place he may designate.

Authority G.S. 90A-50; 90A-57.

### 21 NCAC 62 .0104 SECRETARY-TREASURER

(a) The Board shall elect from among its membership a secretary who shall also serve as treasurer and be referred to as secretary-treasurer of the Board. The secretary-treasurer shall serve for a term of one year or until a successor is elected.

(b) The secretary treasurer shall carry out the following duties and responsibilities:

- (1) keep the records of the Board;
- (2) submit the necessary reports as required by Chapter 93B of the General Statutes of North Carolina;
- (3) pay all bills that are authorized by the Board;
- (4) be bonded to the amount of fifty thousand dollars (\$50,000); and
- (5) submit all account books, receipts, checking accounts, etc., for an audit by a certified public accountant prior to the first meeting of the calendar year.

Authority G.S. 90A-57.

## SECTION .0200 - RULEMAKING PROCEDURES

### 21 NCAC 62 .0201 PETITION FOR RULEMAKING

(a) Any person wishing to submit a petition requesting the adoption, amendment or repeal of a rule by the Board of Sanitarian Examiners Board shall address submit the petition in writing to: Chair, Sanitarian Examiners State Board of Environmental Health Specialist Examiners, c/o Division of Environmental Health, P.O. Box 27687, 1630 Mail Service Center, Raleigh, North Carolina 27611 7687, 27699-1630.

(b) The petition shall contain the following information be filed in accordance with G.S. 150B-20 and shall also contain the following:

- (1) either a draft of the proposed rule or a summary of its contents and the statutory authority for the agency to promulgate the rule;
- (2)(1) reason for proposal;
- (3) effect on existing rules;
- (4)(2) any data supporting the proposal;
- (5)(3) effect of the proposed rule on existing practices in the area involved, including cost factors;
- (4) names and addresses of those individual and groups most likely to be affected by the proposed rule change; and
- (6)(5) name and address of each petitioner.

(c) The Board shall determine, based on a study of the facts stated the information contained in the petition, or any other information obtained regarding the petition whether the public interest will be served by granting the petition. All contents of the submitted petition, and any additional information deemed relevant, shall be considered.

(d) The Board shall render a final decision, within 30 days of submission of the petition. If the decision is to deny the petition, the Chair shall notify the petitioner in writing, stating the reasons for the denial. If the decision is to approve the petition, the Board of Sanitarian Examiners shall initiate a rulemaking proceeding by issuing a rulemaking notice, as provided in these Rules.

Authority G.S. 90A-53; 90A-55; 90A-56; 90A-57; 90A-62; 90A-63; 90A-66; 150B-20.

### 21 NCAC 62 .0202 NOTICE

(a) Any person or agency desiring to be placed on the mailing list for the Board of Sanitarian Examiners' rulemaking notices may file a request in writing, furnishing the name and mailing address, with the Chair, Board of Sanitarian Examiners, c/o Division of Environmental Health, P.O. Box 27687, Raleigh, North Carolina 27611 7687. The request must state the subject areas within the authority of the Board of Sanitarian Examiners for which notice is requested.

(b) The Board of Sanitarian Examiners will review its mailing list periodically and may write to any person on the list to inquire whether that person wishes to remain on the list. If no response is received, that person may be removed from the list.

~~(c) When practical and appropriate, public notice of rulemaking proceedings shall be sent to community, special interest, government, trade or professional organizations for publication.~~

~~(d) When the agency intends to incorporate a rule by reference, the rulemaking notice will include, in addition to the requirements stated in G.S. 150B-21.6:~~

- ~~(1) name and address of agency or organization which previously adopted the material;~~
- ~~(2) title and identifying number of previously adopted material; and~~
- ~~(3) date and edition of previously adopted material.~~

~~(e) Persons desiring information in addition to that provided in a particular rulemaking notice may contact: Chair, Board of Sanitarian Examiners, c/o Division of Environmental Health, P.O. Box 27687, Raleigh, North Carolina 27611-7687.~~

*Authority G.S. 90A-57.*

## **21 NCAC 62 .0203 HEARINGS**

~~(a) Any person desiring to present oral data, views, or arguments on the proposed rule must, register with the Chair. Any person permitted to make an oral presentation is encouraged to submit a written copy of the presentation to the Chair prior to or at the hearing.~~

~~(b) Presentations may not exceed 10 minutes unless, upon request either before or at the hearing, the presiding officer grants an extension of time.~~

~~(c) The Chair shall acknowledge receipt of a request to make an oral presentation on the proposed rule.~~

~~(d) Written Submissions:~~

- ~~(1) Any person may file a written submission containing data, comments or arguments after publication of a rulemaking notice up to and including the day of the hearing and within five days following the hearing, unless a longer period is stated in the particular notice or an extension of time is granted following notice.~~
- ~~(2) A written submission must clearly state the rule or proposed rule to which the comments are addressed and must also include the name and address of the person submitting it. Except when otherwise stated in the particular rulemaking notice, written submission must be sent to the Chair, Board of Sanitarian Examiners, c/o Division of Environmental Health, P.O. Box 27687, Raleigh, North Carolina 27611-7687.~~
- ~~(3) The Chair shall acknowledge receipt of all written submissions.~~

~~(e) The presiding officer at the hearing shall have complete control of the proceedings, including:~~

- ~~(1) the responsibility of having a record made of the proceedings;~~
- ~~(2) extension of any time allotments;~~
- ~~(3) recognition of speakers;~~
- ~~(4) elimination of repetitious presentations;~~
- ~~(5) direction of the flow of the discussion; and~~

~~(6) general management of the hearing.~~

~~(f) The presiding officer shall insure that each person participating in the hearing is given a fair opportunity to present views, data and comments.~~

*Authority G.S. 90A-57.*

## **21 NCAC 62 .0204 JUSTIFICATION OF RULEMAKING DECISION**

~~A statement of the principal reasons for and against the adoption of a rule by the Board of Sanitarian Examiners and the factors that led to overruling the considerations urged against its adoption shall be made available to requesting parties.~~

- ~~(1) The request must be made in writing and submitted to the Chair, Board of Sanitarian Examiners, c/o Division of Environmental Health, P.O. Box 27687, Raleigh, North Carolina 27611-7687, prior to adoption or 30 days thereafter.~~
- ~~(2) The Chair shall make a written answer to the request.~~

*Authority G.S. 90A-57.*

## **21 NCAC 62 .0205 RECORD OF RULEMAKING PROCEEDINGS**

~~A record of all rulemaking proceedings including any petitions received by the Board of Sanitarian Examiners shall be maintained for three years. This record shall include:~~

- ~~(1) the original petition;~~
- ~~(2) the notice;~~
- ~~(3) all written memoranda and information submitted;~~
- ~~(4) a record of the oral hearing;~~
- ~~(5) any reasons for or against adoption of the rule; and~~
- ~~(6) a final draft of the rule.~~

~~It shall be maintained by the Chair, Board of Sanitarian Examiners.~~

*Authority G.S. 90A-57.*

## **21 NCAC 62 .0206 FEES**

~~A fee schedule shall be used by the Board of Sanitarian Examiners in making charges to persons requesting materials relating to the rulemaking hearing. As provided by statute, fees shall be set to cover the costs of meeting the requests, including material, duplicating, mailing and allocable personnel costs.~~

*Authority G.S. 90A-57.*

## **21 NCAC 62 .0208 DECLARATORY RULINGS**

~~The Board of Sanitarian Examiners shall have the power to issue declaratory rulings.~~

- ~~(1) All requests for a declaratory ruling shall be in writing and submitted to the Chair, Board of Sanitarian Examiners, c/o Division of Environmental Health, P.O. Box 27687,~~

Raleigh, North Carolina 27611 7687 and must include the following information:

- (a) ~~name and address of petitioners;~~
- (b) ~~statute or rule to which petition relates;~~
- (c) ~~statement of the manner in which petitioner is aggrieved by the rule or statute or its potential application; and~~
- (d) ~~the consequences of a failure to issue a declaratory ruling.~~
- (2) ~~Whenever the Board of Sanitarian Examiners believes that issuance of a declaratory ruling is undesirable, it may refuse to issue one. The Chair shall notify the petitioner of the decision in writing stating reasons for the denial of the request.~~
- (3) ~~When a declaratory ruling is made, the Board of Sanitarian Examiners shall issue the ruling within 60 days of receipt of the request.~~
- (4) ~~A record of all declaratory ruling proceedings shall be maintained for three years. This record shall contain:~~
  - (a) ~~the original request;~~
  - (b) ~~all written memoranda and information submitted; and~~
  - (c) ~~either the declaratory ruling or a statement of the reasons for denying the request.~~

~~This record shall be maintained by the Chair, Board of Sanitarian Examiners.~~

*Authority G.S. 90A-57; 150B-4.*

## SECTION .0300 - CONTESTED CASES

### 21 NCAC 62 .0301 OPPORTUNITY FOR AN ADMINISTRATIVE HEARING

- (a) ~~Upon request, a contested case hearing will be held prior to final action on a matter by the Board of Sanitarian Examiners if the action will affect a right, privilege or benefit already enjoyed by a specific party, unless the action is taken pursuant to G.S. 150B-3.~~
- (b) ~~When the Board of Sanitarian Examiners takes an action which affects a right, privilege or duty of a specific party, it will notify the party in writing of that party's right to a contested case hearing on the matter.~~

*Authority G.S. 90A-57.*

### 21 NCAC 62 .0302 REQUEST FOR A HEARING

- (a) ~~A written request for a contested case hearing may be filed with the Chair, Board of Sanitarian Examiners, c/o Division of Environmental Health, P.O. Box 27687, Raleigh, North Carolina 27611 7687.~~
- (b) ~~Such request must contain the following information:~~
  - (1) ~~the name and address of petitioner;~~
  - (2) ~~a statement of the agency action being challenged; and~~

- (3) ~~a statement of the way in which the petitioner has been aggrieved.~~

- (e) ~~Such requests shall be acknowledged and a hearing scheduled.~~

*Authority G.S. 90A-57.*

### 21 NCAC 62 .0305 NOTICE

~~In addition to the requirements specified in G.S. 150B-38(b), the notice shall:~~

- (1) ~~give the name, title, address, and phone number of the person in the Board of Sanitarian Examiners to contact for further information or discussion;~~
- (2) ~~include a statement that failure to appear at the hearing may result in the decision on the case being made in the party's absence; and~~
- (3) ~~give the date and place for the prehearing conference, if any.~~

*Authority G.S. 90A-57.*

### 21 NCAC 62 .0306 INTERVENTION

- (a) ~~A motion to intervene shall be granted in accordance with G.S. 1A-1, Rule 24.~~
- (b) ~~If the Board of Sanitarian Examiners determines to allow intervention, notification of that decision shall be issued to all parties and to the movant or petitioner. In cases of discretionary intervention notification shall include a statement of the limitations, if any, of time, subject matter, evidence or whatever else is deemed necessary which are imposed on the intervenor.~~
- (c) ~~If the Board of Sanitarian Examiners' decision is to deny intervention, the movant or petitioner shall be notified. Such notice shall state all reasons for the decision and shall be issued to all parties, as well as to the movant or petitioner.~~

*Authority G.S. 90A-57.*

### 21 NCAC 62 .0307 CHANGE OF VENUE

- (a) ~~Any party may move for a change of venue by filing a motion with the hearing officer at least five days before the hearing. The motion must contain:~~
  - (1) ~~the party's name and address;~~
  - (2) ~~identification of the contested case and the scheduled hearing;~~
  - (3) ~~the county in which the party requests that the hearing be held; and~~
  - (4) ~~a statement of the reasons for a change of venue.~~
- (b) ~~The presiding officer shall consider the motion and notify the movant of the decision, including the reasons for the decision. If the motion is approved, the presiding officer shall issue notice of change of venue to all other parties.~~

*Authority G.S. 90A-57.*



**21 NCAC 62 .0308      DISQUALIFICATION OF BOARD MEMBERS**

~~(a) If for any reason the presiding officer or a member of the body participating in the hearing determines that personal bias or other factors would prevent him from conducting the hearing and performing all duties in an impartial manner, the person shall submit, in writing to the Chair, Board of Sanitarian Examiners, the disqualifications and the reasons therefor.~~

~~(b) If for any reason any party in a contested case believes that the presiding officer or a member of the body conducting the hearing is personally biased or otherwise unable to conduct the hearing and perform all duties in an impartial manner, the party may file a sworn, notarized affidavit with the Chair, Board of Sanitarian Examiners, which states all facts the party deems relevant to the disqualification of the allegedly biased person.~~

~~(c) An affidavit of disqualification shall be considered timely if filed before commencement of the hearing. Any other affidavit will be deemed timely provided it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief the person may be disqualified under this Rule.~~

~~(d) Disqualification by Board:~~

- ~~(1) The Board of Sanitarian Examiners shall decide whether to disqualify the person.~~
- ~~(2) The persons whose disqualification is to be determined, will not participate in the decision but may be called on to furnish information to the Board.~~
- ~~(3) The Board shall appoint a member of the Board to investigate the allegations of the affidavit.~~
- ~~(4) The investigator will report the findings and recommendations to the Board who will then decide whether to disqualify the challenged individual.~~

~~(e) When, by reason of personal bias, the presiding officer or hearing body is disqualified after the hearing has begun, the case will continue unless it is shown that substantial prejudice will result therefrom.~~

~~(f) When, for reasons other than personal interest, a presiding officer is disqualified or otherwise is unable to continue the hearing, the Board shall appoint another presiding officer and the hearing will be resumed except when:~~

- ~~(1) oral testimony has already been given, and it is determined by the successor presiding officer that the viewing of the witness is an important element of the case, in which case that portion of the testimony and evidence will be repeated; and~~
- ~~(2) continuation of the hearing would result in substantial prejudice to the rights of the parties.~~

~~(g) The determination of whether resuming and continuing the case will result in substantial prejudice is to be made by the remaining members of the Board of Sanitarian Examiners.~~

~~(h) Determinations of disqualification, discontinuation of the hearing, rehearing of a portion or all of a contested case, or dismissal of a case without prejudice, together with a statement of reasons will be part of the record of the case and will be communicated to all parties.~~

*Authority G.S. 90A-57.*

**21 NCAC 62 .0309      FAILURE TO APPEAR**

~~If a party served with notice fails to appear without having notified the person designated in the notice as the contact person for the Board and no continuance or adjournment is ordered, the presiding officer may proceed with the hearing in the party's absence or reschedule the hearing and set it for another date to be determined by the Board of Sanitarian Examiners.~~

*Authority G.S. 90A-57.*

**21 NCAC 62 .0310      CONTINUANCES**

~~A continuance may be granted to a party in compelling circumstances.~~

*Authority G.S. 90A-57.*

**21 NCAC 62 .0314      PRE-HEARING CONFERENCE**

~~(a) The pre hearing conference shall be informal in nature.~~

~~(b) The conference shall be noted in the notice of hearing or in a subsequent notice if a conference is later determined to be necessary by the presiding officer.~~

~~(c) The purposes of this conference shall be to discuss:~~

- ~~(1) the possibility of simplification of issues;~~
- ~~(2) stipulation of facts or findings;~~
- ~~(3) identification of areas where evidence is needed;~~
- ~~(4) indication of discovery or subpoenas needed;~~
- ~~(5) the need for consolidation of cases or joint hearings; and~~
- ~~(6) any other matters which may reduce costs, save time or otherwise aid expeditious disposition of the contested case.~~

*Authority G.S. 90A-57.*

**21 NCAC 62 .0315      SIMPLIFICATION OF ISSUES**

~~In a contested case, the Board of Sanitarian Examiners and the other parties may agree in advance to simplify the hearing by:~~

- ~~(1) eliminating issues to be contested at the hearing;~~
- ~~(2) accepting the validity of certain proposed evidence;~~
- ~~(3) accepting the findings in some other case with relevance to the case at hand; or~~
- ~~(4) agreeing to such other matters as may expedite the hearing.~~

*Authority G.S. 90A-57.*

**21 NCAC 62 .0316      SUBPOENAS**

~~(a) Subpoenas requiring the attendance of witnesses or those to produce documents or evidence shall be issued by the presiding officer upon receipt of a request from a party to the case for such a subpoena.~~

~~(b) A request for a subpoena shall include:~~

- ~~(1) the name and address of the person requesting the subpoena;~~

- (2) ~~full identification of the hearing to which the witness or evidence is to be subpoenaed;~~
- (3) ~~name and address of the person(s) whose appearance is sought;~~
- (4) ~~specific identification, including a detailed description, and specific designation of present location of any documents, evidence, or things sought, including the name and address of those in possession of the items sought; and~~
- (5) ~~the reasons the person, documents, or evidence should be compelled to attend the hearing, including a statement of the relevance and significance of the person, documents, or evidence to the case.~~

~~(e) Any objection to the subpoena shall be served on the party who requested the subpoena at the same time it is filed with the Board of Sanitarian Examiners.~~

~~(d) The party requesting the subpoena, in such time as may be granted by the presiding officer, may file a written response to the objection. The response shall be served in like manner as the objection.~~

~~(e) After receipt of the objection and any response, the presiding officer shall issue a notice to the person requesting and the person challenging the subpoena and may notify all other parties of an open hearing to be scheduled as soon as practicable at which evidence and testimony may be presented limited to the questions raised by the objection and any response.~~

~~(f) After the close of such hearing, the Board members hearing the case shall rule on the challenge and issue a written decision. A copy of this decision will be issued to all parties and be made a part of the record.~~

*Authority G.S. 90A-57.*

#### **21 NCAC 62 .0317 TRANSCRIPTS**

~~(a) Requests for a transcript of a hearing, in part or in whole, shall be made to the Chair, Board of Sanitarian Examiners, c/o Division of Environmental Health, P.O. Box 27687, Raleigh, North Carolina 27611-7687.~~

~~(b) The party requesting the transcript shall bear the cost of the transcript or part thereof.~~

*Authority G.S. 90A-57.*

#### **21 NCAC 62 .0319 RECORD OF CONTESTED CASES**

~~An official record of all administrative hearings shall be maintained for 10 years. The record shall be maintained by the Chair, Board of Sanitarian Examiners.~~

*Authority G.S. 90A-57.*

### **SECTION .0400 - RULES OF OPERATION**

#### **21 NCAC 62 .0401 STATUTORY AUTHORITY AND DEFINITIONS**

~~(a) The Board of Sanitarian Examiners operates under and follows the requirements and procedures as set forth in Chapter 90A, Article 4 of the North Carolina General Statutes.~~

~~(b) The definitions in G.S. 90A-51 apply to rules in this Chapter.~~

*Authority G.S. 90A-51; 90A-57.*

#### **21 NCAC 62 .0402 APPLICATIONS**

~~(a) Applications for registration as a sanitarian or sanitarian intern an environmental health specialist or environmental health specialist intern shall be filed with the Board on a form provided by the Board and available on the Board website at: www.rsboard.com or from the secretary treasurer of the Board ~~or from the~~ Division of Environmental Health, P.O. Box 27687, 1630 Mail Service Center, Raleigh, NC 27611-7687, 27699-1630.~~

~~(b) The application form shall be signed by the applicant and shall contain biographical data on the applicant including education, experience, duties, prior registration and related matters as specified by the Board necessary to determine the applicant's qualifications for registration. The application shall also be accompanied by the following:~~

- ~~(1) a certified transcript sent directly to the Board from the educational institution from which the applicant has received a degree;~~
- ~~(2) certified transcripts from all other educational institutions from which the applicant has earned science credits used to comply with G.S. 90A-53;~~
- ~~(3) an official the job description signed by the applicant's supervisor; and~~
- ~~(4) the registered sanitarian's statement as described in Rule .0414 of this Section.~~
- ~~(4) a statement from the applicant's employer verifying dates of employment, and~~
- ~~(5) a signed Code of Ethics.~~

*Authority G.S. 90A-53; 90A-57; 90A-59; 90A-62.*

#### **21 NCAC 62 .0403 EXAMINATION**

~~(a) The Board shall administer schedule an examination at least three two times annually, at a time and location designated by the Board, annually. An applicant for a certificate as a registered sanitarian environmental health specialist shall pass the examination which consists of the following:~~

- ~~(1) an objective written examination, designed to test the applicant's competence in the subject of environmental health;~~
- ~~(2) an oral examination prepared prepared, administered and evaluated by the Board; and~~
- ~~(3) a written question prepared prepared, administered and evaluated by the Board.~~

~~(b) Applicants taking or retaking the examination shall submit a written application to the Board. The request shall indicate which portions of the exam the applicant intends to take. The exam application shall be postmarked no later than 30 days prior to the advertised date of the examination.~~

~~(b)(c) Every applicant shall be required to pass the examination with a grade of at least 70 percent, with the objective written examination to count 50 percent of the total score, the oral examination to count 25 percent of the total score, and the written question to count 25 percent of the total score. An~~

applicant ~~must~~ shall score a minimum of 60 percent on each individual portion of the examination. All scores of any part of the exam shall be retained by the Board and applied in meeting the requirements of this Section.

~~(c) An applicant retaking the examination must retake all three portions, unless a written request is made to the Board to only retake one or two portions. This request must be received by the Board prior to the cutoff date for registration for the examination.~~

(d) Applicants shall not cheat or attempt to cheat on the examination by any means, including giving or receiving assistance, and shall not communicate in any manner with any person during the examination, other than the person(s) administering the examination. Violation of this ~~Rule shall be~~ Paragraph is cause for dismissal from the examination, invalidation of the examination score, and revocation or denial of registration.

Authority G.S. 90A-53; 90A-57; 90A-59; 90A-64.

## 21 NCAC 62 .0404 DISCIPLINARY ACTION

~~The Board shall receive complaints and appoint two members to investigate any matter which may lead to suspension or revocation of a certificate. The two members shall initiate administrative hearings and present the case for suspension or revocation. The two members shall not participate in the final decision.~~

(a) The Chair shall appoint two board members to investigate a complaint which may lead to disciplinary action regarding a Registered Environmental Health Specialist or a Registered Environmental Health Specialist Intern. An investigation may also be performed by a person hired by the Board to conduct the investigation. Disciplinary action taken by the Board may include:

- (1) Letter of Warning;
- (2) Letter of Censure;
- (3) suspension; or
- (4) revocation of certificate.

(b) A complaint made to the Board shall be in writing.

(c) A hearing conducted by the Board shall meet the provisions in G.S. 150B.

Authority G.S. 90A-64; 90A-57.

## 21 NCAC 62 .0405 AUTHORIZED EXPENDITURES AND FEES

~~(a) Individual Board members are not authorized to incur expenses nor financially obligate the Board without prior notification and permission of the secretary treasurer or chair.~~

~~(b)~~ (a) The following fees shall apply:

- (1) application for ~~sanitarian intern~~ \$35.00 registration of environmental health specialist—fifty dollars (\$50.00);
- (2) examination—current cost of the Professional Examination Service's registered sanitarian environmental health specialist exam; exam purchased by the Board;
- (3) an administration fee of fifty dollars (\$50.00) for each examination application received;

~~(3)(4) registration by reciprocity—\$35.00; issuance of a certificate as provided in G.S. 90A-62—fifty dollars (\$50.00); and~~

~~(4)(5) annual renewal—\$35.00. postmarked prior to January 1 of the year—fifty dollars (\$50.00); postmarked January 1 or later—seventy-five dollars (\$75.00).~~

~~(e)(b)~~ Applications for registration, renewal, and examinations shall be accompanied by the payment of appropriate fees ~~set by the Board.~~ fees.

~~(d) An additional fee of five dollars (\$5.00) shall be charged for each late renewal postmarked after December 31 of each year.~~

~~(e)(c)~~ An additional fee of twenty dollars (\$20.00) plus the actual cost charged by the bank shall be charged for all returned checks.

(d) Fees for copies shall be in accordance with G.S. 12-3.1 and G.S. 132-6.2(b).

Authority G.S. 12-3.1; 25-512; 90A-53; 90A-56; 90A-57; 90A-62; 90A-63; 132-6.2(b).

## 21 NCAC 62 .0407 RENEWAL

(a) Applications for renewal ~~must~~ shall be filed with the Board on a form provided by the Board and available from the Board website at: www.rsboard.com ~~or from the secretary treasurer or from the Division of Environmental Health, P.O. Box 27687, 1630 Mail Service Center, Raleigh, NC 27611-7687, 27699-1630.~~ The renewal form may also be generated by the Registered Sanitarian Training and Authorization (RSTAS) computer system at: <http://apps.bluelizard.com/RSTAS/>.

(b) The renewal application ~~must~~ shall be completed and signed by the applicant.

(c) Renewal fees ~~must~~ shall be ~~received~~ paid annually not later than December 31. ~~The secretary treasurer Board shall notify each sanitarian and registered sanitarian intern of the December 31 expiration date of registration and shall send a renewal application form to the last current mailing address for each sanitarian and intern on or before December 1 of each year post on the Board's website (www.rsboard.com) the renewal application annually on October 1. The individual shall download and submit the application for renewal to the Board. Individuals may also contact the Board at the Division of Environmental Health, 1630 Mail Service Center, Raleigh, NC 27699-1630 for a copy.~~

~~(d) Registered sanitarians Registered environmental health specialists or sanitarian interns registered environmental health specialists interns who fail to renew by December 31 shall be notified by the secretary treasurer Board that their registration has expired and that they may not practice as a sanitarian registered environmental health specialist or a registered environmental health specialists intern until reinstated by paying the required renewal fee plus a late fee as specified in these Rules. they have met the requirements for renewal.~~

~~(e) Sanitarian interns must renew temporary certificates annually by submitting a renewal application no later than December 31 and the required renewal fee.~~

~~(f)(e) Registered sanitarians or registered sanitarian interns Registered environmental health specialists or registered environmental health specialists interns shall successfully~~

complete a minimum of 15 instructional clock hours of continuing education acceptable to the Board each year. Continuing education acceptable to the Board includes:

- (1) the specialized training courses course required in Rule .0411 of this Section;
- (2) District Environmental Health Section Educational meetings;
- (3) professional association courses and educational meetings;
- (4) seminars or ~~short~~ courses offered by the North Carolina State of Practice Committee;
- (5) ~~successful~~ completion of a job related course offered by ~~an accredited~~ a college or ~~university~~, university accredited by the Council of Higher Education Accreditation with the hours credited for the year that the course is ~~successfully~~ completed;
- (6) successful completion of a job related course offered by the Centers for Disease Control and Prevention, the Food and Drug Administration, or the Environmental Protection Agency; ~~and~~
- (7) other practice-related training which:
  - (A) is technical in nature, related to the environment, environmental health or improving the practice of environmental health;
  - (B) is relevant to the actual job being performed by the participants or applicant;
  - (C) includes a method for determining the number of hours spent;
  - (D) includes a method of documentation for verification of completion;
  - (E) is available to all registered environmental health specialists and environmental health specialist interns; and
  - (F) has been granted approval by the Board; and
- (8) an environmental health law course based on North Carolina laws and rules with at least 15 contact hours approved by the Board during the first four years following the date of most recent registration by the Board.

~~(g)(f)~~ Registrations that have expired may be renewed within 12 months after expiration upon submittal of ~~proper~~ application and payment of the ~~appropriate~~ renewal fee, ~~plus the late fee, as applicable, fee.~~ Registrations that have expired for more than 12 months, but not more than 36 months, may be considered for renewal upon submittal of proper application and payment of the ~~appropriate renewal fee plus the late fee for each year since the expiration.~~ The applicant shall provide verification to the Board that ~~adequate~~ continuing education clock hours ~~have been were~~ obtained during ~~each the~~ year since the expiration to comply with the requirements of this Section. ~~Registrations that have expired for more than 36 months may not be renewed. Registrations that have expired for more than 12 months may not be renewed.~~

~~(h)(g)~~ Interns that are no longer employed in the field of environmental health in North Carolina may not renew.

(h) A registered environmental health specialist or a registered environmental health specialist intern in good standing whose active military service has impaired their ability to obtain the continuing education requirements in Paragraph (f) of this Rule are exempt from the continuing education requirement if written orders from their military unit are provided to the Board. In addition, the renewal fee is waived for each calendar year the environmental health specialist is on active duty.

(i) A registered environmental health specialist or registered environmental health specialist intern who is disabled may request a variance in continuing education hours during the period of the disability. The Board may grant or deny requests for variance in continuing education hours based on a disabling condition on a case by case basis, taking into consideration the particular disabling condition involved and its effect on the registered environmental health specialist or registered environmental health specialist's ability to complete the required hours. In considering the request, the Board may require additional documentation substantiating any specified disability.

(j) A maximum of five clock hours of approved continuing education, that is in excess of the required 15 clock hours, may be applied toward the continuing education requirements for the following year if specifically requested on the renewal application by the applicant by December 31 of the renewal year.

Authority G.S. 90A-53; 90A-57; 90A-63; 90A-67; 93B-15.

#### **21 NCAC 62 .0408 PUBLIC INSPECTION**

A copy of these Rules is available for public inspection in the office of the Division of Environmental Health, 1330 St. Mary's Street, Raleigh, North Carolina.

Authority G.S. 90A-57.

#### **21 NCAC 62 .0411 SPECIALIZED TRAINING**

Every applicant for registration as defined in G.S. 90A-51(2b) shall ~~successfully complete either Sub-items (1)(a) through (e) or Sub-items (2)(a) through (b) of the following:~~ complete the course entitled "Orientation and Initial Internship Training for Environmental Health Interns" offered by the Division of Environmental Health at the centralized training site within 12 months of registration as a registered environmental health specialist intern.

##### (1) — Track I:

- ~~(a) — Orientation and initial field training as soon as possible after employment as a sanitarian intern, but in no case later than 90 days after employment; orientation and initial field training must be completed at one of the Division of Environmental Health orientation and initial field training centers; and~~
- ~~(b) — The Centers for Disease Control (CDC) Homestudy Course 3010 G, "Environmental Science", or its equivalent. Successful completion of~~

~~the CDC Homestudy Course 3010 G or its equivalent prior to employment or graduation from an environmental health degree program accredited by the National Environmental Health Science and Protection Accreditation Council meets the requirements of this Rule; and~~

~~(e) Either the NC State University Food Protection Short course or one basic soils workshop approved by the Board within the first two years following employment; and~~

~~(d) The CDC Homestudy course 3013 G, "Vectorborne Disease Control" during first three years following employment. Successful completion of the CDC Homestudy course 3013-G prior to employment, or completion of an equivalent course offered by an environmental health degree program accredited by the National Environmental Health Science and Protection Accreditation Council meets the requirements of this Rule; and~~

~~(e) A public health law course during the first four years following employment.~~

~~(2) Track H:~~

~~(a) Orientation and Initial Internship Training for Environmental Health Interns sponsored by the Division of Environmental Health at the centralized training site as soon as practical, but in no case more than nine months following registration as a sanitation intern; and~~

~~(b) A public health law course during the first four years following employment.~~

Authority G.S. 90A-50; 90A-51; 90A-53; 90A-57.

## **21 NCAC 62 .0414 ENVIRONMENTAL HEALTH SPECIALIST INTERN EXPERIENCE**

Every applicant for registration as a ~~sanitarian intern~~ an environmental health specialist intern ~~must~~ shall be under the guidance direction of a ~~registered sanitarian~~ registered environmental health specialist in order to obtain acceptable environmental health field experience required to be a registered environmental health specialist, as defined in G.S. 90A. ~~For those places of employment that do not have another registered sanitarian on staff, arrangements must be approved by the Board prior to registration to assure that guidance by a registered sanitarian is provided. A statement shall be filed with the Board indicating that the registered sanitarian providing guidance will instruct and guide the intern applicant in the performance of all environmental health duties. This statement will indicate the~~

~~date in which the registered sanitarian providing guidance assumes responsibility and the signatures of both the registered sanitarian and the applicant.~~

Authority G.S. 90A-50; 90A-51; 90A-52; 90A-53; 90A-54; 90A-57; 90A-59; 90A-63; 90A-64; 90A-65; 90A-67.

## **21 NCAC 62 .0415 CODE OF ETHICS**

The Board hereby incorporates by reference the code of ethics adopted by the Environmental Health Section of the North Carolina Public Health Association on September 30, 2009 as the professional code to be followed by registered environmental health specialists and environmental health specialist interns. This incorporation does include subsequent amendments and editions. Copies may be obtained from the Board at no charge. The canons in the code of ethics are part of the registration application.

Authority G.S. 90A-53; 90A-54; 90A-57; 90A-59; 90A-63; 90A-67.

## **TITLE 23 – DEPARTMENT OF COMMUNITY COLLEGES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Community Colleges intends to adopt the rule cited as 23 NCAC 02C .0506.*

**Proposed Effective Date:** August 1, 2010

**Instructions on How to Demand a Public Hearing:** *(must be requested in writing within 15 days of notice): To demand a public hearing please send the written demand to Q. Shanté Martin, Rule-making Coordinator, NC Community College System, 200 West Jones Street, 5001 Mail Service Center, Raleigh, NC 27699-5001 or by emailing the demand to publiccomments@nccommunitycolleges.edu. Demands must be received within 15 days of the publication of the proposed rule in the North Carolina Register.*

**Reason for Proposed Action:** 23 NCAC 02C .0506 "Special Purchasing Delegations" is proposed for adoption to comply with House Bill 490/Session Law 2009-132.

**Procedure by which a person can object to the agency on a proposed rule:** *Written objections shall be addressed to President, NC Community College System Office, 5001 Mail Service Center, Raleigh, NC 27699-5001 within the comment period and must be postmarked by 11:59 p.m. on the last day of the comment period.*

**Comments may be submitted to:** Q. Shanté Martin, Rule-making Coordinator, 200 W. Jones Street, Mail Service Center 5001, Raleigh, NC 27699-5001; email publiccomments@nccommunitycolleges.edu

**Comment period ends:** April 16, 2010

**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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 ( $\geq$ \$3,000,000)  
☒ None

**CHAPTER 02 - COMMUNITY COLLEGES**

**SUBCHAPTER 02C - COLLEGES: ORGANIZATION  
AND OPERATIONS**

**SECTION .0500 - EQUIPMENT**

**23 NCAC 02C .0506 SPECIAL PURCHASING  
DELEGATIONS**

(a) The State Board of Community Colleges, in consultation with the Department of Administration, Division of Purchase and Contract, shall have the authority to increase or decrease the purchasing delegations for each community college based on the college's overall capabilities, including staff resources, purchasing compliance reviews, and audit reports. For the purposes of this Section, "purchasing delegation" means the maximum authorized dollar limits for purchases of commodities, printing, and services by community colleges.

(b) The State Board of Community Colleges shall not increase a community college's purchasing delegation in any calendar year without the concurrence of the Department of Administration, Division of Purchase and Contract. If the Department of Administration, Division of Purchase and Contract does not respond within 60 days of the State Board of Community Colleges notifying the Department of Administration, Division of Purchase and Contract of a college's request to increase its purchasing delegation, the State Board of Community Colleges shall have the authority to increase a community college's purchasing delegation without the concurrence of the Department of Administration, Division of Purchase and Contract.

(c) The maximum purchasing delegation for a community college shall be no greater than one hundred thousand dollars (\$100,000).

(1) Tier Structure:

(A) Each community college's purchasing delegation will correspond to the following four-tiered structure:

<u>Tier 1</u>	<u>Tier 2</u>	<u>Tier 3</u>	<u>Tier 4</u>
<u>\$10,000</u>	<u>\$25,000</u>	<u>\$50,000</u>	<u>\$100,000</u>

(B) Each college is placed on the tier that corresponds to its current delegation. A college may request an increase in delegation only to the next tier.

(C) If the State Board approves a college's request for an increase in delegation, the new delegation will be effective for two years from the effective date of approval. If a college obtains an increased delegation and receives a negative compliance review from the Department of Administration, Division of Purchase and Contract or demonstrates problems managing the increased delegation during the two year period, the State Board of Community Colleges has the authority to rescind the new delegation prior to two years. A college may only request a delegation

increase to the next tier after being at the current tier for two years.

(2) Required Documents. When requesting an increase in purchasing delegation, a college must submit the following hard copy items to the System Office's Business and Finance Division:

(A) Original letter signed by the college President on college letterhead requesting the next tier delegation and the rationale for the request;

(B) Request for Increase in Purchasing Delegation (Form 490);

(C) College Internal Purchasing Manual with policy and procedures for all transaction types;

(D) Copy of a bid posted on the North Carolina Interactive Purchasing System within the 12 months prior to the date the System Office's Business and Finance Division receives the

college's requests to increase its purchasing delegation;

(E) Copy of a posted E-Quote within the 12 months prior to the date System Office's Business and Finance Division receives the college's requests to increase its purchasing delegation;

(F) Copy of a favorable compliance review report from the Department of Administration, Division of Purchase and Contract. The compliance review report must have been conducted within 12 months prior to the date the college requests an increase in purchasing delegation. If any findings are noted in the compliance review report, the college must provide documentation that the college has corrected all findings by the date the college requests an increase in purchasing delegation.

(d) Evaluation Process. The State Board, acting by and through the System Office's Business and Finance Division, will evaluate the following factors before submitting a recommendation to

increase the purchasing delegation to the Department of Administration, Division of Purchase and Contract:

(1) The college's overall capabilities including:

(A) Staff capacity to absorb additional volume and complexity;

(B) Experience and training of the procurement staff of the requesting college; and

(C) Frequency of procurement staff turnover;

(2) Purchasing compliance reviews;

(3) College internal purchasing procedures; and

(4) Audit reports from the North Carolina Office of the State Auditor.

(e) If the State Board approves a college's request to increase its purchasing delegation, the approval will be effective on the first day of the month following the State Board's approval.

(f) If a college receives an unfavorable compliance review from the Department of Administration, Division of Purchase and Contract or an unfavorable audit from the North Carolina Office of the State Auditor with findings related to purchasing, the State Board has the authority to decrease the delegation amount.

*Authority G.S. 115D-5; 115D-58.14(b); S.L. 2009-132, s. 1.*

**Note from the Codifier:** The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270<sup>th</sup> day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270<sup>th</sup> day.

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

## TITLE 10A – DEPARTMENT HEALTH AND HUMAN SERVICES

**Rule-making Agency:** Division of Health Service Regulation

**Rule Citation:** 10A NCAC 14C .1202, .1402-.1403, .1703, .1902, .2102, .2103-.2106, .2202-.2203, .2701

**Effective Date:** February 1, 2010

**Date Approved by the Rules Review Commission:** January 21, 2010

**Reason for Action:** Each year, changes to existing Certificate of Need rules are required to compliment or to ensure consistency with the SMFP. The effective date of the 2010 SMFP is January 1, 2010.

## CHAPTER 14 – DIRECTOR, DIVISION OF HEALTH SERVICE REGULATION

### SUBCHAPTER 14C – CERTIFICATE OF NEED REGULATIONS

#### SECTION .1200 – CRITERIA AND STANDARDS FOR INTENSIVE CARE SERVICES

#### 10A NCAC 14C .1202 INFORMATION REQUIRED OF APPLICANT

(a) An applicant that proposes new or expanded intensive care services shall use the Acute Care Facility/Medical Equipment application form.

(b) An applicant proposing new or expanded intensive care services shall also submit the following additional information:

- (1) the number of intensive care beds currently operated by the applicant and the number of intensive care beds to be operated following completion of the proposed project;
- (2) documentation of the applicant's experience in treating patients at the facility during the past twelve months, including:
  - (A) the number of inpatient days of care provided to intensive care patients;
  - (B) the number of patients initially treated at the facility and referred to other facilities for intensive care services; and
  - (C) the number of patients initially treated at other facilities and referred to the applicant's facility for intensive care services.

~~(3) the number of patients from the proposed service area who are projected to require intensive care services by the patients' county of residence in each of the first 12 quarters of operation, including all assumptions and methodologies;~~

~~(4)~~(3) the projected number of patients to be served and inpatient days of care to be provided by county of residence by specialized type of intensive care for each of the first twelve calendar quarters following completion of the proposed project, including all assumptions and methodologies;

~~(5)~~(4) data from actual referral sources or correspondence from the proposed referral sources documenting their intent to refer patients to the applicant's facility;

~~(6)~~(5) documentation which demonstrates the applicant's capability to communicate effectively with emergency transportation agencies;

~~(7)~~(6) documentation of written policies and procedures regarding the provision of care within the intensive care unit, which includes, but is not limited to the following:

- (A) the admission and discharge of patients;
- (B) infection control;
- (C) safety procedures; and
- (D) scope of services.

~~(8)~~(7) documentation that the proposed service shall be operated in an area organized as a physically and functionally distinct entity, separate from the rest of the facility, with controlled access;

~~(9)~~(8) documentation to show that the services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies;

~~(10)~~(9) a detailed floor plan of the proposed area drawn to scale; and

~~(11)~~(10) documentation of a means for observation by unit staff of all patients in the unit from at least one vantage point.

*History Note: Authority G.S. 131E-177(1); 131E-183; Eff. January 4, 1994; Amended Eff. November 1, 1996; Temporary Amendment Eff. February 1, 2010.*



**SECTION .1400 – CRITERIA AND STANDARDS FOR  
NEONATAL SERVICES**

**10A NCAC 14C .1402 INFORMATION REQUIRED OF  
APPLICANT**

(a) An applicant proposing to develop a ~~new~~ Level I nursery in the facility for the first time or ~~increase the number of new or additional~~ Level II, III or IV neonatal beds shall use the Acute Care Facility/Medical Equipment application form.

(b) An applicant proposing to develop a ~~new~~ Level I nursery service in the facility for the first time or ~~to increase the number of new or additional~~ Level II, III or IV neonatal beds shall provide the following additional information:

- (1) the current number of Level I nursery bassinets, Level II beds, Level III beds and Level IV beds operated by the applicant;
- (2) the proposed number of Level I nursery bassinets, Level II beds, Level III beds and Level IV beds to be operated following completion of the proposed project;
- (3) evidence of the applicant's experience in treating the following patients at the facility during the past twelve months, including:
  - (A) the number of obstetrical patients treated at the acute care facility;
  - (B) the number of neonatal patients treated in Level I nursery bassinets, Level II beds, Level III beds and Level IV beds, respectively;
  - (C) the number of inpatient days at the facility provided to obstetrical patients;
  - (D) the number of inpatient days provided in Level II beds, Level III beds and Level IV beds, respectively;
  - (E) the number of high-risk obstetrical patients treated at the applicant's facility and the number of high-risk obstetrical patients referred from the applicant's facility to other facilities or programs; and
  - (F) the number of neonatal patients referred to other facilities for services, identified by required level of neonatal service (i.e. Level II, Level III or Level IV);
- (4) the projected number of neonatal patients to be served identified by Level I, Level II, Level III and Level IV neonatal services for each of the first three years of operation following the completion of the project, including the methodology and assumptions used for the projections;
- (5) the projected number of patient days of care to be provided in Level I bassinets, Level II beds, Level III beds, and Level IV beds, respectively, for each of the first three years of operation following completion of the project,

including the methodology and assumptions used for the projections;

- (6) if proposing to provide Level I or Level II neonatal ~~services,~~ services in the facility for the first time, documentation that at least 90 percent of the anticipated patient population is within 30 minutes driving time one-way from the facility;
- (7) if proposing to provide ~~new~~ Level I or Level II neonatal ~~services,~~ services in the facility for the first time, documentation of a written plan to transport infants to Level III or Level IV neonatal services as the infant's care requires;
- (8) evidence that the applicant shall have access to a transport service with at least the following components:
  - (A) trained personnel;
  - (B) transport incubator;
  - (C) emergency resuscitation equipment;
  - (D) oxygen supply, monitoring equipment and the means of administration;
  - (E) portable cardiac and temperature monitors; and
  - (F) a mechanical ventilator;
- (9) documentation that the proposed service shall be operated in an area organized as a physically and functionally distinct entity with controlled access;
- (10) documentation to show that the new or additional Level I, Level II, Level III or Level IV neonatal services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies;
- (11) a detailed floor plan of the proposed area drawn to scale;
- (12) documentation of direct or indirect visual observation by unit staff of all patients from one or more vantage points; and
- (13) documentation that the floor space allocated to each bed and bassinet shall accommodate equipment and personnel to meet anticipated contingencies.

(c) If proposing to provide ~~new~~ Level III or Level IV neonatal services in the facility for the first time, the applicant shall also provide the following information:

- (1) documentation that at least 90 percent of the anticipated patient population is within 90 minutes driving time one-way from the facility, with the exception that there shall be a variance from the 90 percent standard for facilities which demonstrate that they provide very specialized levels of neonatal care to a large and geographically diverse population, or facilities which demonstrate the availability of air ambulance services for neonatal patients;
- (2) evidence that existing and approved neonatal services in the applicant's defined neonatal service area are unable to accommodate the

- applicant's projected need for additional Level III and Level IV services;
- (3) an analysis of the proposal's impact on existing Level III and Level IV neonatal services which currently serve patients from the applicant's primary service area;
- (4) the availability of high risk OB services at the site of the applicant's planned neonatal service;
- (5) copies of written policies which provide for parental participation in the care of their infant, as the infant's condition permits, in order to facilitate family adjustment and continuity of care following discharge; and
- (6) copies of written policies and procedures regarding the scope and provision of care within the neonatal service, including but not limited to the following:
  - (A) the admission and discharge of patients;
  - (B) infection control;
  - (C) pertinent safety practices;
  - (D) the triaging of patients requiring consultations, including the transfer of patients to another facility; and
  - (E) the protocols for obtaining emergency physician care for a sick infant.

*History Note: Authority G.S. 131E-177(1); 131E-183; Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Amended Eff. November 1, 1996; Temporary Amendment Eff. March 15, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. February 1, 2010.*

**10A NCAC 14C .1403 PERFORMANCE STANDARDS**

- (a) An applicant shall demonstrate that the proposed project is capable of meeting the following standards:
  - (1) if an applicant ~~proposes an increase in the number of the facility's existing~~ is proposing to increase the total number of neonatal beds (i.e., the sum of Level II, Level III ~~or~~ and Level IV beds, beds), the overall average annual occupancy of the total combined number of all existing Level II, Level III and Level IV beds in the facility is at least 75 percent, over the 12 months immediately preceding the submittal of the proposal;
  - (2) if an applicant is proposing to ~~develop new or additional~~ increase the total number of neonatal beds (i.e., the sum of Level II, Level III ~~or~~ and Level IV beds, beds), the projected overall average annual occupancy of the total combined number of all Level II, Level III and Level IV beds proposed to be operated during the third year of operation of the proposed project shall be at least 75 percent; and

- (3) The applicant shall document the assumptions and provide data supporting the methodology used for each projection in this rule.
- (b) If an applicant proposes to develop a new Level III or Level IV service, the applicant shall document that an unmet need exists in the applicant's defined neonatal service area, unless the State Medical Facilities Plan includes a need determination for neonatal beds in the service area. The need for Level III and Level IV beds shall be computed for the applicant's neonatal service area by:
  - (1) identifying the annual number of live births occurring at all hospitals within the proposed neonatal service area, using the latest available data compiled by the State Center for Health Statistics;
  - (2) identifying the low birth weight rate (percent of live births below 2,500 grams) for the births identified in (1) of this Paragraph, using the latest available data compiled by the State Center for Health Statistics;
  - (3) dividing the low birth weight rate identified in (2) of this Paragraph by .08 and subsequently multiplying the resulting quotient by four; and
  - (4) determining the need for Level III and Level IV beds in the proposed neonatal service area as the product of:
    - (A) the product derived in (3) of this Paragraph, and
    - (B) the quotient resulting from the division of the number of live births in the initial year of the determination identified in (1) of this Paragraph by the number 1000.

*History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Temporary Amendment Eff. March 15, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. February 1, 2009; Amended Eff. November 1, 2009; Temporary Amendment Eff. February 1, 2010.*

**SECTION .1700 – CRITERIA AND STANDARDS FOR OPEN-HEART SURGERY SERVICES AND HEART-LUNG BYPASS MACHINES**

**10A NCAC 14C .1703 PERFORMANCE STANDARDS**

- The applicant shall demonstrate that the proposed project is capable of meeting the following standards:
- ~~(1) the applicant shall perform at least four diagnostic catheterizations per open heart surgical procedure during each quarter;~~
  - ~~(2)~~(1) an applicant's existing and new or additional heart-lung bypass machines shall be utilized at an annual rate of 200 open heart surgical procedures per machine, measured during the

- twelfth quarter following completion of the project;
- (3)(2) at least 50 percent of the projected open heart surgical procedures shall be performed on patients residing within the primary open heart surgery service area;
  - (4)(3) the applicant's projected utilization and proposed staffing patterns are such that each open heart surgical team shall perform at an annual rate of at least 150 open heart surgical procedures by the end of the third year following completion of the project;
  - (5)(4) the applicant shall document the assumptions and provide data supporting the methodology used to make these projections; and
  - (6)(5) heart-lung bypass machines that have been acquired for non-surgical use, or for non-heart surgical procedure use, and that are dedicated for services that are not related to the open heart surgery services, shall not be utilized in the performance of open heart surgical procedures.

*History Note: Authority G.S. 131E-177(1); 131E-183(b); Eff. January 1, 1987;*  
*Amended Eff. November 1, 1989;*  
*Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*  
*Amended Eff. January 4, 1994;*  
*Temporary Amendment January 1, 1999;*  
*Temporary Eff. January 1, 1999 expired October 12, 1999;*  
*Temporary Amendment Eff. January 1, 2000 and shall expire on the date the permanent amendment to this rule, approved by the Rules Review Commission on November 17, 1999, becomes effective;*  
*Amended Eff. July 1, 2000;*  
*Temporary Amendment Eff. January 1, 2002;*  
*Amended Eff. April 1, 2003;*  
*Temporary Amendment Eff. February 1, 2010.*

## **SECTION .1900 – CRITERIA AND STANDARDS FOR RADIATION THERAPY EQUIPMENT**

### **10A NCAC 14C .1902 INFORMATION REQUIRED OF APPLICANT**

- (a) An applicant proposing to acquire radiation therapy equipment shall use the Acute Care Facility/Medical Equipment application form.
- (b) An applicant proposing to acquire radiation therapy equipment shall also provide the following additional information:
  - (1) a list of all the radiation therapy equipment to be acquired and documentation of the capabilities and capacities of each item of equipment;
  - (2) documentation of the purchase price and fair market value of each piece of radiation therapy

- equipment, each simulator, and any other related equipment proposed to be acquired;
  - (3) the projected number of patient treatments by ~~county and by~~ intensity modulated (IMRT), stereotactic radiosurgery, simple, intermediate and complex radiation treatments to be performed on each piece of radiation therapy equipment for each of the first three years of operation following the completion of the proposed project and documentation of all assumptions by which utilization is projected;
  - (4) documentation that the proposed radiation therapy equipment shall be operational at least seven hours per day, five days a week;
  - (5) documentation that no more than one simulator is available for every two linear accelerators in the applicant's facility, except that an applicant that has only one linear accelerator may have one simulator;
  - (6) documentation that the services shall be offered in a physical environment that conforms to the requirements of federal, state, and local regulatory bodies; ~~and~~
  - (7) the projected total number of radiation treatment patients that will be treated by county in the facility in each of the first three years of operation following completion of the proposed ~~project-project~~;
  - (8) the projected number of radiation treatment patients that will be treated for palliation in each of the first three years of operation following completion of the proposed project; and
  - (9) the projected number of radiation treatment patients that will be treated for cure in each of the first three years of operation following completion of the proposed project.
- (c) An applicant proposing to acquire a linear accelerator for development of a multidisciplinary prostate health center pursuant to a need determination for a demonstration project in the State Medical Facilities Plan shall provide the following additional information:

- (1) description of all services to be provided by the proposed multidisciplinary prostate health center, including a description of each of the following services:
  - (A) urology services,
  - (B) medical oncology services,
  - (C) biofeedback therapy,
  - (D) chemotherapy,
  - (E) brachytherapy, and
  - (F) living skills counseling and therapy;
- (2) documentation that urology services, medical and radiation oncology services, biofeedback therapy, brachytherapy and post-treatment living skills counseling and therapy will be provided in the same building;

- (3) description of any services that will be provided by other facilities or in different buildings;
- (4) demographics of the population in the county in which the proposed multidisciplinary prostate health center will be located, including:
  - (A) percentage of the population in the county that is African American,
  - (B) the percentage of the population in the county that is male,
  - (C) the percentage of the population in the county that is African American male,
  - (D) the incidence of prostate cancer for the African American male population in the county, and
  - (E) the mortality rate from prostate cancer for the African American male population in the county;
- (5) documentation that the proposed center is located within walking distance of an established bus route and within five miles of a minority community;
- (6) documentation that the multiple medical disciplines in the center will collaborate to create and maintain a single or common medical record for each patient and conduct multidisciplinary conferences regarding each patient's treatment and follow-up care;
- (7) documentation that the center will establish its own prostate/urological cancer tumor board for review of cases;
- (8) copy of the center's written policies that prohibit the exclusion of services to any patient on the basis of age, race, religion, disability or the patient's ability to pay;
- (9) copy of written strategies and activities the center will follow to assure its services will be accessible by patients without regard to their ability to pay;
- (10) description of the center's outreach activities and the manner in which they complement existing outreach initiatives;
- (11) documentation of number and type of clinics to be conducted to screen patients at risk for prostate cancer;
- (12) written description of patient selection criteria, including referral arrangements for high-risk patients;
- (13) commitment to prepare an annual report at the end of each of the first three operating years, to be submitted to the Medical Facilities Planning Section and the Certificate of Need Section, that shall include:
  - (A) the total number of patients treated;
  - (B) the number of African American persons treated;
  - (C) the number of persons in other minority populations treated; and
  - (D) the number of insured, underinsured and uninsured patients served by type of payment category;
- (14) documentation of arrangements made with a third party researcher to evaluate, during the fourth operating year of the center, the efficacy of the clinical and outreach initiatives on prostate and urological cancer treatment, and develop recommendations regarding the advantages and disadvantages of replicating the project in other areas of the State. The results of the evaluation and recommendations shall be submitted in a report to the Medical Facilities Planning Section and Certificate of Need Section in the first quarter of the fifth operating year of the demonstration project; and
- (15) if the third party researcher is not a historically black university, document the reasons for using a different researcher for the project.

*History Note: Authority G.S. 131E-177(1); 131E-183; Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*  
*Eff. January 4, 1994;*  
*Amended Eff. November 1, 1996;*  
*Temporary Amendment Eff. January 1, 1999;*  
*Temporary Amendment Eff. January 1, 1999 Expired on October 12, 1999;*  
*Temporary Amendment Eff. January 1, 2000;*  
*Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000;*  
*Amended Eff. April 1, 2001;*  
*Temporary Amendment Eff. January 1, 2005;*  
*Amended Eff. November 1, 2005;*  
*Temporary Amendment Eff. February 1, 2009;*  
*Amended Eff. November 1, 2009;*  
*Temporary Amendment Eff. February 1, 2010.*

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

### **10A NCAC 14C .2102 INFORMATION REQUIRED OF APPLICANT**

- (a) An applicant proposing to establish a new ambulatory surgical facility, to establish a new campus of an existing facility, to establish a new hospital, to increase the number of operating rooms, to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall identify each of the following specialty areas that will be provided in the facility:
- (1) gynecology;
  - (2) otolaryngology;
  - (3) plastic surgery;

- (4) general surgery;
- (5) ophthalmology;
- (6) orthopedic;
- (7) oral surgery; and
- (8) other specialty area identified by the applicant.

(b) An applicant proposing to ~~establish a new ambulatory surgical facility~~, to increase the number of operating rooms ~~except relocations of existing operating rooms between existing licensed facilities within the same~~ in a service area, to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall provide the following information:

- (1) the number and type of operating rooms in each ~~licensed~~ facility which the applicant or a related entity owns a controlling interest in and is located in the service area, (separately identifying the number of dedicated open heart and dedicated C-Section rooms);
- (2) the number and type of operating rooms to be located in each ~~licensed~~ facility which the applicant or a related entity owns a controlling interest in and is located in the service area after completion of the proposed project and all previously approved projects related to these facilities (separately identifying the number of dedicated open heart and dedicated C-Section rooms);
- (3) the number of inpatient surgical cases, excluding trauma cases reported by Level I, II, or III trauma centers, cases reported by designated burn intensive care units, and cases performed in dedicated open heart and dedicated C-section rooms, and the number of outpatient surgical cases performed in the most recent 12 month period for which data is available, in the operating rooms in each ~~licensed~~ facility listed in response to Subparagraphs (b)(1) and (b)(2) of this Rule;
- (4) the number of inpatient surgical cases, excluding trauma cases reported by level I, II, or III trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and dedicated C-section rooms, and the number of outpatient surgical cases projected to be performed in each of the first three operating years of the proposed project, in each ~~licensed~~ facility listed in response to Subparagraphs (b)(1) and (b)(2) of this Rule;
- (5) a detailed description of and documentation to support the assumptions and methodology used in the development of the projections required by this Rule;
- (6) the hours of operation of the proposed new operating rooms;
- (7) if the applicant is an existing facility, the average reimbursement received per procedure for the 20 surgical procedures most commonly

performed in the facility during the preceding 12 months and a list of all services and items included in the reimbursement;

- (8) the projected average reimbursement to be received per procedure for the 20 surgical procedures which the applicant projects will be performed most often in the facility and a list of all services and items included in the reimbursement; and
- (9) identification of providers of pre-operative services and procedures which will not be included in the facility's charge.

(c) An applicant proposing to relocate existing or approved operating rooms ~~between existing licensed facilities~~ within the same service area shall provide the following information:

- (1) the number and type of existing and approved operating rooms in each ~~licensed~~ facility in which the number of operating rooms will increase or decrease (separately identifying the number of dedicated open heart and dedicated C-Section rooms);
- (2) the number and type of operating rooms to be located in each affected ~~licensed~~ facility after completion of the proposed project and all previously approved projects related to these facilities (separately identifying the number of dedicated open heart and dedicated C-Section rooms);
- (3) the number of inpatient surgical cases, excluding trauma cases reported by Level I, II, or III trauma centers, cases reported by designated burn intensive care units, and cases performed in dedicated open heart and dedicated C-section rooms, and the number of outpatient surgical cases performed in the most recent 12 month period for which data is available, in the operating rooms in each ~~licensed~~ facility listed in response to Subparagraphs (c)(1) and (c)(2) of this Rule;
- (4) the number of inpatient surgical cases, excluding trauma cases reported by level I, II, or III trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and dedicated C-section rooms, and the number of outpatient surgical cases projected to be performed in each of the first three operating years of the proposed project, in each ~~licensed~~ facility listed in response to Subparagraphs (c)(1) and (c)(2) of this Rule;
- (5) a detailed description of and documentation to support the assumptions and methodology used in the development of the projections required by this Rule;
- (6) the hours of operation of the facility to be expanded;
- (7) the average reimbursement received per procedure for the 20 surgical procedures most commonly performed in each affected ~~licensed~~

- facility during the preceding 12 months and a list of all services and items included in the reimbursement;
- (8) the projected average reimbursement to be received per procedure for the 20 surgical procedures which the applicant projects will be performed most often in the facility to be expanded and a list of all services and items included in the reimbursement; and
- (9) identification of providers of pre-operative services and procedures which will not be included in the facility's charge.

(d) An applicant proposing to establish a new single specialty separately licensed ambulatory surgical facility pursuant to the demonstration project in the 2010 State Medical Facilities Plan shall provide:

- (1) the single surgical specialty area in which procedures will be performed in the proposed ambulatory surgical facility;
- (2) a description of the ownership interests of physicians in the proposed ambulatory surgical facility;
- (3) a commitment that the Medicare allowable amount for self pay and Medicaid surgical cases minus all revenue collected from self-pay and Medicaid surgical cases shall be at least seven percent of the total revenue collected for all surgical cases performed in the proposed facility;
- (4) for each of the first three full fiscal years of operation, the projected number of self-pay surgical cases;
- (5) for each of the first three full fiscal years of operation, the projected number of Medicaid surgical cases;
- (6) for each of the first three full fiscal years of operation, the total projected Medicare allowable amount for the self pay surgical cases to be served in the proposed facility, i.e. provide the projected Medicare allowable amount per self-pay surgical case and multiply that amount by the projected number of self pay surgical cases;
- (7) for each of the first three full fiscal years of operation, the total projected Medicare allowable amount for the Medicaid surgical cases to be served in the facility, i.e. provide the projected Medicare allowable amount per Medicaid surgical case and multiply that amount by the projected number of Medicaid surgical cases;
- (8) for each of the first three full fiscal years of operation, the projected revenue to be collected from the projected number of self-pay surgical cases;
- (9) for each of the first three full fiscal years of operation, the projected revenue to be collected from the projected number of Medicaid surgical cases;

- (10) for each of the first three full fiscal years of operation, the projected total revenue to be collected for all surgical cases performed in the proposed facility;
- (11) a commitment to report utilization and payment data for services provided in the proposed ambulatory surgical facility to the statewide data processor, as required by G.S. 131E-214.2;
- (12) a description of the system the proposed ambulatory surgical facility will use to measure and report patient outcomes for the purpose of monitoring the quality of care provided in the facility;
- (13) descriptions of currently available patient outcome measures for the surgical specialty to be provided in the proposed facility, if any exist;
- (14) if patient outcome measures are not currently available for the surgical specialty area, the applicant shall develop its own patient outcome measures to be used for monitoring and reporting the quality of care provided in the proposed facility, and shall provide in its application a description of the measures it developed;
- (15) a description of the system the proposed ambulatory surgical facility will use to enhance communication and ease data collection, e.g. electronic medical records;
- (16) a description of the proposed ambulatory surgical facility's open access policy for physicians, if one is proposed;
- (17) a commitment to provide to the Agency annual reports at the end of each of the first five full years of operation regarding:
  - (A) patient payment data submitted to the statewide data processor as required by G.S. 131E-214.2;
  - (B) patient outcome results for each of the applicant's patient outcome measures;
  - (C) the extent to which the physicians owning the proposed facility maintained their hospital staff privileges and provided Emergency Department coverage, e.g. number of nights each physician is on call at a hospital; and
  - (D) the extent to which the facility is operating in compliance with the representations the applicant made in its application relative to the single specialty ambulatory surgical facility demonstration project in the 2010 State Medical Facilities Plan.

*History Note: Authority G.S. 131E-177; 131E-183(b); Eff. November 1, 1990;*

*Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*

*Amended Eff. January 4, 1994;*

*Temporary Amendment Eff. July 1, 2001;*

*Temporary Amendment Eff. January 1, 2002;*

*Amended Eff. August 1, 2002;*

*Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002;*

*Amended Eff. April 1, 2003;*

*Temporary Amendment Eff. February 1, 2008;*

*Amended Eff. November 1, 2008;*

*Temporary Amendment Eff. February 1, 2010.*

#### **10A NCAC 14C .2103 PERFORMANCE STANDARDS**

(a) In projecting utilization, the operating rooms shall be considered to be available for use five days per week and 52 weeks a year.

(b) A proposal to establish a new ambulatory surgical facility, to establish a new campus of an existing facility, to establish a new hospital, to increase the number of operating rooms in an existing facility (excluding dedicated C-section operating rooms), to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall not be approved unless:

- (1) the applicant reasonably demonstrates the need for the number of proposed operating rooms in the facility, which is the subject of this review, facility, which is proposed to be developed or expanded, in the third operating year of the project based on the following formula:  $\{[(\text{Number of facility's projected inpatient cases, excluding trauma cases reported by Level I or II trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and C-section rooms, times 3.0 hours}) \text{ plus } (\text{Number of facility's projected outpatient cases times 1.5 hours})] \text{ divided by } 1872 \text{ hours}\}$  minus the facility's total number of existing and approved operating rooms and operating rooms proposed in another pending application, excluding one operating room for Level I or II trauma centers, one operating room for facilities with designated burn intensive care units, and all dedicated open heart and C-section operating rooms. The number of rooms needed is determined as follows:

- (A) in a service area which has more than 10 operating rooms, if the difference is a positive number greater than or equal to 0.5, then the need is the next highest whole number for fractions of 0.5 or greater and the next lowest whole number for fractions less than 0.5; and if the difference is a negative number or a positive number less than 0.5, then the need is zero;

- (B) in a service area which has six to 10 operating rooms, if the difference is a positive number greater than or equal to 0.3, then the need is the next highest whole number for fractions of 0.3 or greater and the next lowest whole number for fractions less than 0.3, and if the difference is a negative number or a positive number less than 0.3, then the need is zero; and

- (C) in a service area which has five or fewer operating rooms, if the difference is a positive number greater than or equal to 0.2, then the need is the next highest whole number for fractions of 0.2 or greater and the next lowest whole number for fractions less than 0.2; and if the difference is a negative number or a positive number less than 0.2, then the need is zero; or

- (2) the applicant demonstrates conformance of the proposed project to Policy AC-3 in the State Medical Facilities Plan titled "Exemption From Plan Provisions for Certain Academic Medical Center Teaching Hospital Projects."

(c) ~~A proposal to establish a new ambulatory surgical facility, to increase the number of operating rooms (excluding dedicated C-section operating rooms) except relocations of existing operating rooms within the same in a service area, to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program~~ area shall not be approved unless the applicant reasonably demonstrates the need for the number of proposed operating rooms in addition to the rooms in all of the licensed facilities identified in response to 10A NCAC 14C .2102(b)(2) in the third operating year of the proposed project based on the following formula:  $\{[(\text{Number of projected inpatient cases for all the applicant's or related entities' facilities, excluding trauma cases reported by Level I or II trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and C-section rooms, times 3.0 hours}) \text{ plus } (\text{Number of projected outpatient cases for all the applicant's or related entities' facilities times 1.5 hours})] \text{ divided by } 1872 \text{ hours}\}$  minus the total number of existing and approved operating rooms and operating rooms proposed in another pending application, excluding one operating room for Level I or II trauma centers, one operating room for facilities with designated burn intensive care units, and all dedicated open heart and C-Section operating rooms in all of the applicant's or related entities' licensed facilities in the service area. The number of rooms needed is determined as follows:

- (1) in a service area which has more than 10 operating rooms, if the difference is a positive number greater than or equal to 0.5, then the need is the next highest whole number for fractions of 0.5 or greater and the next lowest whole number for fractions less than 0.5; and if the difference is a negative number or a

positive number less than 0.5, then the need is zero;

- (2) in a service area which has six to 10 operating rooms, if the difference is a positive number greater than or equal to 0.3, then the need is the next highest whole number for fractions of 0.3 or greater and the next lowest whole number for fractions less than 0.3, and if the difference is a negative number or a positive number less than 0.3, then the need is zero; and
- (3) in a service area which has five or fewer operating rooms, if the difference is a positive number greater than or equal to 0.2, then the need is the next highest whole number for fractions of 0.2 or greater and the next lowest whole number for fractions less than 0.2; and if the difference is a negative number or a positive number less than 0.2, then the need is zero.

(d) An applicant that has one or more existing or approved dedicated C-section operating rooms and is proposing to develop an additional dedicated C-section operating room in the same facility shall demonstrate that an average of at least 365 C-sections per room were performed in the facility's existing dedicated C-section operating rooms in the previous 12 months and are projected to be performed in the facility's existing, approved and proposed dedicated C-section rooms during the third year of operation following completion of the project.

(e) An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall provide documentation to show that each existing ambulatory surgery program in the service area that performs ambulatory surgery in the same specialty area as proposed in the application is currently utilized an average of at least 1,872 hours per operating room per year, excluding dedicated open heart and C-Section operating rooms. The hours utilized per operating room shall be calculated as follows: [(Number of projected inpatient cases, excluding open heart and C-sections performed in dedicated rooms, times 3.0 hours) plus (Number of projected outpatient cases times 1.5 hours)] divided by the number of operating rooms, excluding dedicated open heart and C-Section operating rooms.

(f) An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall reasonably demonstrate the need for the conversion in the third operating year of the project based on the following formula: [(Total number of projected outpatient cases for all ambulatory surgery programs in the service area times 1.5 hours) divided by 1872 hours] minus the total number of existing, approved and proposed outpatient or ambulatory surgical operating rooms and shared operating rooms in the service area. The need for the conversion is demonstrated if the difference is a positive number greater than or equal to one, after the number is rounded to the next highest number for fractions of 0.50 or greater.

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

*History Note: Authority G.S. 131E-177; 131E-183(b); Eff. November 1, 1990; Amended Eff. March 1, 1993; Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. January 4, 1994; Temporary Amendment Eff. January 1, 2002; July 1, 2001; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. January 1, 2005; Amended Eff. November 1, 2005; Temporary Rule Eff. February 1, 2006; Amended Eff. November 1, 2006; Temporary Amendment Eff. February 1, 2008; Amended Eff. November 1, 2008; Temporary Amendment Eff. February 1, 2009; Amended Eff. November 1, 2009; Temporary Amendment Eff. February 1, 2010.*

#### **10A NCAC 14C .2104 SUPPORT SERVICES**

(a) An applicant proposing to establish a new ambulatory surgical facility, a new campus of an existing facility, or a new hospital ~~increase the number of operating rooms, convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or add a specialty to a specialty ambulatory surgical program~~ shall provide copies of the written policies and procedures ~~demonstrating that~~ that will be used by the proposed facility ~~will have for~~ for patient referral, transfer, and ~~follow-up procedures.~~ follow-up.

(b) ~~The applicant~~ An applicant proposing to establish a new ambulatory surgical facility, a new campus of an existing facility, or a new hospital shall provide documentation showing the proximity of the proposed facility to the following services:

- (1) emergency services;
- (2) support services;
- (3) ancillary services; and
- (4) public transportation.

*History Note: Authority G.S. 131E-177; 131E-183(b); Eff. November 1, 1990; Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. January 4, 1994; Temporary Amendment Eff. July 1, 2001; Temporary Amendment Eff. January 1, 2002; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. February 1, 2010.*



**10A NCAC 14C .2105 STAFFING AND STAFF TRAINING**

(a) An applicant proposing to establish a new ambulatory surgical facility, to establish a new campus of an existing facility, to establish a new hospital, to increase the number of operating rooms, rooms in a facility, to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall identify, justify and document the availability of the number of current and proposed staff to be utilized in the following areas: areas in the facility to be developed or expanded:

- (1) administration;
- (2) pre-operative;
- (3) post-operative;
- (4) operating room; and
- (5) other.

(b) The applicant shall identify the number of physicians who currently utilize the facility and estimate the number of physicians expected to utilize the facility and the criteria to be used by the facility in extending surgical and anesthesia privileges to medical personnel.

(c) The applicant shall provide documentation that physicians with privileges to practice in the facility will be active members in good standing at a general acute care hospital within the ambulatory surgical service area in which the facility is, or will be, located or will have written referral procedures with a physician who is an active member in good standing at a general acute care hospital in the ambulatory surgical service area. documentation of contacts the applicant made with hospitals in the service area in an effort to establish staff privileges.

(d) The applicant shall provide documentation that physicians owning the proposed single specialty demonstration facility will meet Emergency Department coverage responsibilities in at least one hospital within the service area, or documentation of contacts the applicant made with hospitals in the service area in an effort to commit its physicians to assume Emergency Department coverage responsibilities.

*History Note: Authority G.S. 131E-177; 131E-183(b); Eff. November 1, 1990;*  
*Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*  
*Amended Eff. January 4, 1994;*  
*Temporary Amendment Eff. July 1, 2001;*  
*Temporary Amendment Eff. January 1, 2002;*  
*Amended Eff. August 1, 2002;*  
*Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002;*  
*Amended Eff. April 1, 2003;*  
*Temporary Amendment Eff. February 1, 2010.*

**10A NCAC 14C .2106 FACILITY**

(a) An applicant proposing to establish a licensed ambulatory surgical facility that will be physically located in a physician's or dentist's office or within a general acute care hospital shall demonstrate that reporting and accounting mechanisms exist and can be used to confirm that the licensed ambulatory surgery

facility is a separately identifiable entity physically and administratively, and is financially independent and distinct from other operations of the facility in which it is located.

(b) An applicant proposing to establish a licensed ambulatory surgical facility or a new hospital shall receive accreditation from the Joint Commission for the Accreditation of Healthcare Organizations, the Accreditation Association for Ambulatory Health Care or a comparable accreditation authority within two years of completion of the facility.

(c) ~~An applicant proposing to establish a new ambulatory surgical facility, to increase the number of operating rooms, to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program~~ All applicants shall document that the physical environment of the facility to be developed or expanded conforms to the requirements of federal, state, and local regulatory bodies.

(d) ~~The An~~ applicant proposing to establish a new ambulatory surgical facility, a new campus of an existing facility or a new hospital shall provide a floor plan of the proposed facility identifying the following areas:

- (1) receiving/registering area;
- (2) waiting area;
- (3) pre-operative area;
- (4) operating room by type;
- (5) recovery area; and
- (6) observation area.

(e) An applicant proposing to expand by converting a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or by adding a specialty to a specialty ambulatory surgical program that does not propose to add physical space to the existing ambulatory surgical facility shall demonstrate the capability of the existing ambulatory surgical program to provide the following for each additional specialty area:

- (1) physicians;
- (2) ancillary services;
- (3) support services;
- (4) medical equipment;
- (5) surgical equipment;
- (6) receiving/registering area;
- (7) clinical support areas;
- (8) medical records;
- (9) waiting area;
- (10) pre-operative area;
- (11) operating rooms by type;
- (12) recovery area; and
- (13) observation area.

*History Note: Authority G.S. 131E-177; 131E-183(b); Eff. November 1, 1990;*  
*Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*  
*Amended Eff. January 4, 1994;*  
*Temporary Amendment Eff. July 1, 2001;*  
*Temporary Amendment Eff. January 1, 2002;*  
*Amended Eff. August 1, 2002;*

*Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002;  
Amended Eff. April 1, 2003;  
Temporary Amendment Eff. February 1, 2008;  
Amended Eff. November 1, 2008;  
Temporary Amendment Eff. February 1, 2010.*

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

**10A NCAC 14C .2202 INFORMATION REQUIRED OF  
APPLICANT**

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

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

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

- (1) For new facilities, a letter of intent to sign a written agreement or a signed written agreement with an acute care hospital that specifies the relationship with the dialysis facility and describes the services that the hospital will provide to patients of the dialysis facility. The agreement must comply with 42 C.F.R., Section 405.2100.
- (2) For new facilities, a letter of intent to sign a written agreement or a written agreement with a transplantation center describing the relationship with the dialysis facility and the specific services that the transplantation center will provide to patients of the dialysis facility. The agreements must include the following:
  - (A) timeframe for initial assessment and evaluation of patients for transplantation,
  - (B) composition of the assessment/evaluation team at the transplant center,
  - (C) method for periodic re-evaluation,

- (D) criteria by which a patient will be evaluated and periodically re-evaluated for transplantation, and
- (E) signatures of the duly authorized persons representing the facilities and the agency providing the services.

(3) For new or replacement facilities, Documentation documentation of standing service from a power company and back-up capabilities, that power and water will be available at the proposed site.

(4) Copies of written policies and procedures for back up for electrical service in the event of a power outage.

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

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

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

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

~~(8)~~(9) A commitment that the applicant shall admit and provide dialysis services to patients who have no insurance or other source of payment, but for whom payment for dialysis services will be made by another healthcare provider in an amount equal to the Medicare reimbursement rate for such services.

*History Note: Authority G.S. 131E-177(1); 131E-183(b);  
Eff. March 1, 1989;  
Temporary Amendment Eff. January 1, 2003;  
Amended Eff. August 1, 2004;  
Temporary Amendment Eff. January 1, 2005;  
Amended Eff. November 1, 2005;  
Temporary Amendment Eff. February 1, 2010.*

**10A NCAC 14C .2203 PERFORMANCE STANDARDS**

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

end of the first operating year of the facility, with the exception that the performance standard shall be waived for a need in the State Medical Facilities Plan that is based on an adjusted need determination.

(b) An applicant proposing to increase the number of dialysis stations in an existing End Stage Renal Disease facility or one that was not operational prior to the beginning of the review period but which had been issued a certificate of need shall document the need for the additional stations based on utilization of 3.2 patients per station per week as of the end of the first operating year of the additional stations.

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

*History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. January 1, 2003; January 1, 2002; Eff. April 1, 2003; Amended Eff. August 1, 2004; Temporary Amendment Eff. January 1, 2005; Amended Eff. November 1, 2005; Temporary Amendment Eff. February 1, 2006; Amended Eff. November 1, 2006; Temporary Amendment Eff. February 1, 2010.*

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

### **10A NCAC 14C .2701 DEFINITIONS**

The following definitions apply to all rules in this Section:

- (1) "Approved MRI scanner" means an MRI scanner which was not operational prior to the beginning of the review period but which had been issued a certificate of need.
- (2) "Capacity of fixed MRI scanner" means 100 percent of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a fixed MRI scanner is 6,864 weighted MRI procedures, which assumes two weighted MRI procedures are performed per hour and the scanner is operated 66 hours per week, 52 weeks per year.
- (3) "Capacity of mobile MRI scanner" means 100 percent of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a mobile MRI scanner is 4,160 weighted MRI procedures, which assumes two weighted MRI procedures are performed per hour and the scanner is operated 40 hours per week, 52 weeks per year.

- (4) "Dedicated breast MRI scanner" means an MRI scanner that is configured to perform only breast MRI procedures and is not capable of performing other types of non-breast MRI procedures.
- (5) "Existing MRI scanner" means an MRI scanner in operation prior to the beginning of the review period.
- (6) "Extremity MRI scanner" means an MRI scanner that is utilized for the imaging of extremities and is of open design with a field of view no greater than 25 centimeters.
- (7) "Fixed MRI scanner" means an MRI scanner that is not a mobile MRI scanner.
- (8) "Magnetic Resonance Imaging" (MRI) means a non-invasive diagnostic modality in which electronic equipment is used to create tomographic images of body structure. The MRI scanner exposes the target area to nonionizing magnetic energy and radio frequency fields, focusing on the nuclei of atoms such as hydrogen in the body tissue. Response of selected nuclei to this stimulus is translated into images for evaluation by the physician.
- (9) "Magnetic resonance imaging scanner" (MRI Scanner) is defined in G.S. ~~131E-176(14e)~~; 131E-176(14m).
- (10) "Mobile MRI region" means either the eastern part of the State which includes the counties in Health Service Areas IV, V and VI (Eastern Mobile MRI Region), or the western part of the State which includes the counties in Health Service Areas I, II, and III (Western Mobile MRI Region). The counties in each Health Service Area are identified in Appendix A of the State Medical Facilities Plan.
- (11) "Mobile MRI scanner" means an MRI scanner and transporting equipment which is moved at least weekly to provide services at two or more campuses or physical locations.
- (12) "MRI procedure" means a single discrete MRI study of one patient.
- (13) "MRI service area" means the Magnetic Resonance Imaging Planning Areas, as defined in the applicable State Medical Facilities Plan, except for proposed new mobile MRI scanners for which the service area is a mobile MRI region.
- (14) "MRI study" means one or more scans relative to a single diagnosis or symptom.
- (15) "Multi-position MRI scanner" means an MRI scanner as defined in the State Medical Facilities Plan, pursuant to a special need determination for a demonstration project.
- (16) "Related entity" means the parent company of the applicant, a subsidiary company of the applicant (i.e., the applicant owns 50 percent or more of another company), a joint venture

- in which the applicant is a member, or a company that shares common ownership with the applicant (i.e., the applicant and another company are owned by some of the same persons).
- (17) "Temporary MRI scanner" means an MRI scanner that the Certificate of Need Section has approved to be temporarily located in North Carolina at a facility that holds a certificate of need for a new fixed MRI scanner, but which is not operational because the project is not yet complete.
- (18) "Weighted MRI procedures" means MRI procedures which are adjusted to account for the length of time to complete the procedure, based on the following weights: one outpatient MRI procedure without contrast or sedation is valued at 1.0 weighted MRI procedure, one outpatient MRI procedure with contrast or sedation is valued at 1.4 weighted MRI procedures, one inpatient MRI procedure without contrast or sedation is valued at 1.4 weighted MRI procedures; and one inpatient MRI procedure with contrast or sedation is valued at 1.8 weighted MRI procedures.
- (19) "Weighted breast MRI procedures" means MRI procedures which are performed on a dedicated breast MRI scanner and are adjusted to account for the length of time to complete the procedure, based on the following weights: one diagnostic breast MRI procedure is valued at 1.0 weighted MRI procedure (based on an average of 60 minutes per procedure), one MRI-guided breast needle localization MRI procedure is valued at 1.1 weighted MRI procedure (based on an average of 66 minutes per procedure), and one MRI-guided breast biopsy procedure is valued at 1.6 weighted MRI procedures (based on an average of 96 minutes per procedure).
- History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*  
*Eff. February 1, 1994;*  
*Temporary Amendment Eff. January 1, 1999;*  
*Temporary Amendment Eff. January 1, 1999 Expired on October 12, 1999;*  
*Temporary Amendment Eff. January 1, 2000;*  
*Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000;*  
*Temporary Amendment Eff. January 1, 2001;*  
*Temporary Amendment effective January 1, 2001 amends and replaces a permanent rulemaking originally proposed to be effective April 1, 2001;*  
*Temporary Amendment Eff. January 1, 2002;*  
*Amended Eff. August 1, 2002;*  
*Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002;*  
*Temporary Amendment Eff. January 1, 2003;*  
*Amended Eff. August 1, 2004; April 1, 2003;*  
*Temporary Amendment Eff. January 1, 2005;*  
*Amended Eff. November 1, 2005;*  
*Temporary Amendment Eff. February 1, 2006;*  
*Amended Eff. November 1, 2006;*  
*Temporary Amendment Eff. February 1, 2008;*  
*Amended Eff. November 1, 2008;*  
*Temporary Amendment Eff. February 1, 2009;*  
*Amended Eff. November 1, 2009;*  
*Temporary Amendment Eff. February 1, 2010.*

*This Section contains information for the meeting of the Rules Review Commission on Thursday, November 19, 2009 9:00 a.m. at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3100. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

**RULES REVIEW COMMISSION MEMBERS****Appointed by Senate**

Jim R. Funderburk - 1st Vice Chair  
David Twiddy - 2nd Vice Chair  
Ralph A. Walker  
Jerry R. Crisp  
Jeffrey P. Gray

**Appointed by House**

Jennie J. Hayman - Chairman  
John B. Lewis  
Clarence E. Horton, Jr.  
Daniel F. McLawhorn  
Curtis Venable

**COMMISSION COUNSEL**

Joe Deluca (919)431-3081  
Bobby Bryan (919)431-3079

**RULES REVIEW COMMISSION MEETING DATES**

February 18, 2010      March 18, 2009  
April 15, 2010      May 20, 2010

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**RULES REVIEW COMMISSION****January 21, 2010  
MINUTES**

The Rules Review Commission met on Thursday, January 21, 2010, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Clarence Horton, Dan McLawhorn, David Twiddy and Ralph Walker.

Staff members present were: Joseph DeLuca and Bobby Bryan, Commission Counsel; Tammara Chalmers and Dana Vojtko.

The following people were among those attending the meeting:

Anca Grozav	Office of State Budget and Management
Nancy Pate	Department of Environment and Natural Resources
Ann Christian	Substance Abuse Professional Practice Board
Barden Culbreth	Substance Abuse Professional Practice Board
Rob Roegner	Department of Insurance – OSFM
Andrea Borden	DHHS/Division of Mental Health
Ruth Strauss	Department of Environment and Natural Resources
Daren Waddell	Department of Insurance
Nadine Pfeiffer	DHHS/Division of Health Service Regulation
Gloria Hale	DHHS/Division of Health Service Regulation
Jessica Dickerson	OAH Extern
Jeff Babb	NC State Highway Patrol
B.M. Brogden	Department of the Secretary of State
Bert Bennett	Substance Abuse Professional Practice Board

**APPROVAL OF MINUTES**

The meeting was called to order at 9:04 a.m. with Mr. Funderburk presiding. He reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e). Vice Chairman Funderburk asked for any discussion, comments, or corrections concerning the minutes of the December 17, 2009 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

12 NCAC 09B .0203 – Criminal Justice Education and Training Standards Commission. No rewritten rule has been submitted and no action was taken.

15A NCAC 13B .0835, .0836, .0841, .0842 – Commission for Public Health. No rewritten rules have been submitted and no action was taken.

21 NCAC 22L .0101 – Hearing Aid Dealers and Fitters Board. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 53 .0603 – Board of Licensed Professional Counselors. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 68 .0509, .0511 – Substance Abuse Professional Practice Board. The Commission approved the rewritten rules submitted by the agency contingent on receiving a change in Rule .0509. The change was subsequently received.

**LOG OF FILINGS**

Vice Chairman Funderburk presided over the review of the log of permanent rules.

All permanent rules were approved unanimously with the following exceptions:

11 NCAC 05D .0114: Department of Insurance – The Commission approved this rule contingent on receiving a requested technical change. The technical change has been received.

Prior to the review of the rules from the Private Protective Services Board, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because he teaches for the Board pursuant to a contract.

12 NCAC 07D .0405: Private Protective Services Board – This rule was withdrawn by the agency and refiled for next month's meeting.

15A NCAC 07H .0209: Coastal Resources Commission – This rule was withdrawn by the agency and refiled for next month's meeting.

Prior to the review of the rules from the Board of Dental Examiners, Commissioner Crisp recused himself and did not participate in any discussion or vote concerning these rules because his daughter is a Dental Hygienist.

**TEMPORARY RULES**

Vice Chairman Funderburk presided over the review of the log of temporary rules.

All temporary rules were unanimously approved by the Commission.

**OTHER**

The Commission found that the 2010 State Medical Facilities Plan was adopted in compliance with G.S. 131E-176(25).

**COMMISSION PROCEDURES AND OTHER BUSINESS**

The Commissioners reviewed Mr. DeLuca's draft of a proposed revision to its Rule 26 NCAC 05 .0112 and decided that no changes were needed to this or any other rule. It also accepted the forms drafted by staff for use by an agency or member of the public in applying for a waiver of Rule .0108 specifically or any of the other rules in general.

The Commissioners adopted by unanimous vote the changes to Article 5 of its Bylaws as proposed by Commissioner McLawhorn and amended by Commissioner Funderburk. The full text of the amended Article 5 is attached.

The meeting adjourned at 10:02 a.m.

The next scheduled meeting of the Commission is Thursday, February 18 at 9:00 a.m.

Respectfully Submitted,

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Dana Vojtko  
Publications Coordinator

## **ARTICLE 5. OFFICERS AND TERMS**

The officers of this organization shall consist of the chairman, the first vice-chairman, and the second vice-chairman.

The terms of the officers of this organization shall be from the time of their election until the following January meeting. ~~30 or until their successors are elected.~~

Elections shall be held at the January meeting. ~~meeting following the expiration of the terms or at such other time as the commissioners by majority vote may decide.~~

The officers shall be elected in the following manner:

(The members of the commission are appointed by the legislature or the governor on the recommendation of either the President Pro-Term of the Senate or the Speaker of the House of Representatives. For purposes of the convenience and to avoid unnecessary repetition, the following paragraphs shall use the phrases "appointed by the Senate" or "appointed by the House" to refer to how members are appointed to the commission.)

The ~~candidates for~~ chairman and first vice-chairman shall ~~each~~ be elected from members appointed by different chambers of the legislature. The election for the chairman shall be held first. Then the election for the first vice-chairman shall be held and the candidate(s) for that office must be elected from members appointed by the other chamber of the legislature than that which appointed the chairman-elect.

Candidates for the second vice-chairman shall be from any members of the commission.

~~The~~ Unless the membership by a majority vote determines otherwise prior to the election, the chairman may be reelected one time. If the chairman is reelected, then the above provision applying to the vice-chairmen shall apply. ~~The~~ Unless the membership by a majority vote determines otherwise prior to the election, the vice-chairmen may be reelected one time.

In the event that the chairman is unable to be present during part or all of a commission meeting or other commission business, the first vice-chairman shall act as the chairman. In the event the first vice-chairman is unable to fulfill this duty, the second vice-chairman shall act as chairman. In the event that ~~neither of these~~ none of the officers is available, the most senior member of the commission shall serve as the chairman ~~highest ranking officer aware of the inability shall designate a chairman~~ for that business.

In the event of a vacancy in ~~an office,~~ the office of chairman or first vice-chairman, the members shall elect a new officer appointed by the same recommending office as the previous officer for the balance of the unexpired term.

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### **LIST OF APPROVED PERMANENT RULES January 21, 2010 Meeting**

#### **MENTAL HEALTH, COMMISSION FOR**

Schedule II

10A NCAC 26F .0103

Schedule V

10A NCAC 26F .0106

#### **INSURANCE, DEPARTMENT OF**

Cigarette Fire-Safety Standards

11 NCAC 05A .0801

Definitions

11 NCAC 05D .0101

Display Operator's Identification Badges

11 NCAC 05D .0102

Display Operator's Permit

11 NCAC 05D .0103

<u>Assistant Display Operator's Permit</u>	11	NCAC 05D .0104
<u>Assistant Display Operator's Certification</u>	11	NCAC 05D .0105
<u>Application for Permit</u>	11	NCAC 05D .0106
<u>Examination</u>	11	NCAC 05D .0107
<u>Application for Reciprocity</u>	11	NCAC 05D .0108
<u>Permit Renewal</u>	11	NCAC 05D .0109
<u>Fees</u>	11	NCAC 05D .0110
<u>Notification to OSFM</u>	11	NCAC 05D .0111
<u>Replacement and Duplicate Permit</u>	11	NCAC 05D .0112
<u>Report of Theft or Loss of Pyrotechnics</u>	11	NCAC 05D .0113
<u>Report of Injury or Property Damage</u>	11	NCAC 05D .0114
<u>Inspections</u>	11	NCAC 05D .0115
<u>Foreign HMO: Successful Operation</u>	11	NCAC 11C .0308
<u>Health Insurance Risk Pool Notice Language Requirements</u>	11	NCAC 12 .0331
<u>Use of Senior-Specific Certifications and Professional De...</u>	11	NCAC 12 .0461
<u>Foreign Company Must Have Conducted Successful Business</u>	11	NCAC 14 .0504
<u>Waivers of Three-Year Net Income Requirement</u>	11	NCAC 14 .0505

#### **PRIVATE PROTECTIVE SERVICES BOARD**

<u>Records</u>	12	NCAC 07D .0109
<u>Definitions</u>	12	NCAC 07D .1301
<u>Required Continuing Education Hours</u>	12	NCAC 07D .1302
<u>Accreditation Standards</u>	12	NCAC 07D .1303
<u>Non-resident Licensee Continuing Education Credits</u>	12	NCAC 07D .1304
<u>Recording and Reporting Continuing Education Credits</u>	12	NCAC 07D .1305
<u>Non-compliance</u>	12	NCAC 07D .1306
<u>Credit for CE Courses</u>	12	NCAC 07D .1307

#### **ALARM SYSTEMS LICENSING BOARD**

<u>Fees for Licenses</u>	12	NCAC 11 .0203
<u>Fees for Registration</u>	12	NCAC 11 .0302

#### **ENVIRONMENTAL MANAGEMENT COMMISSION**

<u>General Requirements</u>	15A	NCAC 02N .0901
<u>Tanks</u>	15A	NCAC 02N .0903

#### **SECRETARY OF STATE, DEPARTMENT OF THE**

<u>Senior Designation as Dishonest or Unethical Practice</u>	18	NCAC 06B .0201
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#### **DENTAL EXAMINERS, BOARD OF**

<u>Dental Licensure by Credentials</u>	21	NCAC 16B .0501
<u>Dental Hygiene Licensure by Credentials</u>	21	NCAC 16C .0501

#### **HEARING AID DEALERS AND FITTERS BOARD**

<u>Committee on Investigations</u>	21	NCAC 22L .0101
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**LICENSED PROFESSIONAL COUNSELORS, BOARD OF**Continuing Education

21 NCAC 53 .0603

**SUBSTANCE ABUSE PROFESSIONAL PRACTICE BOARD**Client Relationships

21 NCAC 68 .0509

Remuneration21 NCAC 68 .0511

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**LIST OF APPROVED TEMPORARY RULES  
January 21, 2010 Meeting****HHS - HEALTH SERVICE REGULATION, DIVISION OF**Information Required of Applicant

10A NCAC 14C .1202

Information Required of Applicant

10A NCAC 14C .1402

Performance Standards

10A NCAC 14C .1403

Performance Standards

10A NCAC 14C .1703

Information Required of Applicant

10A NCAC 14C .1902

Information Required of Applicant

10A NCAC 14C .2102

Performance Standards

10A NCAC 14C .2103

Support Services

10A NCAC 14C .2104

Staffing and Staff Training

10A NCAC 14C .2105

Facility

10A NCAC 14C .2106

Information Required of Applicant

10A NCAC 14C .2202

Performance Standards

10A NCAC 14C .2203

Definitions10A NCAC 14C .2701

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**AGENDA  
RULES REVIEW COMMISSION  
Thursday, February 18, 2010 9:00 A.M.**

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
  - II. Approval of the minutes from the last meeting
  - III. Follow-Up Matters:
    - A. Criminal Justice Education and Training Standards Commission – 12 NCAC 09B .0203 (Bryan)
    - B. Commission for Public Health – 15A NCAC 13B .0835, .0836, .0841, .0842 (DeLuca)
  - IV. Review of Log of Filings (Permanent Rules) for rules filed between December 22, 2009 and January 20, 2010
  - V. Review of Log of Filings (Temporary Rules)
  - VI. Commission Business
    - Next meeting: March 18, 2010
- 

**Commission Review  
Log of Permanent Rule Filings  
December 22, 2009 through January 20, 2010**

## **HHS - MEDICAL ASSISTANCE, DIVISION OF**

The rules in Chapter 21 concern medical assistance administration.

The rules in Subchapter 21C concern benefits including medicaid i.d. card (.0100).

<u>Pharmacy of Record</u>	10A NCAC 21C .0103
Repeal/*	

The rules in Chapter 22 are medical assistance eligibility rules.

The rules in Subchapter 22M concern drug use review (DUR) including the drug use review board (.0100); prospective drug review (.0200); retrospective drug use review (.0300).

<u>Membership</u>	10A NCAC 22M .0102
Amend/**	

<u>Patient Counseling</u>	10A NCAC 22M .0201
Amend/*	

<u>Applicability</u>	10A NCAC 22M .0301
Amend/*	

The rules in Subchapter 22O establish what medical assistance is provided including rules about general provisions (.0100); dental services (.0200); amount, duration and scope of assistance (.0300); and limitation of amount, duration, and scope of assistance (.0400).

<u>Pharmacy Services</u>	10A NCAC 22O .0118
Amend/**	

<u>Prescribed Drugs</u>	10A NCAC 22O .0407
Repeal/*	

## **HOME INSPECTOR LICENSURE BOARD**

The rules in Chapter 8 are the engineering and building codes including the approval of school maintenance electricians (.0400); qualification board-limited certificate (.0500); qualification board-probationary certificate (.0600); qualification board-standard certificate (.0700); disciplinary actions and other contested matters (.0800); manufactured housing board (.0900); NC Home Inspector Licensure Board (.1000); home inspector standards of practice and code of ethics (.1100); disciplinary actions (.1200); home inspector continuing education (.1300); Manufactured Housing Board continuing education (.1400); and alternate designs and construction appeals (.1500).

<u>Meetings</u>	11 NCAC 08 .1002
Repeal/*	

<u>Equivalent Experience</u>	11 NCAC 08 .1004
Amend/**	

<u>Purpose and Scope</u>	11 NCAC 08 .1103
Amend/*	

## **INSURANCE, DEPARTMENT OF**

The rules in Chapter 11 are from the Department of Insurance and concern financial evaluation of insurance companies.

The rules in Subchapter 11F are actuarial rules including general provisions (.0100); health insurance minimum reserve standards (.0200); actuarial opinion and memorandum (.0300); commissioner's reserve valuation method (.0400); new annuity valuation mortality tables (.0500); recognition of the 2001 CSO mortality table for use in determining minimum reserve liabilities and non-forfeiture benefits (.0600); determining minimum reserve liabilities for credit life insurance (.0700); and preferred class structure mortality table (.0800).

<u>Actuarial Memorandum with Asset Adequacy Analysis</u> Amend/*	11	NCAC 11F .0307
<u>Basic and Premium Deficiency Reserves</u> Adopt/*	11	NCAC 11F .0403
<u>Model Regulation Permitting the Recognition of Preferred ...</u> Amend/*	11	NCAC 11F .0801

The rules in Chapter 12 cover life and health insurance including general provisions applicable to all rules and all life and health insurance policies (.0100 - .0300); general life insurance provisions (.0400); general accident and health insurance provisions (.0500); replacement of insurance (.0600); credit insurance (.0700); medicare supplement insurance (.0800); long-term care insurance (.1000); mortgage insurance consolidations (.1100); accelerated benefits (.1200); small employer group health coverage (.1300); HMO and point-of-service coverage (.1400); uniform claim forms (.1500); retained asset accounts (.1600); viatical settlements (.1700); preferred provider plan product limitations (.1800); and domestic violence - prohibited acts (.1900).

<u>Definitions</u> Adopt/**	11	NCAC 12 .1901
<u>Unfair or Deceptive Acts or Practices</u> Adopt/*	11	NCAC 12 .1902
<u>Justification of Adverse Insurance Decisions</u> Adopt/*	11	NCAC 12 .1903

#### **PRIVATE PROTECTIVE SERVICES BOARD**

The rules in Subchapter 7D cover organization and general provisions (.0100); licenses and trainee permits (.0200); security guard patrol and guard dog service (.0300); private investigator and counterintelligence (.0400); polygraph (.0500); psychological stress evaluator (PSE) (.0600); unarmed security guard registration (.0700); armed security guard firearm registration permit (.0800); trainer certificate (.0900); recovery fund (.1000); training and supervision for private investigator associates (.1100); courier (.1200); and continuing education (.1300).

<u>Private Investigator's Use of a Badge</u> Adopt/*	12	NCAC 07D .0405
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#### **SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION**

Rules in Subchapter 10B are from the N. C. Sheriffs' Education and Training Standards Commission. These rules govern the commission organization and procedure (.0100); enforcement rules (.0200); minimum standards for employment as a justice officer (deputy or jailer) (.0300); certification of justice officers (.0400); standards and accreditation for justice officers schools, training programs, and the instructors (.0500-.0900); certificate and awards programs for sheriffs, deputies, justice officers, jailers, reserve officers, and telecommunicators (.1000-.1700); in-service training (.2000); and firearms in-service training and re-qualification (.2100).

<u>Instructors</u> Amend/*	12	NCAC 10B .2004
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#### **LABOR, DEPARTMENT OF**

The rules in Chapter 7 are from the office of occupational safety and health.

The rules in Subchapter 7A are general rules and operational procedures including purpose, definitions (.0100); organization (.0200); procedures (.0300); state advisory council on occupational safety and health (.0500); safety and health programs and committees (.0600); rules of practice for variances, limitations, tolerances and exemptions (.0700); informal conference procedures (.0800); and access to employee medical records (.0900).

<u>Incorporation by Reference</u> Amend/*	13	NCAC 07A .0301
<u>Scope and Application</u> Adopt/**	13	NCAC 07A .0901

<u>Responsible Persons</u> Adopt/*	13	NCAC 07A .0902
<u>Security Procedures; Retention and Destruction of Records</u> Adopt/*	13	NCAC 07A .0903
<u>Intra-Agency Use and Transfer</u> Adopt/**	13	NCAC 07A .0904
<u>Inter-Agency Transfer and Public Disclosure</u> Adopt/*	13	NCAC 07A .0905

## **CRIME CONTROL AND PUBLIC SAFETY**

The rules in Chapter 9 concern the State Highway Patrol.

The rules in Subchapter 09H concern enforcement regulations including enforcement actions (.0100); civil disturbances (.0200); wrecker service (.0300); traffic accident (.0400); patrol escorts and relays (.0500); use of patrol cars and aircraft (.0600); use of physical force: firearms (.0700); persons in custody (.0800); information to news media (.0900); and leaving assigned duty station (.1000).

<u>Rotation Wrecker Service Regulations</u> Amend/**	14A	NCAC 09H .0321
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## **ENVIRONMENTAL MANAGEMENT COMMISSION**

The rules in Chapter 2 concern environmental management and are promulgated by the Environmental Management Commission or the Department of Environment and Natural Resources.

The rules in Subchapter 2D are air pollution control requirements including definitions and references (.0100); air pollution sources (.0200); air pollution emergencies (.0300); ambient air quality standards (.0400); emission control standards (.0500); air pollutants monitoring and reporting (.0600); complex sources (.0800); volatile organic compounds (.0900); motor vehicle emission control standards (.1000); control of toxic air pollutants (.1100); control of emissions from incinerators (.1200); oxygenated gasoline standard (.1300); nitrogen oxide standards (.1400); transportation conformity (.1500); general conformity for federal actions (.1600); emissions at existing municipal solid waste landfills (.1700); control of odors (.1800); open burning (.1900); transportation conformity (.2000); risk management program (.2100); special orders (.2200); emission reduction credits (.2300); clean air interstate rules (.2400); mercury rules for electric generators (.2500); and source testing (.2600).

<u>Toxic Air Pollutant Guidelines</u> Amend/*	15A	NCAC 02D .1104
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## **COASTAL RESOURCES COMMISSION**

The rules in Chapter 7 are coastal management rules.

The rules in Subchapter 7H are from the CRC and are the state guidelines for areas of environmental concern including introduction and general comments (.0100); the estuarine system (.0200); ocean hazard areas (.0300); public water supplies (.0400); natural and cultural resource areas (.0500); development standards (.0600); general permits for: construction or maintenance of bulkheads and the placement of riprap for shoreline protection in estuarine and public trust waters (.1100); piers, docks and boat houses in estuarine and public trust waters (.1200); boat ramps along estuarine shorelines and into estuarine and public trust waters (.1300); groins in estuarine and public trust waters (.1400); excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters, and estuarine shoreline AECs (.1500); aerial and subaqueous utility lines with attendant structures in coastal wetlands, estuarine waters, public trust waters and estuarine shorelines (.1600); emergency work requiring a CAMA or a dredge and fill permit (.1700); beach bulldozing landward of the mean high-water mark in the ocean hazard AEC (.1800); temporary structures within the estuarine and ocean hazard AECs (.1900); minor modifications and repair to existing pier/mooring facilities in estuarine and public trust waters and ocean hazard areas (.2000); construction of sheetpile sill for shoreline protection in estuarine and public trust waters (.2100); construction of freestanding moorings in established waters and public trust areas (.2200); replacement of existing bridges and culverts in estuarine waters, estuarine shorelines, public trust areas and coastal wetlands (.2300); placement of riprap for wetland protection in estuarine and public trust waters (.2400); replacement of structures, the reconstruction of primary or frontal dune systems, and the maintenance excavation of existing canals, basins, channels, or

ditches, damaged, destroyed, or filled in by hurricanes or tropical storms (.2500); construction of wetland, stream and buffer mitigation sites by the North Carolina Ecosystem Enhancement Program or the North Carolina Wetlands Restoration Program (.2600); and the construction of riprap sills for wetland enhancement in estuarine and public trust waters (.2700).

Coastal Shorelines 15A NCAC 07H .0209  
Amend/\*

## ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF

The rules in Chapter 12 concern parks and recreation areas.

The rules in Subchapter 12A concern organization and duties.

Organization and Purpose 15A NCAC 12A .0101  
Amend/\*

Directory of State Parks and Recreation Areas 15A NCAC 12A .0104  
Amend/\*

Definitions 15A NCAC 12A .0105  
Amend/\*

The rules in Subchapter 12B concern parks and recreation areas including general provisions (.0100); preservation of the park (.0200); bathing (.0300); refuse and rubbish (.0400); traffic and parking (.0500); boating and camping (.0600); sports and games (.0700); hunting and fishing (.0800); firearms, explosives, fires, etc. (.0900); disorderly conduct, public nuisance, etc. (.1000); commercial enterprises, advertising, meetings, exhibitions, etc. (.1100); and miscellaneous (.1200).

Permits 15A NCAC 12B .0104  
Amend/\*

Natural and Cultural Resource Protection 15A NCAC 12B .0201  
Amend/\*

Metal Detectors Prohibited 15A NCAC 12B .0203  
Amend/\*\*

Rock or Cliff Climbing and Rappelling 15A NCAC 12B .0204  
Amend/\*\*

Bathing and Swimming Activities Where Prohibited 15A NCAC 12B .0301  
Amend/\*

Disposal of Refuse: Garbage, Etc. 15A NCAC 12B .0401  
Amend/\*

Vehicles; Where Prohibited 15A NCAC 12B .0501  
Amend/\*\*

Parking 15A NCAC 12B .0502  
Amend/\*\*

Boating 15A NCAC 12B .0601  
Amend/\*\*

Camping 15A NCAC 12B .0602  
Amend/\*\*

Sports and Games: When Permitted 15A NCAC 12B .0701  
Amend/\*\*

Fishing 15A NCAC 12B .0802  
Amend/\*\*

Noise Regulation 15A NCAC 12B .1001  
Amend/\*\*

Intoxication Liquors: Controlled Substance or Beverages 15A NCAC 12B .1003  
Amend/\*\*

Animals at Large 15A NCAC 12B .1004

Amend/**			
<u>Commercial Enterprises</u>	15A	NCAC 12B	.1101
Amend/**			
<u>Public Assemblies and Meetings; Special Activity Permit</u>	15A	NCAC 12B	.1105
Amend/**			
<u>Closing and Opening Hours; Restricted Areas</u>	15A	NCAC 12B	.1201
Amend/**			
<u>Reservation Periods</u>	15A	NCAC 12B	.1205
Amend/**			
<u>Fees and Charges</u>	15A	NCAC 12B	.1206
Amend/**			

## **BARBER EXAMINERS, BOARD OF**

The rules in Subchapter 06F concern barber schools.

<u>Manager</u>	21	NCAC 06F	.0102
Amend/*			
<u>Roster and Student Records</u>	21	NCAC 06F	.0110
Amend/*			
<u>Students with Criminal Records</u>	21	NCAC 06F	.0116
Amend/*			

The rules in Subchapter 06J concern apprentice barbers.

<u>Renewal as Registered Apprentice</u>	21	NCAC 06J	.0103
Amend/*			

The rules in Subchapter 06K concern registered barbers.

<u>Waiver of Time and Renewal Fees</u>	21	NCAC 06K	.0112
Adopt/**			

The rules in Subchapter 06L concern barber shops.

<u>Separation From Other Businesses; Residential Shops; Mobi...</u>	21	NCAC 06L	.0106
Amend/*			
<u>Where Barber Services May Be Performed</u>	21	NCAC 06L	.0111
Amend/**			
<u>Inspections of Shops</u>	21	NCAC 06L	.0115
Amend/*			
<u>Additional Duties of Barber Shop Owners and Managers and ...</u>	21	NCAC 06L	.0116
Amend/**			

The rules in Subchapter 6N establish fees and provide for the use of various forms.

<u>Fees</u>	21	NCAC 06N	.0101
Amend/**			

The rules in Subchapter 6O govern the assessing of civil penalties.

<u>Barber Failing to Maintain or Produce Exemption Log</u>	21	NCAC 06O	.0117
Adopt/*			

The rules in Subchapter 6Q concern prohibited acts.

<u>Registered Sex Offender</u>	21 NCAC 06Q .0103
Amend/*	

## **BUILDING CODE COUNCIL**

<u>NC Building Code - Exit Stairways</u>	1007.3
Amend/*	
<u>NC Building Code - Referenced Standards</u>	Chapter 35
Amend/*	
<u>NC Energy Conservation Council - Piping Insulation</u>	503.2.8
Amend/*	
<u>NC Fire Code - Retail Display and Sale, Fireworks</u>	3308.11
Amend/*	
<u>NC Residential Code - Carbon Monoxide Detectors</u>	R313
Amend/**	
<u>NC Residential Code - Alterations, Repairs and Additions....</u>	R313.2.1
Amend/*	
<u>NC Residential Code - Side Hinge and Garage Doors</u>	R614
Amend/*	

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**Commission Review**  
*Log of Temporary Rule Filings*  
*February 5, 2010*

## **HHS - HEALTH SERVICE REGULATION, DIVISION OF**

The rules in Chapter 14 concern services provided by the Division of Health Service Regulation.

The rules in Subchapter 14C are Certificate of Need regulations including general provisions (.0100); applications and review process (.0200); exemptions (.0300); appeal process (.0400); enforcement and sanctions (.0500); and criteria and standards for nursing facility or adult care home services (.1100); intensive care services (.1200); pediatric intensive care services (.1300); neonatal services (.1400); hospices, hospice inpatient facilities, and hospice residential care facilities (.1500); cardiac catheterization equipment and cardiac angioplasty equipment (.1600); open heart surgery services and heart-lung bypass machines (.1700); diagnostic centers (.1800); radiation therapy equipment (.1900); home health services (.2000); surgical services and operating rooms (.2100); end stage renal disease services (.2200); computed tomography equipment (.2300); immediate care facility/mentally retarded (ICF/MR) (.2400); substance abuse/chemical dependency treatment beds (.2500); psychiatric beds (.2600); magnetic resonance imaging scanner (.2700); rehabilitation services (.2800); bone marrow transplantation services (.2900); solid organ transplantation services (.3000); major medical equipment (.3100); lithotripter equipment (.3200); air ambulance (.3300); burn intensive care services (.3400); oncology treatment centers (.3500); gamma knife (.3600); positron emission tomography scanner (.3700); acute care beds (.3800); gastrointestinal endoscopy procedure rooms in licensed health service facilities (.3900); and hospice inpatient facilities and hospice residential care facilities (.4000).

<u>Definitions</u>	10A NCAC 14C .1701
Amend/*	

*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	Randall May
Selina Brooks	A. B. Elkins II
Melissa Owens Lassiter	Joe Webster
Don Overby	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOL BEVERAGE CONTROL COMMISSION</u></b>				
NC Alcoholic Beverage Control Commission v. Ciro Maya Maya, T/A Carolina Sports Arena	08 ABC 2411	Overby	06/29/09	
NC Alcoholic Beverage Control Commission v. Abdu Suleh Ali d/b/a Harlam Mini Mart	08 ABC 2980	Overby	01/07/2010	
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	
N.C. Alcoholic Beverage Control Commission v. Roberta White Bridges T/A Christina Restaurant and Catering	09 ABC 1899	May	07/28/09	
NC Alcoholic Beverage Control Commission v. La Tienda Mexicana Corp. T/A Tienda La Unica	09 ABC 4379	Brooks	09/17/09	
NC Alcoholic Beverage Control Commission v. Uwem Eyo Equan, T/A Sahara Restaurant and Lounge	09 ABC 4682	May	11/13/09	
NC Alcoholic Beverage Control Commission v. KAM Properties Inc. T/A Grays Creek Superette	09 ABC 4686	Gray	10/19/09	
<b><u>CRIME VICTIMS COMPENSATION</u></b>				
Mary D. Malone v. State of North Carolina, Department of Crime Control., Victims Compensations Services	08 CPS 2463	Gray	07/09/09	
Ricky F. Smith v. Crime Control and Public Safety	08 CPS 2582	May	08/06/09	
Robert Melvin v. Janice Carmichael, NC Crime Victim Compensation	08 CPS 2634	Elkins	06/01/09	
B-Red Enterprises, Inc., Linda Parrish v. Secretary of Crime Control and Public Safety	08 CPS 3043	Webster	06/23/09	
Spencer's Incorporated of Mount Airy, NC d/b/a Ararat Rock Products Company and Jim Crossingham, III v. North Carolina Highway Patrol	08 CPS 3399	May	08/25/09	24:11 NCR 908
Apex PTO & Trailer, Inc. Morris F. Purdy v. NC Dept. of Crime Control & Public Safety, Division of State Highway Patrol, Carrier Enforcement Section	09 CPS 0010	Lassiter	08/17/09	
Peggy Gulley, Gulley's Backhoe Service v. Crime Control and Public Safety	09 CPS 0085	Overby	06/04/09	
Peter Thomas, Southeast Forest Works, LLC v. NC State Highway Patrol	09 CPS 1257	Gray	05/19/09	
Allen Bender, AB's Gravel Driveways, LLC v. North Carolina State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 1259	Gray	06/29/09	
Bruce E. Tyndall v. NC Dept. of Crime Control & Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 1494	Webster	07/29/09	
Cape Romain Contractors, Inc., Andrew Dupre v. North Carolina Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 1599	Gray	07/02/09	
John Emiliani, Jr., v. N.C. Division of Motor Vehicles	09 CPS 1604	Brooks	06/15/09	
Alexander Rybak v. NC DMV, State Highway Patrol	09 CPS 1834	Brooks	08/11/09	
Shelby T. Wallace v. Motor Carrier Enforcement, NC State Highway Patrol	09 CPS 1840	Brooks	08/11/09	
Rowland L. Simmons v. North Carolina State Highway Patrol	09 CPS 2087	Brooks	05/19/09	
Covenant Trucking Company, Inc. v. NC Dept. of Crime Control & Public Safety	09 CPS 2361	Cella	08/11/09	
SEKO-Charlotte, Inc. v. NC State Highway Patrol	09 CPS 2380	May	07/28/09	



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James Christian Laubach and the Auto Barn, Inc. v. NC State Highway Patrol	09 CPS 2385	Mann	07/28/09
George Allen Cook (Case #08-35780), v. N.C. Department of Crime Control and Public Safety, Victim Compensation Services Division	09 CPS 2391	May	07/29/09
Cynthia K. Shreve v. Victims Compensation Program	09 CPS 2404	May	06/23/09
Allen Robinson v. NCSHP	09 CPS 2449	Overby	06/17/09
Walter D. Cochran v. NC Dept. of Crime Control and Public Safety	09 CPS 2458	Cella	08/14/09
Gregory Vett Arnold v. NC State Highway Patrol	09 CPS 2509	Gray	08/25/09
Jeffrey Andrew Kennedy v. NC State Highway Patrol, Citation and Notice of Assessment	09 CPS 2511	May	07/09/09
George M. Gause v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 2551	Webster	09/30/09
Rowland L. Simmons v. North Carolina State Highway Patrol	09 CPS 2885	May	06/11/09
Derik Core V. NCHP	09 CPS 3500	Overby	07/29/09
Randy Stewart v. State Highway Patrol	09 CPS 3646	Brooks	10/09/09
D&D Auto Transport, Jimmy Donald v. NC State Highway Patrol	09 CPS 3690	Cella	10/30/09
Jennifer Elizabeth Bollinger v. NC Dept. of Crime Control & Public Safety, Division of Victims Compensation Commission	09 CPS 3765	Gray	10/07/09
CL Hill Hauling, LLC, Christopher Hill v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 3784	Gray	09/08/09
KJ Logistics, LLC v. NC State Highway Patrol	09 CPS 3876	Gray	09/08/09
Jorge Rodriguez v. Secretary of Crime Control & Public Safety	09 CPS 3921	Gray	09/10/09
TMC Transportation Inc. v. NC State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 3996	Lassiter	09/17/09
Douglas Harris v. NC Dept. of Crime Control and Public Safety	09 CPS 4023	Brooks	11/23/09
Antonio LeGrande v. Victim Compensation Service Division	09 CPS 4065	Lassiter	10/07/09
Andrew S. McJunkin v. NC Victim and Justice Services	09 CPS 4206	Brooks	10/07/09
Shirley Wilson v. State Highway Patrol	09 CPS 4332	Gray	10/07/09
Darryl Tyrone Davis, D&G Excavating Services	09 CPS 4363	Gray	10/07/09
Ronald William Duke v. NC State Highway Patrol	09 CPS 4366	Lassiter	10/13/09
Triad Solutions, Inc., Gene Petty v. NC State Highway Patrol Motor Carrier Enforcement Division	09 CPS 4455	Brooks	10/20/09
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Lindsey Carol Bollinger v. NC Dept. of Crime Control & Public Safety, Division of Victims Compensation Services	09 CPS 4514	May	09/27/09
Palmetto Sealing Co., Inc. v. NC Secretary of Crime Control and Public Safety	09 CPS 4632	Gray	11/30/09
Eddy L. Cheek v. NC Dept. of Crime Control & Public Safety, State Highway Patrol	09 CPS 4633	May	10/09/09
Yurry Demyanchwk v. RR Sheets, NC State Highway Patrol	09 CPS 4799	Lassiter	09/29/09
Piedmont Cheerwine Bottling Co. v. NC Dept. of Crime Control and Public Safety	09 CPS 4852	Brooks	11/09/09
Phillip J. Evans v. Highway Motor Carrier	09 CPS 4953	Overby	10/28/09
Atlantic Constructio Services, Inc., Frederick George Lempe II v. NC Dept. of Crime Control and Public Safety	09 CPS 5161	Lassiter	12/01/09
CMT Trucking Inc. Charles M. Tyson v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 5446	Gray	12/16/09

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

Patricia L. Tiller v. NC Dept. of Health & Human Ser., Health Care Personnel Registry Sec	07 DHR 0302	Lassiter	07/14/09	
Envisions of Life LLC v. Hearing Office – 05 Division of Medical Assistance	08 DHR 0967	Lassiter	07/01/09	
Cynthia Curtis v. Department of Health and Human Services, Division of Health Service Regulation	08 DHR 1485	Brooks	05/07/09	24:07 NCR 408
MedExpress Pharmacy LTD. v. NC Dept. of Health and Human Services and NC Dept. of Administration	08 DHR 1566	Elkins	11/30/09	
Lilieth P. Brown v. Office of Administrative Hearings	08 DHR 1807	Morrison	08/13/09	
Blue Ridge Healthcare Surgery Center-Morganton, LLC & Grace Hospital, Inc. v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section & Carolina Digestive Care, PLLC and HMB Properties, LLC	08 DHR 2216	Brooks	06/19/09	24:11 NCR 913
Bethlehem Center of Charlotte v. Child and Adult Care Food Program, Division of Public Health, NC Dept. of Health and Human Services	08 DHR 2284	Brooks	05/26/09	
Edward A. Patterson v. Division of Child Development	08 DHR 2364	Webster	06/02/09	
Choices Group Home Inc., Victor Vega v. N.C. Department of Health and Human Services	08 DHR 2404	Gray	07/16/09	
MJKM, LLC d/b/a Pueblo Supermarket v. NC Dept. of Health and Human Services, Division of Public Health, Women and Children's Health Section	08 DHR 2443	Gray	09/03/09	
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Choices Group Home Inc, Victor Vega v. Office of Administrative Hearings, Department of Health and Human Services	08 DHR 2512	Gray	07/16/09	
Pepper Dawn Kirk-McLendon Peppermint Daycare v. N.C Department of Health and Human Services, Division of Child Development	08 DHR 2571	Mann	07/07/09	24:07 NCR 416
Edward Royal, Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	08 DHR 2698	Overby	05/27/09	
C. Vann Pierce, Executive Officer, Heritage Care of Rocky Mount, Licensee, License No. Hal-033-005 v. N.C DHHS, Division of Health Service Regulation, Adult Care Licensure Section	08 DHR 2732	Lassiter	11/03/09	24:16 NCR 1435
Abundant Life Child Care Center, Tiffany D. Monroe v. Division of Child Development, June	08 DHR 2954	Elkins	06/03/09	

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Locklear, Brenda Faircloth			
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Amy G. Poteat v. Health Care Personnel Registry	08 DHR 3489	May	06/03/09
Freedom House Recovery Center, Inc. v. NC Division of Health Service Regulation	08 DHR 3674	Gray	10/13/09
Kathy Dunning Bright v. Health Care Personnel Registry	09 DHR 0057	Overby	08/04/09
Marie Jagne v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Registry Section	09 DHR 0444	Lassiter	07/27/09
Brenda V. Patterson v. Division of Child Development	09 DHR 0667	Webster	06/02/09
Sonya C. Ragland, Joseph K. Ragland, Barbara Washington, and The Seed of Abraham Learning Center v. NC Dept. of Health and Human Services	09 DHR 1261	Gray	06/08/09
Sonya C. Ragland, Joseph K. Ragland, Barbara Washington, and The Seed of Abraham Learning Center v. NC Dept. of Health and Human Services	09 DHR 1262	Gray	06/08/09
Sonya C. Ragland, Joseph K. Ragland, Barbara Washington, and The Seed of Abraham Learning Center v. NC Dept. of Health and Human Services	09 DHR 1263	Gray	06/08/09
Sonya C. Ragland, Joseph K. Ragland, Barbara Washington, and The Seed of Abraham Learning Center v. NC Dept. of Health and Human Services	09 DHR 1264	Gray	06/08/09
Genesis Family Health Care Inc. c/o James Collins v. NC Dept. of Health and Human Services, Division of Medical Assistance	09 DHR 1413	Gray	08/18/09
Michael Parks Fresh Start Residential Services Inc. v. NC DHHS Division of Health Service Regulation Mental Health Licensure Certification	09 DHR 1474	Overby	06/17/09
Spring House Residential Facility v. N.C. Dept. of Health and Human Services DHSR MHLC	09 DHR 1482	May	06/19/09
Victoria Martin v. Surry County Dept of Health and Human Services AFDC/Work First	09 DHR 1533	May	06/04/09
Yolanda Portillo v. N.C. Department of Health and Human Services	09 DHR 1558	Webster	07/17/09
David E. Fornes v. NC Dept. of Health and Human Services	09 DHR 1730	Overby	08/24/09
Regina T. Jones v. N.C. Department of Health and Human Services	09 DHR 1859	Webster	06/23/09
Sharay C. Vinson v. North Carolina Department of Health and Human Services, Division of Health Service Regulation	09 DHR 1884	Brooks	07/10/09
Rae'gan Smith v. NC Dept. of Health and Human Services	09 DHR 1974	Brooks	09/14/09
Chreatha Alston v. NC Dept. of Health and Human Services	09 DHR 1980	Elkins	08/06/09
Vickie Hovis Abernethy v. Third Party Recovery	09 DHR 1984	Brooks	08/24/09
Jason M. Paris (petitioner, Christine O. Jacobs (representing petitioner) v. N.C. Department of Health and Human Services (DHHS)	09 DHR 2296	May	07/10/09
Bernice Taylor v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	09 DHR 2297	May	08/07/09
Gerald A .Harper v. NC Dept. of Health and Human Services	09 DHR 2349	Gray	10/07/09
Contour Service, Inc., (MHL #090-101) v. Department of Health Services, Division of Health Regulation	09 DHR 2350	May	07/21/09
Community Alternative Resources, Inc. Wayne L. Burch and Michelle M. Dolphus v. Dept. of Health and Human Services	09 DHR 2456	May	08/28/09
Charlene M. Hatfield v. NC Dept. of Health and Human Services, Division of Health Service Regulation	09 DHR 2503	Gray	08/31/09
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Lanika Ortega v. North Carolina Department of Health and Human Services	09 DHR 2637	Lassiter	07/27/09
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Brenda V. Patterson v. State Department of Social Services	09 DHR 2654	Webster	07/17/09
Brenda V. Patterson v. State Department of Social Services	09 DHR 2655	Webster	07/17/09
Rose Boyd v. NC Dept. of Health and Human Services	09 DHR 2706	Brooks	08/17/09
John Okoroma v. Mecklenburg County Dept. of Social Services	09 DHR 2710	May	07/24/09
Angela Conner Tawes, Conner's Cape Hatteras Supermarket, Inc v. North Carolina Department of Health and Human Services	09 DHR 2717	Gray	06/15/09
Melonie L. Keith, John David Keith v. Central Billing DHHS Controllers Office	09 DHR 2779	Webster	10/22/09
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Cipriano Mendez Chiquito v. NC Dept. of Health and Human Services, Division of Public Health	09 DHR 2824	May	08/12/09
Trinia E. McCorkle v. North Carolina Department of Health and Human Services	09 DHR 2829	Brooks	07/10/09
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Edward A. Patterson v. Division of Child Development	09 DHR 2838	Webster	07/17/09
Brenda V. Patterson v. Division of Child Development	09 DHR 2839	Webster	07/17/09
Edward A. Patterson v. Division of Child Development	09 DHR 2841	Webster	07/17/09
John and Candice Danner v. NC Dept. of Health and Human Services	09 DHR 2936	Brooks	08/28/09
Rickie Annas v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	09 DHR 2962	Brooks	08/10/09
Berta Spencer v. NC Dept. of Health and Human Services	09 DHR 3000	Cella	10/07/09
Brenda V. Patterson v. State Department of Social Services	09 DHR 3002	Webster	07/17/09
Brenda V. Patterson v. State Department of Social Services	09 DHR 3003	Webster	07/17/09
Brenda V. Patterson v. State Department of Social Services	09 DHR 3004	Webster	07/17/09
Mary's House, Inc., MHL #041-288, Craig Thomas, Executive Director v. Ms. Emery Milliken, General Counsel, Department of Health and Human Services, Office of Legal Affairs	09 DHR 3008	Mann	07/22/09

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Keshea Montgomery v. Randolph County Dept. of Health and Human Services	09 DHR 3012	Mann	08/27/09
Shawanda Ann Barnes V. Cherry Hospital	09 DHR 3076	Lassiter	09/28/09
St. Francis of Charlotte, Inc. Francis Ford Provider #83022329B and 83022329H v. NC Dept. of Health and Human Services, Div. of Medical Assistance	09 DHR 3101	Brooks	09/23/09
Edward A. Patterson v. Division of Child Development	09 DHR 3113	Webster	07/17/09
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Ernest Hines v. Cherry Hospital	09 DHR 3266	Gray	09/17/09
Sandra Wright v. Division of Child Development	09 DHR 3434	Elkins	08/24/09
Carolyn Diane Ragin v. Health Care Personnel Registry	09 DHR 3502	Gray	08/31/09
Edward A. Patterson v. Division of Child Development	09 DHR 3503	Webster	07/17/09
Tamekia Cain v. Athena Foreman, HCPR Investigator, NC Dept. of Health and Human Services	09 DHR 3536	Elkins	10/01/09
Amanda L. Brewer v. DHHS	09 DHR 3541	Elkins	08/21/09
Kenneth and Kimberly Thomason v. NC Dept. of Health and Human Services	09 DHR 3592	Gray	10/08/09
Tommy G. Davis v. NC Dept. of Revenue	09 DHR 3647	Gray	09/02/09
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Katonia L. Davis v. Office of Administrative Hearings, Ms. Emery Edwards Milliken	09 DHR 3683	Elkins	10/08/09
Angel's Childcare, Treva Richardson v. Division of Child Development, Dept. of Health and Human Services	09 DHR 3688	Elkins	10/08/09
Brenda Fay Simmons v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	09 DHR 3752	Brooks	08/12/09
Lloyd K. Howell v. NC Dept. of Health and Human Services	09 DHR 3756	Lassiter	09/14/09
Pamela Ann Hedgecock v. NC Dept. of Health and Human Services, Division of health Service Regulation	09 DHR 3763	Brooks	10/30/09
TLC Adult Home, Sonja Hazelwood v. NC Dept. of Health and Human Services, Division of Health Service Regulation	09 DHR 3776	Gray	09/16/09
Lesia Hammonds DBA Sampsons Family Care Home v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section	09 DHR 3872	Gray	11/13/09
Alvester Miller, III v. NC Dept. of Health and Human Services	09 DHR 4003	Overby	10/26/09
Omnicare of Hickory, Jackie Knight	09 DHR 4069	Brooks	10/07/09
Charles D. Harris v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section	09 DHR 4107	Brooks	10/29/09
St. Mary's Home Care Agency v. NC Dept. of Health and Human Services	09 DHR 4170	Gray	10/23/09
Higher Development, LLC Robert Waters v. Division of Medical Assistance	09 DHR 4235	Overby	10/15/09
Vickie Blair v. Office of Administrative Hearings	09 DHR 4236	May	09/27/09
Leilani Michelle Adames v. Linda Waugh, RN, BSN HCPR Investigator Health Care Personnel Registry Investigations	09 DHR 4275	May	09/22/09
Erica M. Small v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section	09 DHR 4299	Brooks	09/11/09
Elite Care Service, Inc. Barsheem Chapman Executive Director v. NCDHHS Division of Health Service Regulation	09 DHR 4331	Gray	10/19/09
Rebecca Leigh Sadowski v. Dept. of Health and Human Services, Division of Health Service Registry	09 DHR 4362	May	08/26/09
Target Pharmacy v. NC Dept. of Health and Human Services	09 DHR 4397	May	10/05/09
Erie R. Washington v. Dept. of Health and Human Services	09 DHR 4399	May	10/01/09
Erica Moore v. Dept. of Health and Human Services, Division of Health Service Regulation	09 DHR 4429	Brooks	10/09/09
Vametoa L. Deal v. North Carolina Health Care Services	09 DHR 4497	Brooks	10/16/09
Valley Hospital Medical Center v. NC Dept. of Health and Human Services, Division of Medical Assistance	09 DHR 4548	Overby	09/14/09
Anthony Hosea Wiseman v. Dept. of Health and Human Services	09 DHR 4567	May	09/02/09
Roberta Latasha Wilson v. DHHS	09 DHR 4687	Overby	12/02/09
Ward Life Outreach of Cape Fear v. Division of Health Service Regulation Health Care Personnel Registry	09 DHR 4711	Gray	11/18/09
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### DEPARTMENT OF ADMINISTRATION

Meherrin Indian Tribe, a/k/a Meherrin Tribe of North Carolina and Meherrin Tribe of North	08 DOA 2068	Morrison	06/15/09
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Battlecat Productions, Inc., D/B/A Battlecat Marine v. East Carolina University and State of NC Dept. of Purchase and Contract	09 DOA 4788	Gray	10/08/09
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Richard F. Shoe v. UNC Hospitals	09 UNC 4396	Elkins	11/24/09	
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

Filed

2010 JAN 15 PM 3:38

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
05 OSP 1178

Wade Bryan Bulloch,  
Petitioner,

vs.

North Carolina Department of Crime Control  
and Public Safety, North Carolina Highway  
Patrol,  
Respondent.

Office of  
Administrative Hearings

**DECISION**

This contested State personnel case was heard before Beecher R. Gray, Administrative Law Judge, on July 29, 30, and August 4, 2009 in Raleigh, North Carolina.

**APPEARANCES**

Petitioner: J. Michael McGuinness, Esquire, The McGuinness Law Firm, Elizabethtown, N.C.

Respondent: Tamara S. Zmuda, Esquire, and Hal S. Askins, Esquire, N. C. Attorney General's Office, Raleigh, N.C.

**ISSUES**

1. Whether Respondent has proven that there was just cause to terminate Petitioner's employment in light of the totality of the facts and circumstances surrounding Petitioner's off-duty conduct.
2. Whether Respondent has proven that Petitioner's off-duty behavior, involving influences from an underlying medical condition and a psychoactive, prescription medication, exacerbated by alcohol consumption, had a *rational nexus* between the off-duty conduct and potential adverse impact on Petitioner's future ability to perform for Respondent employer.
3. Whether Respondent properly considered and correctly applied the necessary factors and facts in its personnel decision terminating Petitioner's employment.

**FINDINGS OF FACT**

1. The parties received notice of the hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.



2. In adjudicating this case and making these findings, the undersigned has considered and weighed all of the evidence of record including all testimony and exhibits admitted. The undersigned carefully has considered and assessed the credibility and believability of all witnesses following examination and observations of their demeanor, ability to recall, any interest or bias, candor, their ability to see, hear, know, or remember the facts or occurrences, and considering whether the testimony of the witness is reasonable and consistent with other believable evidence in the case.

3. This contested personnel case arose from Petitioner's termination of employment by the North Carolina Highway Patrol (hereafter "Patrol" or "Respondent"). Petitioner Wade Bulloch is a sixteen year veteran Trooper and Line Sergeant with the North Carolina Highway Patrol.

4. This case arose exclusively from off-duty behavior that occurred on December 14, 2004. Sergeant Bulloch attended a Christmas party while off duty with his future wife, Patricia Bravo Gomez, where they engaged in what began as playful physical conduct while going to the dance floor. Ms. Bravo Gomez did not want to dance and Sergeant Bulloch tried to coax her to dance. Ms. Bravo Gomez did not like the music being played so Petitioner asked that a different song be played. Petitioner then again attempted to get Ms. Bravo Gomez out onto the dance floor. She was reluctant to dance and was pulled by Petitioner toward the dance floor. She dug her fingernails into the back of Petitioner's hands to indicate her reluctance to dance. Petitioner briefly moved her arm behind her back so as to bring her along with him. This technique was one taught by the Patrol as a defensive tactic and can cause pain if severely applied. Ms. Bravo Gomez was embarrassed by this and her eyes welled up with tears. Sergeant Bulloch immediately stopped his efforts at dancing as soon as he saw this. They thereafter left the party, and Sergeant Bulloch later became frustrated and very emotional. On the way home with Ms. Bravo Gomez driving, she told Petitioner that she was leaving him. Upon arriving at the home they shared, Sergeant Bulloch emotionally began to break down. He became suicidal and took two Ambien sleeping pills. He told Ms. Bravo Gomez that he might kill himself. While he was alone in his bedroom, he retrieved his service pistol and placed it to his temple but then removed it and discharged one round into the floor of his bedroom. Ms. Bravo Gomez was not, at any time, threatened or harmed. Ms. Bravo Gomez went into the bedroom to check on Petitioner when she heard the shot. Petitioner, upon being asked how many Ambien pills he had taken by Ms. Bravo Gomez, stated that he had taken the whole bottle. Ms. Bravo Gomez alerted 911 with a call requesting help for an "overdose." Sergeant Bulloch was taken to Wake Medical Hospital, where he was relieved of duty for medical reasons. He later was taken to and precautionarily observed at Holly Hill Hospital and released.

5. Following an investigation by Respondent, Sergeant Bulloch was terminated on May 6, 2005 for personal conduct. This investigation did not include a specialized fitness for duty examination as recommended by Dr. Griggs and ordered by the Patrol Commander, Colonel Clay. Sergeant Bulloch timely grieved and appealed his termination. Sergeant Bulloch filed a contested case petition with the Office of Administrative Hearings, challenging the discipline imposed as being without just cause. The burden of proof that there was substantial evidence of just cause for termination resides with Respondent. N.C.G.S. 126-35(d).



**A. Sergeant Wade Bulloch's Law Enforcement Career History**

6. Sergeant Wade Bulloch served with the Highway Patrol from 1989 until his termination on May 6, 2005. Sergeant Bulloch initially served as a Trooper and subsequently as a Line Sergeant. Petitioner's Exhibits 1, 2, 3, and 4 demonstrate that Sergeant Bulloch earned an exemplary record as a Trooper and later as a Line Sergeant, regarding both performance and conduct. See, e.g., testimony of Attorney Josh Tharrington at T351-355, testimony of Philip Wadsworth at T 357-359, testimony of Magistrate Jason Cox at T 363-365, testimony of Trooper Hans Ellefson at T 368 - 371, and Petitioner's Exhibits 1 - 4. Sergeant Bulloch also was a highly regarded instructor. See testimony of Barbara Moore at 324-339 and Petitioner's Exhibit 16.

7. Sergeant Bulloch is 43 years old and resides in Raleigh. T481 Sergeant Bulloch's father is a retired career Highway Patrol officer. T481 Sergeant Bulloch graduated from Pamlico High School in 1984. T481 Sergeant Bulloch has two children, one who is nineteen and one who is thirteen. T482

8. Sergeant Bulloch served in the United States Marine Corps for four years, earning an honorable discharge. T483 His military occupational specialty was military policeman. T483 Sergeant Bulloch grew up in a Highway Patrol family and planned a career with the North Carolina Highway Patrol. T484

9. In the Marine Corps, Sergeant Bulloch earned a number of commendations and awards including the Marine Corps Good Conduct Medal, the Navy Unit Citation, and a Sea Service Deployment Ribbon. Sergeant Bulloch served as a military police officer for his entire tenure of service with the Marine Corps. T483.

10. Sergeant Bulloch holds the highest level of police certification by the North Carolina Criminal Justice Education and Training Standards Commission, the Advanced Law Enforcement Certificate. T485 Sergeant Bulloch's law enforcement certification always has been in good standing and he never has had any adverse action or punishment from the Commission. T486

11. Sergeant Bulloch also is certified by the Criminal Justice Commission as an instructor. T486 Sergeant Bulloch has instructed for a number of organizations including the Highway Patrol, the UNC Institute of Government, North Carolina State University, the University of North Carolina, and Duke University. T489 Sergeant Bulloch was President of the North Carolina Passenger Safety Association, an elected position. T489 He was chair of Wake County SAFE Kids Coalition, an elected position. T488 He served on the N.C. Child Passenger Safety Board and helped author a driver's education program. T488 He authored a block of instruction for the N.C. Conference of District Attorneys. T326, 489.

12. Sergeant Bulloch completed the Highway Patrol Basic School in 1989 and initially began serving as a Trooper in Wake County. T498 He served as a Trooper until about 1998 and then was selected to perform Traffic Safety Information Responsibilities. T498 He served as a field training officer and trained other troopers. T498 Sergeant Bulloch was promoted to Line

Sergeant in 2000. T498 Sergeant Bulloch earned a Silver Star of Bravery from the *American Police Hall of Fame* and other commendations. T490

13. The Criminal Justice Education and Training Standards Commission was informed about the behavior that occurred on December 14, 2004 which is in issue in this case. Sergeant Bulloch cooperated and communicated with the Commission and provided the facts and circumstances about what happened. T482 After considering that information, the Commission did not find probable cause to further investigate or to take disciplinary action. T492

14. Sergeant Bulloch currently is employed as a Sergeant with the Franklinton Police Department, having begun his service there around December 1, 2005. T492 He initially served as a patrol officer with Franklinton and thereafter was promoted. T493 The duties and responsibilities of a patrol officer for Franklinton are similar to the duties and functions of a North Carolina State Trooper. T493 Sergeant Bulloch's supervisory work as a Sergeant with the Franklinton Police Department is similar and comparable to a line sergeant position on the Patrol. T493

15. While serving with Franklinton, Sergeant Bulloch has not had any disciplinary action taken against him. T494 When seeking employment with Franklinton, the Department completed a background investigation on Sergeant Bulloch, which included the facts and circumstances surrounding the December 14, 2004, behavior. T494 Sergeant Bulloch provided them medical documentation that had been developed from his doctors who had examined and treated him. T495 Franklinton's decision to hire Sergeant Bulloch was a unanimous decision made by a number of management officials. T495 Sergeant Bulloch discussed with the Franklinton Chief everything related to the December 14, 2004 behavior by opening up his entire Internal Affairs file. T496

16. Sergeant Bulloch's position with the Franklinton Police Department has worked out very well and he has enjoyed a good working relationship with his superiors and his chief. T497

17. Petitioner's Exhibit 1 contains representative samples of Sergeant Bulloch's training certificates and diplomas, which were admitted into evidence. T502 Petitioner's Exhibit 2 consists of a representative sample of recent performance and conduct appraisals of Sergeant Bulloch by the Highway Patrol, which were admitted into evidence. T503 These performance appraisals demonstrate substantial and consistent very high conduct ratings of Sergeant Bulloch by his supervisors with the Highway Patrol. Many of these ratings are excellent or approaching excellence. See Petitioner's Exhibit 2.

18. Petitioner's Exhibit 3 contains representative samples of an additional Highway Patrol evaluation form, known as a Form 361. These were admitted into evidence. T504 The multiple exhibits contained within Petitioner's Exhibit 3 demonstrate various types of achievements and successes by Sergeant Bulloch in different capacities. These exhibits provide an overall reflection of Sergeant Bulloch as being a very dedicated and extraordinarily professional member of the Highway Patrol for many years.

19. Petitioner's Exhibit 4 contains representative samples of commendations which appear in Sergeant Bulloch's personnel file from various institutions where he has worked and taught courses. T504-05 Exhibit 4 consists of numerous exhibits demonstrating that Sergeant Bulloch has been commended highly and has been recognized for various significant contributions and achievements for many years of dedicated service as a member of the Highway Patrol. Various institutions and individuals initiated very compelling commendations and reports of excellent conduct, performance, and professionalism by Sergeant Bulloch over the years as reflected in Petitioner's Exhibit 4 and in testimony from several witnesses.

#### **B. Sergeant Bulloch's Medical History**

20. In July, 2003, Sergeant Bulloch sought counseling for depression with Kimball Sargent, a specialized nurse. After referral, Sergeant Bulloch became a patient of Dr. David Zarzar, M.D., on September 2, 2003. Sergeant Bulloch was treated for depression. See Respondent's Exhibit 7; Petitioner's Exhibit 12-A and 10.

21. In 2004, Sergeant Bulloch was being treated for medical conditions including Bipolar Disorder and depression. See Petitioner's medical records, and Exhibits 10 - 12. Sergeant Bulloch previously had been diagnosed with Bipolar Disorder and depression. Petitioner's Exhibit 11. Dr. David Zarzar, M.D., is one of Sergeant Bulloch's treating physicians. Petitioner's Exhibits 10 and 11. Sergeant Bulloch subsequently was evaluated and has been treated by Dr. Nancy V. Cross, M.D., since February, 2005. Petitioner's Exhibit 11.

22. Bipolar Disorder, also known as manic-depressive illness, causes shifts in a person's mood, energy, and ability to function. See Petitioner's Exhibit 19 (National Institute of Mental Health - Bipolar Disorder). More than two million American adults have Bipolar Disorder. *Id.* "[B]ipolar disorder can be treated, and people with this illness can lead full and productive lives." *Id.* As explained by Dr. Moira Artigues, M.D., all sorts of people have Bipolar Disorder, for example, professors, physicians, teachers, and attorneys. T409

23. Dr. Thomas Griggs, M.D., serves as Medical Director for the Highway Patrol. Dr. Griggs previously has medically examined Sergeant Bulloch. Following the December 14, 2004 incident, Sergeant Bulloch conferred with Dr. Griggs. Dr. Griggs thereafter recommended to Colonel Clay that Sergeant Bulloch be given a specialized fitness for duty medical examination by a specialized medical group in Greensboro, *Law Enforcement Services, Inc. (LESI)*. Petitioner's Exhibits 6 and 15.

24. The request by Dr. Griggs for a specialized medical examination for Sergeant Bulloch is significant in that it put Respondent and Colonel Clay on notice that the Patrol's Medical Director believed that a special medical examination was necessary. Colonel Clay agreed, and directed that the medical examination be completed. Petitioner's Exhibit 15 ("I respectfully request that Law enforcement Services, Inc. conduct a 'Fitness for Duty' evaluation on Sergeant Wade Bulloch.").

25. Following Colonel Clay's official directive requesting a specialized fitness for duty evaluation for Sergeant Bulloch, another memorandum was issued to start the fitness for duty

process. Petitioner's Exhibit 15 at page 2. Sergeant Bulloch executed the release forms to begin the medical evaluation process. Petitioner's Exhibit 15 at page 3. Sergeant Bulloch was eager to undergo the directed testing. Petitioner's Exhibit 7. However, the medical examination never was done and Sergeant Bulloch and the Patrol were deprived of the benefit of that specialized medical analysis.

26. The recommendation by Dr. Griggs that Sergeant Bulloch be referred for a specialized medical examination was mandated by Patrol policy. Petitioner's Exhibit 9, Highway Patrol Directive E.2 at page 11 and T455-459.

27. Part of Respondent's internal affairs file (Respondent's Exhibit 2), acknowledged that "Sergeant Bulloch apparently has been diagnosed as having several disorders during the last eight months." Respondent's Exhibit 2, at page 2 (December 14, 2004 memorandum from Captain Castelloe to Colonel Clay). Thus, Respondent immediately was on notice of the medical difficulties of Sergeant Bulloch.

28. Respondent's Internal Affairs report appears as Respondent's Exhibit 7. Page 133 of that report identifies a list of "supporting documents." Some of those documents identified were a "Copy of Report of Psychological Evaluation," "Copies of discharge papers from Holly Hill Hospital", and "Miscellaneous copies of medical documentation regarding Bipolar Disorder." Therefore, Respondent collected considerable medical documents and evidence regarding Sergeant Bulloch and his condition, which appear near the end of Respondent's Exhibit 12. Respondent's internal affairs file provides additional medical documents which further demonstrate Sergeant Bulloch's medical conditions, of which Respondent Highway Patrol was aware.

### C. Abbreviated Summary Of Incident

29. On December 14, 2004, Sergeant Bulloch attended a Highway Patrol Christmas party while off duty with Ms. Patricia Bravo Gomez, his future wife. Prior to attending the party, Sergeant Bulloch had been unmedicated for his Bipolar Disorder and, on the late afternoon of December 14, 2004, for the very first time, took his first dose of a new, prescribed medicine, Lithium. Sergeant Bulloch also consumed alcohol in his home before Ms. Bravo Gomez drove them to the party. At the party Sergeant Bulloch attempted to coax Ms. Bravo Gomez onto the dance floor, which embarrassed Ms. Bravo Gomez and caused her some pain when Petitioner briefly pulled her arm behind her back as he was leading her onto the dance floor. That conduct prompted Ms. Bravo Gomez to request to go home. Ms. Bravo Gomez and Sergeant Bulloch left the party and Ms. Bravo Gomez drove them home. During the ride, Ms. Bravo Gomez informed Sergeant Bulloch that she was going to leave him. Following that statement by Ms. Bravo Gomez, Sergeant Bulloch voiced frustrations and made a statement containing a suicidal ideation.

30. Upon arriving at the house they shared, Sergeant Bulloch deteriorated and contemplated suicide. While alone in his bedroom, Sergeant Bulloch made a suicidal gesture by placing a pistol to his temple. Sergeant Bulloch dropped the pistol along his side and discharged one round into the floor of his bedroom. Sergeant Bulloch had taken two Ambien sleeping pills

and fell asleep. Ms. Bravo Gomez was not, at any time, threatened, injured, or harmed throughout the evening. Ms. Bravo Gomez heard the shot and went to check on Petitioner. She asked him how many sleeping pills he had taken and he replied "the whole bottle". Fearing that Sergeant Bulloch had overdosed, Ms. Bravo Gomez called 911 requesting EMS for a possible "overdose."

31. Wake County EMS transported Sergeant Bulloch to Wake Medical Hospital. Sergeant Bulloch's Troop Commander and the Director of Internal Affairs responded to the hospital and relieved him of duty for medical reasons. Sergeant Bulloch was hospitalized for three days. Sergeant Bulloch returned to limited duty service for an off-duty illness. Sergeant Bulloch was requested to undergo a specialized fitness for duty examination as both the Patrol Medical Director, Dr. Thomas Griggs and the Commander, Colonel Clay, of the Patrol believed that such examination was necessary. Despite Sergeant Bulloch's complete cooperation and willingness to undertake the specialized fitness for duty examination, Respondent fired Sergeant Bulloch on May 6, 2005 despite the fact that the specialized fitness for duty medical exam had not been done, rendering the internal affairs investigation incomplete.

#### **D. Expert Medical Evidence of Dr. Moira Artigues**

32. Dr. Moira Artigues, M.D., was qualified as an expert witness in the fields of forensic psychiatry and general psychiatry. T417 Petitioner's Exhibit 13 is Dr. Artigues' six page resume outlining her qualifications. Following her clinical process and review of Sergeant Bulloch's records, Dr. Artigues issued an eight page forensic psychiatric evaluation report, which appears as Petitioner's Exhibit 14.

33. Dr. Artigues is a general and forensic psychiatrist in private practice. T400 Dr. Artigues graduated from the Medical University of South Carolina and then completed a four year residency at Duke University in psychiatry. T401 Following her four year residency, she completed a year of training in forensic psychiatry at the Federal Prison in Butner under the auspices of Duke University. T401 Dr. Artigues is a licensed medical doctor whose North Carolina license is in good standing. T401

34. Dr. Artigues earned *Board Certifications* in both forensic psychiatry and general psychiatry. T402 Dr. Artigues' patients have a broad variety of concerns; she manages medications and does some psychotherapy. T403 Dr. Artigues has testified over 50 times and has been deposed 30-40 times. T404 Dr. Artigues has testified on behalf of the United States in competency proceedings in federal court. T404

35. Dr. Artigues conducted a clinical analysis of Sergeant Bulloch. T406 Dr. Artigues analyzed records and the mental health status and history of Sergeant Bulloch. T407, 42 Dr. Artigues conducted an analysis of Sergeant Bulloch's medical and mental health history, including his current status and his status in December, 2004. T407, 412 Dr. Artigues has diagnosed and treated patients experiencing Bipolar Disorder. T408-409

36. Dr. Moira Artigues, M.D., conducted a forensic evaluation of Sergeant Bulloch. Petitioner's Exhibit 14. Dr. Artigues analyzed the work and records of numerous medical and related professionals who had treated Sergeant Bulloch. Dr. Artigues found Sergeant Bulloch fit

for duty and explained the behavioral implications of Lithium and the Bipolar Disorder on Sergeant Bulloch's behavior. Petitioner's Exhibit 15 and T399-470.

37. Dr. Artigues explained that Bipolar Disorder is "an equal opportunity illness" in that professors, physicians, attorneys, school teachers, as well as a variety of types of persons visit her office for treatment of Bipolar Disorder. T409 Dr. Artigues reviewed Sergeant Bulloch's medical history and records, including his observation at Holly Hill. T412

38. Dr. Artigues explained that Bipolar Disorder is in the mood disorders category. Bipolar Disorder is a disorder where depression is present, but the other pole would be mania or hypomania. In mania, there is accelerated thought processes, pressured speech, and a lot of impulsive and inappropriate behavior at times. T413 In hypomania, there are symptoms such as those but they are not quite as severe, so a person may go days without sleeping, have excess energy, and have an enhanced sense of well being. T413

39. Dr. Artigues explained that up to twenty-five percent of the population at some time is going to have a mood disorder. T414 Bipolar Disorder is not as common. T414 Bipolar Disorder is a mental illness. T415 Mood disorders run in families. There is a family history of depression on Sergeant Bulloch's mother's side. T415 Bipolar Disorder usually manifests itself in people around early to middle age in their thirties to middle forties, the usual age of onset. T415 Bipolar Disorder has recognized symptoms. T416

40. Bipolar Disorder is treatable by medication. T419 Bipolar illness is one of the psychiatric illnesses that has been treatable for a long time. T420 Lithium salts were introduced in 1949 as actually the earliest psychoactive medication available. T420 There is a new group of anti-psychotic medications which are very good at treating Bipolar Disorder. T420 There are multiple treatments available for patients with Bipolar Disorder. T420

41. Both medicines and psychotherapy are available to treat Bipolar Disorder. T420 Individuals who have Bipolar Disorder can lead normal and productive lives, including holding jobs that are very stressful. T421 However, Bipolar Disorder is not always easy to recognize or diagnose. T421

42. Depression or major Depressive Disorder is different from feeling depressed. T422 Depression is a diagnosable illness. T422 Depression is a medical condition profoundly impacting someone's functioning, especially over time. T423 Depression is thought to be very common, and Dr. Artigues believes that, over a lifetime, one in four people will suffer with depression. T424

43. Lithium is a medicine designed to stabilize moods. T424 Lithium, with the proper dosage and properly administered, is a very good medicine for Bipolar Disorder. T425 Lithium is a psychoactive drug and has lots of psychoactive side effects as a result. T425 Lithium can cause sedation; it can cause mental confusion; it can cause problems with movement such as difficulties with balance; and it can cause slurred speech among other psychoactive effects. T425 Confusion definitely can result from taking Lithium. T425 These side effects were



consistent with the behavior exhibited by Sergeant Bulloch on December 14, 2004, when Sergeant Bulloch experienced mental confusion, a breakdown of emotions, slurred speech, and difficulty with balance, all of which were part of a medical crisis for him.

44. The first occasion that a patient ingests Lithium may have particular significance. T425-26 Getting someone on Lithium is a challenge because the patient may have to endure transient side effects at first until the medication is fully assimilated and well tolerated. T426 The common side effects of Lithium are more likely to occur in a first dosage. T426 However, it is very common that the side effects of Lithium may become severe enough that a person may end up in an emergency room. T426

45. Sergeant Bulloch was suffering from Bipolar Disorder in December, 2004. T427 At that time, Sergeant Bulloch was "relatively unmedicated" because he had been given a trial of Lamictal which caused practically unbearable side effects. The Lamictal caused painful neuropathy in his feet so Dr. Zarzar decided on a trial of Lithium. T427 Therefore, Sergeant Bulloch essentially was between medications on December 14, 2004. T427

46. Because Sergeant Bulloch essentially was between medications, that would have increased his risk of an adverse reaction from a new psychoactive medication such as Lithium. T428 Sergeant Bulloch had been on a combination of Lamictal and Depakote with the Lamictal being discontinued and Lithium being started. T428 Therefore, as of the beginning of the day on December 14, 2004, Sergeant Bulloch was on a single mood stabilizer, Depakote, which had not proved to adequately medicate him in the past. T428

47. When suffering from Bipolar Disorder, a person often may have a great deal of difficulty managing their own emotions, which appeared to Dr. Artigues to be an important component of what occurred with Sergeant Bulloch on the evening of December 14, 2004. T429

48. Sergeant Bulloch's first dose of Lithium gave him some unexpected psychoactive effects. T429 Both Dr. Zarzar and Dr. Artigues believed it was a combination of things that affected his mental status, but Lithium significantly was involved. T429 The combination of things that affected Sergeant Bulloch's mental status on that occasion were the first dose of Lithium, Sergeant Bulloch's condition of being relatively unmedicated for his Bipolar Disorder, and the fact that he drank some alcohol. T429-30 Dr. Artigues explained that if one reads the package insert on Lithium, it says "limit ones drinking" but it doesn't specifically say "don't drink." T430 Hypomania may have contributed to Sergeant Bulloch's reaction as well. T430

49. Sergeant Bulloch's underlying conditions of depression and Bipolar Disorder are significant in understanding his behavior on December 14, 2004, because, especially with Bipolar Disorder, there may be extreme emotional reactions and difficulty containing oneself. T432 The combination of the factors identified by Dr. Artigues were, in her expert opinion, causal factors in Sergeant Bulloch's behavior. T432

50. After Dr. Artigues' evaluation of Sergeant Bulloch, she has no concern about him being dangerous to himself or anyone else. T433 Dr. Artigues explained that having suicidal thoughts from time to time, even in a high stress occupation, does not render that person a danger

to themselves or others. T434 In persons experiencing Bipolar Disorder and with a reaction from Lithium, suicidal thoughts or suicidal gestures are very common. T432-33

51. Dr. Zarzar was very satisfied that Sergeant Bulloch had been very compliant and had done well; Sergeant Bulloch had not had a major depressive or manic/hypomanic episode according to Dr. Zarzar. T435 Therefore, Sergeant Bulloch had done quite well. T435 Sergeant Bulloch has been very compliant with his medications. T434

52. Sergeant Bulloch's service as a police officer and as a police sergeant for four years in Franklinton had significance to Dr. Artigues in evaluating him with respect to issues of danger to himself or others. T436 Dr. Artigues explained that one of the things that was striking to her was that since Sergeant Bulloch can tolerate the stress of being a police officer on the beat for four years and even being promoted in that position, that is a very good track record and speaks very well for him. T436

53. Because Dr. Artigues is not a law enforcement officer, she conferred with retired Colonel Robert Barefoot of the Highway Patrol, who explained that if someone could withstand the stress of being a police officer, they could withstand the stress of being a Highway Patrolman. T436 Sergeant Bulloch handled all law enforcement stress for sixteen years while employed with the Patrol and four years while employed with Franklinton; his single occasion of deviation was when he was off duty on December 14, 2004.

54. Dr. Artigues explained that Sergeant Bulloch could have continued to serve in April or May of 2005 to complete the duties, functions, and obligations of either a State Trooper or a Line Sergeant. T437 Sergeant Bulloch also could continue to serve as a State Trooper at the present time. T437 Dr. Artigues was not aware of any reason from a medical perspective that Sergeant Bulloch could not have continued to serve as a highway patrolman or a sergeant on the Highway Patrol in April or May of 2005. T437 Dr. Artigues explained that other physicians and healthcare providers had documented the same diagnosis and opinions stated by her regarding Sergeant Bulloch's condition. T438

55. Dr. Artigues explained that there is a negative stigma associated with individuals that have Bipolar Disorder. T438 There are many ways in which having the label of being a mentally ill person adversely affects that person, mostly in terms of wrong perceptions of the illness and what it means for a person. T438 Dr. Artigues explained that there is a lot of negative stigma attached to mental illness in general and to Bipolar Disorder because of a lack of understanding. T441

56. The likelihood is "very good" that Sergeant Bulloch would be able successfully to serve as a law enforcement officer or a sergeant in a law enforcement agency. Dr. Artigues explained that Sergeant Bulloch's track record is vitally important in this regard. T439 Neither before or since December 14, 2004, has any incident occurred. T439 Dr. Artigues explained that his track record would suggest a very positive future for him. T439

57. Dr. Artigues explained that there are lots of reasons to believe that Sergeant Bulloch did not understand what he was doing on the evening of December 14, 2004. T450



58. Dr. Artigues was asked about her explanation that it appeared that the Highway Patrol deviated from their usual policy by not providing Sergeant Bulloch with a fitness for duty examination. T455 Dr. Artigues' opinion was based upon the Highway Patrol Policy Manual, Subsection H, Part V. T455 Dr. Artigues explained: "Reading from that policy, it says, 'members who are involved in any critical incidents shall be referred to the Patrol medical office for evaluation of fitness for duty determination outlined in directive E.2, Section VIII, Procedures for the Members Assistance Team.'" T457

59. Dr. Artigues observed that Dr. Griggs wanted to do a fitness for duty evaluation, but that was not carried out. T458 She observed that the Highway Patrol deviated from their normal policy. T459 That departure from policy is troubling, especially because of the underlying medical circumstances.

60. Dr. Artigues explained that it was her understanding that the Highway Patrol terminated Sergeant Bulloch for unbecoming conduct, which she explained "had a medical basis, but that was not noted" by the Patrol. T459 Dr. Artigues explained that when she used the term medical basis, she meant a medical explanation. T459

61. Dr. Artigues explained how former Colonel Barefoot indicated that he would do many things to address medical and mental illness in troopers including troopers with Bipolar Disorder, one of whom is still serving and has an exemplary record. T460 Dr. Artigues explained that understanding the underlying medical conditions and associated behavior of Sergeant Bulloch on December 14, 2004 may lead one to not judge him so harshly on the worst day of his life. T460-61

62. Dr. Artigues explained that Sergeant Bulloch's behavior, which was caused in part from Bipolar Disorder and associated medications, resulted in his discharge from the Patrol. T462 According to Dr. Artigues, Sergeant Bulloch was terminated for unbecoming conduct which had its genesis in his underlying medical condition. T463

63. Dr. Artigues explained that Sergeant Bulloch's behavior resulted from a medical illness and that it was not explored in the depth that would have led to an understanding of it and putting it into proper perspective and context. T464 Dr. Artigues described the events of December 14, 2004 as the "perfect storm" for Sergeant Bulloch because it had not happened before or since. T465

64. Dr. Artigues explained that Sergeant Bulloch is fit for duty as a police officer or trooper. T465 Sergeant Bulloch's track record shows compliance with medication and treatment; he has four additional years of experience as a police officer; and has done very well. T465

65. A bench question posed to Dr. Artigues was whether, from a medical standpoint, it appeared that Patrol Commander, Colonel Clāy, had sufficient medical information before him to make any sort of determination about Petitioner's underlying medical condition and its relationship to the conduct that he engaged in on December 14, 2004.. Dr. Artigues explained

that she saw no documentation indicating that the Colonel would have been able to see the nature of the mental illness and associated pharmacology and understand how those underlying conditions impacted Petitioner that day. T468-69 Dr. Griggs wanted Sergeant Bulloch to have the specialized fitness for duty examination and Colonel Clay agreed and directed that the fitness for duty examination be conducted. Dr. Artigues' expert medical opinion was that Colonel Clay was not provided sufficient medical information or knowledge to enable him to understand how Sergeant Bulloch's medical condition and his first dosage of Lithium, along with Ambien and some alcohol, affected Sergeant Bulloch's behavior.

#### **E. Respondent's Incomplete Investigation**

66. A proper and thorough internal affairs investigation would have and should have included a completed fitness for duty examination, as recommended by Dr. Griggs and directed by Colonel Clay. The failure to have the specialized fitness for duty examination completed resulted in a defective and incomplete investigation which failed to produce the necessary medical evidence for consideration by Colonel Clay and, ultimately, the Secretary of the Department of Crime Control and Public Safety.

67. Despite the best efforts of Dr. Griggs, the Patrol failed to take reasonable and simple steps to learn more about Sergeant Bulloch's condition and its impact and effect on his behavior. The specialized medical fitness for duty examination for Sergeant Bulloch was *necessary* according to Dr. Griggs, Dr. Artigues, and Colonel Clay. T458, 633, 642, 644, 81.

68. Colonel Clay acknowledged that he made no significant effort to understand or learn about Sergeant Bulloch's medical condition or his medication; this left him ill-prepared to render an objective personnel decision predicated upon the totality of the evidence. Even after issuing a clear directive for a specialized fitness for duty examination for Sergeant Bulloch in January, 2005, Colonel Clay had no basis for why that examination was not carried out and why he did not address that matter before he terminated Sergeant Bulloch's employment. Colonel Clay was Respondent's decisionmaking official with authority to make personnel decisions regarding Sergeant Bulloch.

69. There was no evidence offered by Respondent to refute Dr. Artigues' professional opinions, diagnosis, and expertise. Dr. Moira Artigues is a highly qualified forensic psychiatrist who was credible and believable. Her expert testimony and explanations regarding all issues make sense and were helpful in understanding Sergeant Bulloch's medical conditions and medication, and their impact on his behavior on December 14, 2004.

#### **F. Events of December 14, 2004 and Related Medical History**

70. The sole basis of the single charge against Sergeant Bulloch occurred on December 14, 2004. A Highway Patrol Christmas party was planned in Raleigh. Sergeant Bulloch was then residing with his future wife, Ms. Patricia Bravo Gomez. He had just picked up his first prescription of Lithium, a strong psychoactive medicine used to treat Bipolar Disorder. Sergeant Bulloch drank some alcohol, several margaritas, before going to and after arriving at the party. Ms. Bravo Gomez drove them to the party.

71. The medical background of Sergeant Bulloch especially is relevant as it relates to the events of December 14, 2004. Sergeant Bulloch initially was diagnosed with depression as initially documented in medical records of the Patrol in 1997 with Dr. Griggs. T505 Sergeant Bulloch generally recalled that he was diagnosed with Bipolar Disorder perhaps in 2003. T505 Dr. Zarzar, a psychiatrist, initially characterized Sergeant Bulloch's condition as "clinical depression." T506

72. Sergeant Bulloch was working with his treating physician, Dr. Zarzar, trying different medications, some of which were not effective for Petitioner. T508 Some of the medicines were causing enormous pain in his feet. T508 Sergeant Bulloch was examined by a podiatrist who diagnosed the condition as "neuropathy", perhaps a side effect of the medicines. Sergeant Bulloch communicated that to Dr. Zarzar. T509 A new medicine, Lithium, was prescribed for him. T509 Sergeant Bulloch was taken off medicines including Depakote and Lamictal, which caused his feet to get better but his depression disorder got worse. T510 Therefore, he pretty much was unmedicated in December, 2004. T511 He was not taking any medicine that was treating his diagnosed Depressive Disorder during December, 2004 until a prescription of Lithium was provided. T511

73. Sergeant Bulloch followed the advice of and complied with the recommendations made by his several medical providers, Dr. Zarzar, Dr. Cross, Kimble Sargent, and Dr. Griggs of the Patrol. T511-12

74. Sergeant Bulloch picked up the Lithium around 4:00 p.m. to 5:30 p.m. on December 14, 2004. T513 Sergeant Bulloch knew that he recently had not been medicated, had not been feeling right, and knew that he had to be medicated so he took the Lithium when he got home. T513 Sergeant Bulloch took the recommended dosage of Lithium. T514 At the time Sergeant Bulloch took the first dosage of Lithium, he did not have any clear understanding as to possible side effects that he might experience from that new medicine. T517

75. The Highway Patrol Christmas party was planned for that evening at the Brownstone Inn in Raleigh. T514 Sergeant Bulloch was excited about attending the Christmas party and having the opportunity to be among friends. Sergeant Bulloch had a social companion, a girlfriend at that time, Patricia Bravo Gomez. T515 Ms. Bravo Gomez did not want to attend the party, but he urged her to go. T516 Ms. Bravo Gomez is a native of Mexico. At the time of the December, 2004, Christmas party, her English was understandable but there were still some words that were not quite clear in her speech. T517

76. Sergeant Bulloch wanted to try to get the party started with dancing. He walked over and got Ms. Bravo Gomez by the hand and walked out onto the dance floor and started to dance. T522-23 Sergeant Bulloch took her by both hands and walked backwards; she was looking at him smiling and saying "I don't want to dance." T523 Ms. Bravo Gomez was sticking her thumbnails into his palms and Sergeant Bulloch was thinking that she was playing with him. T523 Ms. Bravo Gomez did not like the music and Sergeant Bulloch went over and talked to the DJ to see if he had any music that was salsa. T523

77. Sergeant Bulloch was hoping to get someone on the dance floor to dance and get the party started. T524 After speaking to the DJ, Sergeant Bulloch went back to Ms. Bravo Gomez to encourage her to dance. He was not angry and did not have any ill intent; he did nothing that intentionally was meant to hurt her or harm her in any way. T524 Sergeant Bulloch thought that he and Ms. Bravo Gomez were being playful. T525 Sergeant Bulloch briefly pulled her arm behind her back as they walked out onto the dance floor. When he faced her, he saw that her eyes were welled up with tears. T525 Sergeant Bulloch then realized that he had hurt her arm. T525 Ms. Bravo Gomez expressed a desire to go home. T525

78. Sergeant Bulloch previously had engaged in and encountered similar playful physical experiences with Ms. Bravo Gomez. T527 Sergeant Bulloch did nothing to threaten Ms. Bravo Gomez in any way that night. T529 After Ms. Bravo Gomez and Sergeant Bulloch left the party, they had conversations as they began to drive home, when Sergeant Bulloch was very frustrated. T531

79. Sergeant Bulloch does not have a crystal clear recollection of the events that occurred back at his home later that night. T532 Sergeant Bulloch was upset. Sergeant Bulloch was in what medical and mental health professionals describe as crisis that evening after returning to his home. T599

80. Although Petitioner only drank alcohol 2-3 times in a year, he previously had consumed similar quantities of alcohol as he did on this evening, and never had any type of adverse reaction from alcohol. T537-38 Following consumption of alcohol in the past, Sergeant Bulloch previously had not experienced any sort of behavioral issues or problems. T538

81. Sergeant Bulloch did not have full control of his mental and physical faculties at his home on the evening of December 14, 2004 when he, while alone in his bedroom, considered suicide and subsequently fired a round into the bedroom floor. T539 Sergeant Bulloch's state of mind at his home on December 14, 2004, was that he was distraught and that he could not care for himself.

82. After Ms. Bravo Gomez's 911 overdose call, officers and paramedics arrived at Petitioner's home. T538 Sergeant Bulloch initially was taken to Wake Medical Center. T540 Captain Anthony Midgett of the Highway Patrol relieved Sergeant Bulloch of duty that evening at the hospital "for medical reasons." T541

83. Sergeant Bulloch was taken to Holly Hill Hospital, where a doctor put him on a seventy-two hour precautionary hold. T598 He was not involuntarily committed. T598 Sergeant Bulloch conferred with Dr. Griggs who advised him about the process that he would have to go through which would involve limited duty. T547 Dr. Griggs indicated that Sergeant Bulloch would have to execute releases and release his medical records to a company called Law Enforcement Services, Inc. of Greensboro. T548 Sergeant Bulloch executed a release for the medical records and internal affairs records to be provided. T548 Dr. Griggs had indicated that LESI would conduct the fitness for duty evaluation and Sergeant Bulloch was willing to undergo the process completely. T550

84. Petitioner's Exhibit 15 is a letter dated January 18, 2005, from Colonel Clay to Law Enforcement Services, Inc. (LESI), whereby Colonel Clay requested that LESI conduct a "fitness for duty" evaluation on Sergeant Bulloch. Petitioner's Exhibit 15. Colonel Clay directed Law Enforcement Services, Inc. to conduct the specialized fitness for duty evaluation that Dr. Griggs recommended. T552 However, the evaluation never was done. T552

85. Petitioner's Exhibit 15 contains additional documents, including forms for use by LESI, Sergeant Bulloch's executed release of information, information about LESI, and Sergeant Bulloch's request for an extension of limited duty. T553

86. On April 1, 2005, Sergeant Bulloch's physicians, Dr. Zarzar and Dr. Nancy Cross, along with a psychologist, recommended that he return to full duty immediately. T558 Sergeant Bulloch collected documents from his doctors and provided them to the Patrol so that they would know what his condition was. T559

87. The Patrol terminated Sergeant Bulloch's employment on May 6, 2005. Sergeant Bulloch submitted significant evidence at the predissmissal conference, which appears as Petitioner's Exhibit 20, which includes a three page single space report from Sergeant Bulloch. The predissmissal conference was held on May 4, 2005. Petitioner's Exhibit 20. On May 5, 2005, Captain Castelloe submitted a memorandum with Sergeant Bulloch's concerns. The very next day, May 6, 2005, Sergeant Bulloch's employment with the Patrol was terminated. Petitioner's Exhibit 20.

88. Petitioner's Exhibit 6 is a transcribed interview of Dr. Thomas Griggs by the Patrol's Internal Affairs office, which was admitted into evidence. T563 Petitioner's Exhibit 7 is an email from Sergeant Bulloch to Dr. Griggs dated February 11, 2005 where Sergeant Bulloch was updating Dr. Griggs on his progress. T564 Sergeant Bulloch expressed that he was looking forward to meeting with the psychologist in Greensboro, referring to LESI. See Exhibit 7, which was admitted into evidence. T565

89. There was no evidence of any news media coverage of the incident or the aftermath of the incident of December 14, 2004, either at that time or since then. T566 Thus, there was not any public relations damage or even any arguable public relations damage from Sergeant Bulloch's off-duty behavior on December 14, 2004.

90. The Patrol kept Sergeant Bulloch in a light duty status from around January 10, 2005 until he was dismissed on May 6, 2005. T566

91. Sergeant Bulloch has had no medically-related incidents from his medication or from his condition at any time since the aftermath of the December 14, 2004 incident. T566 Sergeant Bulloch has been able to complete all of his law enforcement work, both patrol and management related, without any medically-related incidents since December 14, 2004. T566

92. Sergeant Bulloch explained the effect of Lithium on him and how it was ineffective as a treatment for him. T611 Sergeant Bulloch explained the effect of Lithium on another occasion when he was working light duty for the Patrol, when he described that he felt like a

robot and like he did not even belong in his body. T611 He explained that the Lithium caused one pupil to be dilated while the other one was constricted. T611

93. Petitioner's Exhibits 1-23 were admitted into evidence. T621

## SUMMARY OF OTHER PERTINENT TESTIMONY

### A. Testimony of Barbara Moore

94. Barbara Moore was both a fact and character witness. T323 Ms. Moore is Executive Director of the North Carolina Conference of Clerks of Superior Court. Ms. Moore was employed with the North Carolina Conference of District Attorneys as the Deputy Director, where she served for eleven years and was in charge of the training and education for prosecutors and law enforcement personnel. T324

95. Ms. Moore met Sergeant Bulloch in 1998 when she began serving with the District Attorneys' Conference. Ms. Moore met Sergeant Bulloch in the context of his serving as an instructor. T325 She worked with Sergeant Bulloch as an instructor for programs that she was involved in on behalf of the Conference of District Attorneys. T325 Ms. Moore developed statewide training for domestic violence. T329

96. Ms. Moore explained that after Sergeant Bulloch was recommended to her by the Patrol as a potential trainer, Sergeant Bulloch helped her develop a statewide training program for law enforcement personnel and prosecutors on DWI. T325 Ms. Moore developed a working relationship with Sergeant Bulloch that continued for several years. T326 Ms. Moore has been a certified BLET instructor since 1996 and has served with numerous instructors from the Patrol, different law enforcement agencies, and the Attorney General's office. Ms. Moore never has met anybody as dedicated at teaching or instructing as Sergeant Bulloch. T326

97. In the ten years that Ms. Moore was in the criminal justice field, Sergeant Bulloch was well known and very well respected in the prosecution field and the law enforcement field as an instructor and as a law enforcement officer. T327 Ms. Moore testified that Sergeant Bulloch's integrity and moral character were unquestionable. T327

98. Ms. Moore went to the Highway Patrol Christmas party on December 14, 2004. T329 Ms. Moore knew Patricia Bravo Gomez. T329 They had been together at social events and things of that nature. T329 Ms. Moore had been with Ms. Bravo Gomez "on numerous occasions." T330 Ms. Moore observed that Ms. Bravo Gomez "was very challenged with the English language ..." T330 She observed that Ms. Bravo Gomez's knowledge and understanding of English language was "very limited." T330 Ms. Moore testified that "her English was very broken." T330

99. At the Christmas party, Ms. Moore and her husband were seated at the same table with Sergeant Bulloch and Ms. Bravo Gomez. T331 Ms. Moore observed that Ms. Bravo Gomez was not comfortable in the environment at the party. T332 Ms. Bravo Gomez had stated to Ms. Moore that she had reservations about being there and was nervous about how she looked.



T332 There was alcohol being served and there were people at the party who were drinking.  
T333

100. Ms. Bravo Gomez was seated immediately to the right of Ms. Moore when Ms. Bravo Gomez had the conversation with Sergeant Bulloch relative to dancing. T335 There was no struggle or anything of that nature. T335 Ms. Moore explained that Sergeant Bulloch "was just trying to encourage her to go out on the dance floor and she finally stood up and took his hand and went with him out onto the dance floor. I did not see any kind of forceful action on his part or reluctance on her part after she got up out of the chair to go out onto the dance floor." T335-35 They remained on the dance floor for a couple of dances. T336 Ms. Moore was present with Sergeant Bulloch and Ms. Bravo Gomez virtually the entire time when they were at the table, when they got up and danced and when they left. T337

101. In her observations of Sergeant Bulloch that evening, she did not observe anything consistent with domestic violence. T337 Ms. Moore testified that from her close proximity to Ms. Bravo Gomez, there was nothing that she saw that led her to believe that she was in any way harmed or hurt. T338 Ms. Moore had a discussion with Ms. Bravo Gomez as she was leaving and Ms. Moore asked if she was okay. T339 Ms. Bravo Gomez stated "I'm fine. I'm just tired. I want to go." T339 Ms. Moore authenticated Exhibit 16, which was her statement. T346

#### **B. Testimony of Character/Conduct Witnesses**

102. Josh Tharrington, Legal Adviser for the Wake County Sheriff, testified regarding Sergeant Bulloch. T351. Mr. Tharrington has been a licensed attorney since 1990. T352 Prior to that, Mr. Tharrington was a Raleigh police officer from 1973-1986. T352 Mr. Tharrington met Sergeant Bulloch in 1990 when he joined the District Attorney's office. T352 Mr. Tharrington served with the District Attorney's office from 1990-2002. T352 As a result of his professional contact, he knows Sergeant Bulloch well. T353

103. Mr. Tharrington testified that Sergeant Bulloch was "the best we ever had in Wake County, since I've been around, for bringing us drunk driving cases and having them well prepared in the type of testimony and preparation." T353 Regarding Sergeant Bulloch's traits of honesty, character, and trustworthiness, Mr. Tharrington testified that Sergeant Bulloch was very honest and that "I trust him with my life." T354

104. Mr. Tharrington testified that there were few officers as motivated as Sergeant Bulloch. T354 He never has observed Sergeant Bulloch engage in any type of intentional misconduct. T355 Mr. Tharrington testified that Sergeant Bulloch was doing well with the Franklinton Police Department. T355

105. Phillip Wadsworth testified regarding Sergeant Bulloch's reputation and conduct. T357 Mr. Wadsworth is employed in security work with an agency that is contracted with the U.S. Marshal Service at the Federal Bankruptcy Court in Greensboro. T358 He works in courtroom security. T358 Mr. Wadsworth is retired from the North Carolina Highway Patrol as a sergeant, having over 28 years of service. T358 Mr. Wadsworth has known Sergeant Bulloch

since approximately 1998 or 1999. Mr. Wadsworth observed Sergeant Bulloch's performance as TSI (Traffic Safety Information) sergeant. T359

106. Mr. Wadsworth testified that Sergeant Bulloch was one of the best TSI Sergeants he worked with and that Sergeant Bulloch was very knowledgeable and one of the best instructors. T359 Mr. Wadsworth described Sergeant Bulloch's reputation as "very good. One of the best instructors I've ever met." T360 Sergeant Bulloch conducts himself very professionally. T360 Mr. Wadsworth describes Sergeant Bulloch as "very honest" and trustworthy. T360 Mr. Wadsworth considers Sergeant Bulloch to be a substantial asset to the Highway Patrol. T360 Sergeant Bulloch served on the Child Safety Board of North Carolina. T361

107. Jason Cox, who serves as a Magistrate in Franklin County, testified regarding Sergeant Bulloch's conduct and reputation. T363 Mr. Cox is a former Navy veteran and school teacher. T363 Mr. Cox was hired by Judge Hobgood to be a Magistrate. T363 Magistrate Cox has had occasion to deal with Sergeant Bulloch in his professional capacity as a Magistrate with Sergeant Bulloch as a law enforcement officer in Franklinton. T364 Magistrate Cox sees Sergeant Bulloch frequently and has observed him fulfill his duties with some regularity. T363

108. Magistrate Cox testified that Sergeant Bulloch is "very professional...He is very persistent. He's one of the best officers that I have worked with, and he's one of the better officers at de-escalating just about any situation that comes to my office. He is very thorough." T364 Magistrate Cox testified that Sergeant Bulloch is a hard worker, and his observations with regard to Sergeant Bulloch's character traits of honesty, integrity, and trustworthiness are "one hundred percent." T364 Magistrate Cox testified that officers in Franklin County call Sergeant Bulloch for advice and Magistrate Cox has called him for advice. T365 Magistrate Cox testified that "everybody looks up to him..." T365 Magistrate Cox testified that Sergeant Bulloch's reputation in the law enforcement community and judicial community is "very professional." T365

109. Trooper Hans Ellefson testified about Sergeant Bulloch's supervision, conduct, and reputation. T368 Trooper Ellefson has served with the Highway Patrol for approximately 12 years. T368 Trooper Ellefson served in the United States Marine Corps and is a combat veteran from Desert Shield/Desert Storm; he served six years in the military. T369

110. Trooper Ellefson came to know Sergeant Bulloch from observing training films at the Highway Patrol Basic School. T369 Sergeant Bulloch became one of Trooper Ellefson's Line Sergeants in Troop C. T369 Sergeant Bulloch was very helpful to the troopers as their supervisor. T370 Trooper Ellefson "never heard a bad word spoken about Sergeant Bulloch." T370 Sergeant Bulloch is a hard worker and is a professional. T370 Regarding honesty, character and trustworthiness, Sergeant Bulloch is "superior on all accounts". T371

#### **C. The Patrol's Position and The Internal Affairs Investigation**

111. Patrol officials responded to the hospital where Sergeant Bulloch was taken. Sergeant Bulloch was relieved of duty as a member of the Highway Patrol for medical reasons.



T541 Thus, the Patrol initially treated the matter as a medical issue. Sergeant Bulloch was returned to work on light duty. Petitioner's Exhibits 17, 15 at page 5. Sergeant Bulloch was kept on light duty status from around January 10, 2005, until the day of his dismissal on May 6, 2005. T566.

112. Captain Midgett visited Sergeant Bulloch at the hospital; he explained in his internal affairs interview that he wanted to salvage Sergeant Bulloch's career. Exhibit 5. Colonel Clay acknowledged that he found Captain Midgett to be an efficient management official and generally found his observations and judgements to be good. T74

113. As a part of its internal affairs investigation, Respondent interviewed the Patrol Medical Director, Dr. Thomas Griggs. Petitioner's Exhibit 6 contains Dr. Griggs' interview. Dr. Griggs observed that Sergeant Bulloch was suffering from depression as far back as 1998. T628 The reference to depression appeared in medical records in 1998. T628 The Patrol Internal Affairs investigative process collected medical records regarding Sergeant Bulloch. Respondent's Exhibit 7.

114. Dr. Griggs informed Sergeant Bulloch that the evaluation of his medical fitness for duty would be done by a specialist, which was a "standard thing we did to get an independent evaluation for issues that I personally was not an expert in..." T633 The field of psychiatry is not Dr. Griggs' area of specialization. T641

115. Based upon what Dr. Griggs learned about Sergeant Bulloch's situation including the incident of December 14, 2004, Dr. Griggs believed as a medical professional that a specialized medical evaluation of Sergeant Bulloch by a psychiatrist or a psychologist was necessary and appropriate. T642

116. Sergeant Bulloch signed appropriate waivers to release all of the records so that the evaluation that Dr. Griggs recommended could be accomplished. T642 Sergeant Bulloch was fully cooperative with Dr. Griggs. T642

117. Dr. Griggs testified that he was following usual agency policy and protocol in making the referral for the specialized type of medical evaluation for Sergeant Bulloch. T643 The process that Dr. Griggs was following was not unlike that which has been followed in other situations when other members of the Patrol needed a fitness for duty evaluation in the mental health context. T642-43 Dr. Griggs has used the Law Enforcement Services firm in Greensboro for this type of procedure before. T643

118. It was the intent of Dr. Griggs to have the fitness for duty evaluation for Sergeant Bulloch accomplished. T644 Dr. Griggs wanted himself and the Patrol to have the benefit of that specialized expertise from Law Enforcement Services. T644 Dr. Griggs received communications from Sergeant Bulloch continuing to be fully cooperative as he was ready to proceed with the evaluation. T645

119. Dr. Griggs referenced another member of the Patrol with Bipolar Disorder who has been taking appropriate medicine and under medical care for the last eleven years, and has done

fine. T646 Dr. Griggs indicated that a considerable number of troopers have experienced depression. T646 Dr. Griggs has known of members who obtained appropriate medications and treatment for depression and have continued to be productive for the Patrol. T646

120. Even though psychiatry is not his field of expertise, Dr. Griggs observed that Bipolar Disorder, if properly treated with medications, substantially can control that condition. T647-48 Dr. Griggs testified that a person could suffer from Bipolar Disorder and suffer from depression and still have a productive career in professional law enforcement. T648 Dr. Griggs testified, that it was possible for Sergeant Bulloch to work productively following the December 14, 2004 incident. T649

121. Dr. Griggs testified that he had been aware of Sergeant Bulloch's ongoing treatment for health related issues and that his knowledge of those issues did not raise any significant reservations with him. T649-50 If Sergeant Bulloch completed the assessment by the professional medical firm in Greensboro, he could remain a productive member of the Highway Patrol. T650

122. Dr. Griggs was aware that both Dr. Cross and Dr. Zarzar were of the opinion that Sergeant Bulloch was fit for continued law enforcement service with the Highway Patrol. T651 Prior to the decision to terminate Sergeant Bulloch, Colonel Clay did not seek out Dr. Griggs' professional medical opinion about Sergeant Bulloch. T651-52

123. When Dr. Griggs has made decisions and recommendations over the years, since he has been Medical Services Director, to have a Patrol member undergo a specialized fitness for duty evaluation, the Patrol generally has consistently followed his recommendations in that regard. T652

124. Dr. Griggs was aware that other Patrol members over the years have found themselves in situations of medical crisis from time to time. T658 Regarding the behavior involving Sergeant Bulloch on December 14, 2004, Dr. Griggs believed that Sergeant Bulloch was experiencing a medical crisis. T658

125. Dr. Griggs explained that the Highway Patrol has employees with anxiety, attention deficit disorder, insomnia, and Bipolar Disorder. Petitioner's Exhibit 6 at page 2. Dr. Griggs explained that a formal consultation for Sergeant Bulloch with the psychologists was necessary. Petitioner's Exhibit 6.

#### **D. Colonel Clay's Testimony**

126. Colonel Clay acknowledged his deference to Dr. Griggs' medical expertise on medical matters. T78 Colonel Clay found Dr. Griggs' medical decisions to be reliable. T79 However, Colonel Clay had no explanation for why he failed to follow through on Dr. Griggs' recommendation and his own directive that Sergeant Bulloch be given a specialized medical examination by Law Enforcement Services, Inc.

127. Colonel Clay specifically and personally directed that "Law Enforcement Services, Inc. conduct a 'fitness for duty evaluation' on Sergeant Wade B. Bulloch." Petitioner's Exhibit 15 (Colonel Clay's letter to Law Enforcement Services, Inc. of January 18, 2005).

128. Colonel Clay found Sergeant Bulloch to be an honest person with integrity and considered him to be an asset to the Patrol under his command. T62 Colonel Clay testified that Sergeant Bulloch appeared to be a highly dedicated and motivated member of the Patrol. T62 Colonel Clay was aware that Sergeant Bulloch was a certified instructor through the Training and Standards Commission and that he had earned substantial commendations and accolades from his teaching. T62 Colonel Clay testified that Sergeant Bulloch was a highly respected trooper and line sergeant. T62-63 Despite Petitioner's status as a highly respected member of the Patrol, Colonel Clay failed to ensure that the Patrol complied with his order and the Patrol's own policy of specialized medical examinations in Sergeant Bulloch's case. T455-459

129. Colonel Clay testified that he was aware that Captain Midgett wanted to see Sergeant Bulloch's job salvaged and that he didn't want Sergeant Bulloch to lose his job based on this situation; Colonel Clay testified that Captain Midgett said something to him to that effect. T74-75

130. Colonel Clay testified that Dr. Thomas Griggs has been the Medical Services Director for the Patrol; that Colonel Clay has found over the years that Dr. Griggs' judgement, medically and otherwise, was good. T77 Colonel Clay acknowledged that Dr. Griggs was well known in the law enforcement community as being a very highly respected physician as it relates to diagnosing, treating, and assisting Troopers with medical issues. T77-78

131. Colonel Clay acknowledged that he would be likely to defer to the medical expertise of Dr. Griggs. T78 Colonel Clay has found that Dr. Griggs' decisions regarding medical matters have been reliable. T79

132. The letter requesting the fitness for duty evaluation for Sergeant Bulloch was approved and signed by Colonel Clay. T81 By signing the letter requesting a fitness for duty evaluation, Colonel Clay considered it both desirable and necessary. T81 One of the reasons why the fitness for duty process was being considered was based upon what Colonel Clay saw in the file that Sergeant Bulloch may have had, at that time, some underlying medical condition that needed thoroughly to be evaluated. T83

133. Colonel Clay generally was familiar with specialized doctors in the area of psychology or psychiatry, and was aware that they can analyze the historical medical evidence and condition of the patient and make informed decisions about medical matters that are very useful in the management process. T83-84

134. Colonel Clay directed the fitness for duty process to start in January, 2005, and his directive was expected to be carried out, unless canceled by the Colonel. T85 At the time of Petitioner's discharge from the Patrol, no action had been taken to cancel the order for a fitness for duty evaluation process for Sergeant Bulloch. T85

135. Colonel Clay acknowledged that when he saw the terms Bipolar Disorder and depression in the records, that he was aware that those were mental health type conditions. T88 Colonel Clay acknowledged that he could not tell whether Bipolar Disorder could cause certain types of human behaviors. T89

136. Colonel Clay acknowledged seeing a reference that the medicine that Sergeant Bulloch had taken that day was a drug called Lithium. T89 Colonel Clay testified that he was not familiar with Lithium then or now. T89 When Colonel Clay was asked what he knew about Lithium and what type of medication he understood that it to be, he responded that "I wouldn't - just the name - the recognition of the name, what it might, what would be the appropriate application to treat XYZ, or what's the effects or the side effects, I wouldn't know." T90 Colonel Clay acknowledged that understanding the effects or side effects of such medication was above his paygrade and that is why the Patrol has employees like Dr. Griggs to help with that analysis. T90

137. Colonel Clay could not recall any discussions or communications at all with Dr. Griggs about the effects of Lithium on a patient who had been diagnosed with depression and Bipolar Disorder. T90

138. When Colonel Clay saw the reference in the file that Sergeant Bulloch had been diagnosed with Bipolar Disorder, he was surprised. T93 When asked about his understanding as to what the Bipolar Disorder is, what it meant to him, he responded "I don't know that I have today a thorough medical understanding of Bipolar - then or today." T93

139. Colonel Clay acknowledged that someone who worked in his office brought a document to him from the National Institute of Mental Health on Bipolar Disorder. T94 When asked if he reviewed and considered that, Colonel Clay responded "I think I reviewed some of that. I didn't read it in its entirety." T94 Petitioner's Exhibit 19 is the document acknowledged by Colonel Clay.

140. Colonel Clay testified that he continues to hold Sergeant Bulloch in high regard. T111 This is a significant recognition as it further establishes that the conduct in question has not caused any significant alteration in Respondent's confidence in Sergeant Bulloch. Since Colonel Clay still holds Sergeant Bulloch in high regard, that infers that the incident of December 14, 2009 did not result in significant damage to Sergeant Bulloch's reputation.

#### **E. Testimony Of Law Enforcement And Internal Affairs Personnel**

141. Following the incident at Sergeant Bulloch's home, law enforcement authorities arrived in response to a call for assistance regarding a possible overdose. T123 Deputy William Ross was there and testified regarding his observations of Sergeant Bulloch in his home on December 14, 2009. T121 Deputy Ross began to question Sergeant Bulloch about what had occurred and Sergeant Bulloch responded that he wanted to go to sleep; he was lying on the bed; Sergeant Bulloch stated that he had taken a couple of Ambien pills and that was why he was sleepy. T124 Mr. Ross described his observation of Sergeant Bulloch as "very lethargic, very sleepy. I could smell a little bit of an odor of alcohol." T125

142. Deputy Ross observed that Sergeant Bulloch had slurred speech, was kind of mumbling, and his eyes were red and glassy. T125 When he was asked to stand up, he fell to the floor. T125

143. Deputy Ross testified that during his interview with Sergeant Bulloch, he learned that Sergeant Bulloch had seen a doctor earlier that morning, had been getting assistance through either a psychiatrist or a psychologist, and he had some medications that he was being treated with. T132

144. Deputy Ross observed Sergeant Bulloch nodding off asleep; Sergeant Bulloch had indicated to Deputy Ross very early that he had taken some medication. T137 Sergeant Bulloch was very respectful to Deputy Ross and did not present any threat to Deputy Ross. T138

145. Sergeant Bulloch openly admitted to Deputy Ross that, for the last eight months, he had experienced some mental conditions, had been diagnosed with Bipolar Disorder, and had experienced problems sleeping. T138 Sergeant Bulloch was cooperative with Deputy Ross the entire time. T139

146. Nobody in the residence expressed any concern for their own safety. T139 Ms. Bravo Gomez never made a statement to Deputy Ross at all about having any domestic problems; it was Sergeant Bulloch who acknowledged that he and Ms. Bravo Gomez had experienced some person-to-person frustration that evening prior to the arrival of law enforcement personnel. T139-40

147. Deputy Ross observed in his Internal Affairs interview with the Patrol that it appeared that Sergeant Bulloch's mental and physical faculties were impaired. T141 However, the odor of alcohol detected was "faint." T142

148. After a complete criminal investigation by the Wake County Sheriff's Department, no charges of any kind ever were brought against Sergeant Bulloch. T170 Ms. Bravo Gomez made it very clear both the night of the incident and the next day that she did not want to pursue any type of charge against Sergeant Bulloch. T171

149. Captain Gary Bell managed the internal affairs investigation. Captain Bell found Sergeant Bulloch to be a good, motivated, dedicated, hardworking Trooper. T222 Captain Bell found Sergeant Bulloch to be professional in his work and his conduct. T222 Sergeant Bulloch fully cooperated with Captain Bell and treated him with appropriate respect and professionalism. T222

150. As a part of the Internal Affairs investigation, Captain Bell was told to conduct an interview with Dr. Griggs, the Medical Director of the Highway Patrol. T242 Ordinarily, Dr. Griggs would be interviewed if there were any medical issues that Internal Affairs needed input on. T243

151. Captain Bell also interviewed Captain Anthony Midgett, the Troop C Commander. T245 Captain Midgett appeared at the hospital and had conversations with Sergeant Bulloch following the incident. T245 In his official Internal Affairs interview, Captain Midgett explained that he would like to salvage Sergeant Bulloch's job if he could, and he qualified that by saying maybe not as Sergeant and maybe not in Raleigh, but Captain Midgett would like to see Sergeant Bulloch keep his job if they could do that. T245-246

152. Captain Bell was aware of the fitness for duty evaluation that was recommended by Dr. Griggs and ordered by Colonel Clay that was to be completed for Sergeant Bulloch. T246-47 Captain Bell was unaware that the fitness for duty evaluation never was completed. T247

153. Captain Ken Castelloe then served in the Patrol's Internal Affairs Unit. Captain Castelloe indicated that at the hospital when he saw Sergeant Bulloch, that "he was not in the frame of mind to answer any questions. He was emotional, very apologetic....Sergeant Bulloch was in need of being attended by the medical facility instead of being interviewed." T294 Captain Castelloe acknowledged if there was some question about someone's mental capacity or mental condition, that ordinarily a formal interview would not be conducted. T295

154. Captain Castelloe testified that medical personnel were declining or refusing to release information to Patrol management regarding Sergeant Bulloch. T302 Captain Castelloe, as a part of his inquiry, was trying to figure out what was going on so he was trying to obtain the medical information. T302 Captain Castelloe acknowledged that Sergeant Bulloch made a complete and full authorization so that the medical records regarding him could be obtained from Sergeant's Bulloch's file. T302

155. Sergeant Bulloch's internal affairs file included psychological evaluations, discharge papers from Holly Hill Hospital, and copies of other medical documentation regarding Bipolar Disorder. T304 That medical documentation was in the file for appropriate consideration, and according to Captain Castelloe, it was considered. T304

156. Captain Castelloe acknowledged that Captain Midgett hoped that Sergeant Bulloch would not be fired for this single, isolated incident, and wanted to try to salvage his job. T310 After observing Captain Midgett make those observations in his official interview, Captain Castelloe does not recall if anyone conferred with Captain Midgett to explore the basis of his position in more detail. T311 Respondent's failure to examine and consider Captain Midgett's observations and bases for his opinions is troubling in light of the fact that Captain Midgett was Sergeant Bulloch's Captain and because he was an eye witness to Sergeant Bulloch's medically impaired condition.

157. Captain Castelloe did not recall consulting with anyone to learn about Bipolar Disorder, depression, and the other medical conditions of Sergeant Bulloch in connection with his recommendation made to Colonel Clay. T311 Captain Castelloe did not recall learning anything about the extent or magnitude of Sergeant Bulloch's medical conditions. T312

158. After the December 14, 2004 incident, Sergeant Bulloch was put on limited duty because of his medical issues. T313 Sergeant Bulloch returned to work on limited duty because



of medical reasons. T313 The Patrol's investigation and initial treatment of Sergeant Bulloch's behavior embraced it as medical in nature. However, the medical analysis requested never occurred, resulting in an incomplete investigation which left Colonel Clay without vital information with which to make a reasoned decision.

159. When Captain Castelloe obtained the Internal Affairs report including the medical documents, the discharge notes, and the psychological evaluation, the Patrol did not confer with any medical professional to help them better understand the medical issues involved. T316 Captain Castelloe also did not confer with Dr. Griggs about Sergeant Bulloch's condition. T316-17

160. The Patrol's failure to follow through and have the specialized medical evaluation conducted on Sergeant Bulloch represents a confusing and troubling aspect of the Patrol's investigation and consideration of the facts and circumstances surrounding this matter. All of Sergeant Bulloch's medical providers were in complete agreement that he was ready and able to return to duty. The undisputed facts demonstrate that someone failed to carry out Colonel Clay's order to have the evaluation conducted, yet Respondent had no explanation for why the necessary directive was not carried out.

#### **PRE-TERMINATION MEDICAL EVIDENCE**

161. The evidence, including the official medical records, demonstrate that every medical doctor who has examined Sergeant Bulloch since the incident has found him to be medically fit for continued law enforcement duty from 2005 to the present. See Petitioner's Exhibits 10, 11 and 12. Dr. David Zarzar, M.D., found that Sergeant Bulloch "would continue to make an upstanding law enforcement officer..." Petitioner's Exhibit 10. Dr. Nancy Cross, M.D., similarly found Sergeant Bulloch to be fit for duty. Petitioner's Exhibit 11. A specialized nurse offered similar observations. Petitioner's Exhibit 12.

162. Following the December 14, 2004 behavior, Sergeant Bulloch continued to obtain appropriate treatment for his medical condition. Petitioner's Exhibits 10 - 12. On April 7, 2005, Dr. Nancy V. Cross wrote to the Highway Patrol and Dr. Thomas Griggs and advised that both Dr. Cross and Dr. Zarzar were in "complete agreement" that Sergeant Bulloch "has been medically cleared to resume full active duty." Petitioner's Exhibit 15 at page 2. This undisputed medical recommendation was rejected despite the fact that there were no medical findings or recommendations to the contrary.

163. On April 7, 2005, Dr. Cross wrote that "Dr. Zarzar and I agree that he has followed all medical advice and has been compliant with his medications and his follow-ups with his various health care providers as scheduled. We recommend that he be allowed to resume his full duties as a law enforcement officer effective immediately." Petitioner's Exhibit 11 at page 2. There appears to have been no document generated in response to Dr. Cross either from Dr. Thomas Griggs or the Highway Patrol. In addition, Dr. Zarzar wrote on May 3, 2005 another progress report that Sergeant Bulloch had made good progress and that his compliance recently was very good. Petitioner's Exhibit 10 at page 1.

164. On May 5, 2005, Kimball Sargent, a Clinical Nurse Specialist, wrote to Colonel Clay and Captain Castelloe with a further report of Sergeant Bulloch's progress. Nurse Sargent began by observing that, in connection with Sergeant Bulloch's predisciplinary conference, she "was disappointed that Wade's illness had not been given consideration and that he had not been given an evaluation by the Mental Health Law Enforcement Specialist in Greensboro prior to your decision... Currently, it is my recommendation, as well as that of his treating physicians, that Wade is physically and mentally ready to resume his duties as a highway patrol officer." Petitioner's Exhibit 12 at page 1. Sergeant Bulloch's employment with the Patrol was terminated on May 6, 2005 without further evaluation or review of his known, underlying medical condition.

165. Sergeant Bulloch continued to present compelling medical evidence in the post-termination process. On October 21, 2005, Dr. Zarzar reported that: Sergeant Bulloch's "progress has been excellent and it appears he would continue to make an upstanding law enforcement officer..." Petitioner's Exhibit 10 at page 2. On November 7, 2005, Dr. Cross reported that "I have discussed his case with Dr. Zarzar at length, and we both agree that he is ready (and has been) to resume full active duty as a law enforcement officer. It is unfortunate that during his episode of depression he had a suicidal gesture, which was directly related to his depression and being on the wrong medication for this problem, leading to an adverse reaction." Petitioner's Exhibit 11 at page 1.

#### **RELATED FINDINGS**

166. The North Carolina Criminal Justice Education and Training Standards Commission considered information surrounding the incident. T492 Sergeant Bulloch cooperated fully with the Commission. T492 Thereafter, the Commission declined, under both its convicted or committed standards to conduct any further investigation or to issue a probable cause finding or charge Sergeant Bulloch with anything. T492

167. The N.C. Criminal Justice Education and Training Standards Commission is the statewide regulatory body that certifies law enforcement officers for service. The Commission promulgates rules of conduct for officers. The Commission has authority to suspend or revoke the certifications of officers if they violate Commission rules by engaging in misconduct. Here, the fact that the Commission considered the information surrounding the incident of December 14, 2004, and did not charge Sergeant Bulloch with any alleged rule violation, is some indication that his conduct was not deemed inappropriate under professional law enforcement rules and standards.

168. There was no publicity regarding the December 14, 2004 incident. There was no damage or injury to the Patrol or its functions from the incident. Virtually everyone who testified, including Colonel Clay, continues to hold Sergeant Bulloch in high regard. T61-63 Despite that, Colonel Clay admitted that he did not consider Sergeant Bulloch's medical condition as a mitigating factor. T54.

169. The undersigned has considered the evidence of alcohol use on December 14, 2004. The evidence demonstrates that the Patrol Christmas party was a once a year occasion where



Patrol members and families gather for fun and enjoyment. It appears that the party involved considerable consumption of alcohol. Sergeant Bulloch admitted that he consumed about four margaritas at home before going to the party. Sergeant Bulloch acted appropriately by not driving after alcohol consumption. Because Sergeant Bulloch was off duty, there was no prohibition against his alcohol consumption. The evidence suggests that the alcohol, by being taken in combination with the Lithium and Ambien, may have played some role in the behaviors of the evening of December 14, 2004. However, it is noted that Sergeant Bulloch never before had any type of adverse reaction or behavioral problems from alcohol. T537-38 There is no significant evidence to support a conclusion that alcohol was a substantial proximate cause of the behavior of Sergeant Bulloch.

170. Sergeant Bulloch acknowledged that his behavior at his home was embarrassing and inappropriate behavior. It was, however, unintentional behavior. Sergeant Bulloch has apologized profusely to everyone involved from the immediate aftermath of the incident to the present.

171. Sergeant Bulloch never intended to violate any agency policy, and did not willfully violate Respondent's unbecoming conduct policy.

172. Sergeant Bulloch offered some limited evidence of selective enforcement and disparate treatment in discipline by the Patrol. See Petitioner's Exhibit 22, which is a summary of some examples of discipline administered by the Patrol. The evidence in Exhibit 22 was not generally challenged by the employer; however, a bone of contention was raised regarding the precise characterization of the conduct of a member of the Patrol described in the Exhibit. The precise evidence in issue provided that: "Admitted to making approximately 22 threatening phone calls to his ex wife and threatening to kill her; admitted to making 22 threatening phone calls to his ex wife and, although did not recall threatening to kill her, did not deny doing so. In May of 2002; Admitted to having sexual relations with his ex wife while on duty on 2 or 3 occasions in April 2002; Admitted to using his blue lights in an attempt to initiate a traffic stop involving his ex wife even though there was [sic] on violation of law; and, on the same occasion stopped his ex wife without lawful reason and issued her a warning ticket and, violated patrol policy by turning his issued in-car camera off during the traffic stop; all of this activity occurred in May 2002. 5 percent reduction in pay for the 2002 incidents." Exhibit 22 at page 2. Twenty three other instances of discipline appear in Exhibit 22.

173. Exhibit 22 demonstrates that some other members of the Highway Patrol committed egregious offenses, both on and off duty, and were not terminated. Most of the examples of discipline set forth in Exhibit 22 appear to involve improper intent by the members of the Patrol who were disciplined. Respondent's unbecoming conduct policy is ill defined, and Exhibit 22 demonstrates some evidence that the policy has not been consistently enforced and fairly applied.

174. When asked about whether a trooper threatening to kill his wife 22 times would be a serious matter of unbecoming conduct, Colonel Clay responded that "I think it certainly would need to be investigated, looked into, and figured out." T107 In this instance, Respondent failed to take that kind of an analytical approach. When Colonel Clay further was asked whether that would be unbecoming conduct and a firing offense, he responded by saying: "I'm not sure."

T108 Colonel Clay was not willing to conclude that 22 death threats would constitute unbecoming conduct. T108 This is further evidence of the vagueness and uncertainty of application of the Patrol's unbecoming conduct rule. Reasonable personnel decisionmakers would likely be seriously troubled by a member of the Patrol making 22 death threats under any circumstances.

#### **MITIGATION FACTORS**

175. There were substantial mitigating factors which militate in Sergeant Bulloch's favor. Mitigating factors in Sergeant Bulloch's favor include:

- his long and distinguished conduct and performance record as a sworn law enforcement officer;

- his exemplary law enforcement service going beyond his ordinary expected duty;

- his extraordinary dedication to law enforcement service and his employer;

- his substantial contributions to the law enforcement profession and the criminal justice system from his extensive teaching;

- his outstanding overall reputation;

- his truthfulness and candor about what happened;

- his remorsefulness and regret over his behavior on December 14, 2004;

- his dedication and commitment to remain compliant with medical advice;

- his overall professional conduct in addressing his behavior;

- his complete recovery from his aberrational behavior;

- his successful resumption of his law enforcement career with the Franklinton Police Department despite his termination by the Patrol;

- his successful service of over four years of additional law enforcement service with Franklinton both in patrol and in supervision;

- his earning of a promotion to sergeant with the Franklinton Police Department;

- the fact that Sergeant Bulloch has not experienced any other adverse medical incident since December 14, 2004;

- the fact that there has been no other adverse incident involving Sergeant Bulloch;

his community services including but not limited to his service as President of the N.C. Passenger Safety Association and other public safety education;

his commendations reflecting broad recognition of him for going "beyond the call of duty";

his many police commendations and honors including, but not limited to, his induction into the *American Police Hall of Fame*;

his distinguished military service; and

his successful commitment to recover from the isolated incident, medically and professionally.

176. Sergeant Wade Bulloch experienced an unintentional sequence of events on the evening of December 14, 2009. Sergeant Bulloch did not intend to cause any harm to anyone, and there was no significant harm from his behavior. Sergeant Bulloch's behavior was not malicious or premised upon any improper intent.

177. Sergeant Bulloch's evidence, including his exhibits and testimony presented by several witnesses, is substantial, credible and believable.

### CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. Respondent has the burden of proving just cause for termination of Petitioner's employment under N.C.G.S. 126-35(d). Sergeant Bulloch meets the threshold requirements for protection under the State Personnel Act as a career State employee.

2. The sole charge against Sergeant Bulloch was an alleged violation of the employer's unbecoming conduct policy. Respondent had the burden to prove just cause for termination by proving: 1) a violation of a clearly defined lawful and reasonable employment policy; and 2) that such violation of policy was sufficiently severe to rise to the level required to establish just cause for termination after application of all just cause factors and the consideration of all mitigating and aggravating factors; and 3) that there was a rational nexus between the off-duty conduct and a potential adverse impact on the employee's future ability to perform for the agency.

3. The ultimate issue presented is whether Respondent has proven that there was just cause for termination of employment based upon Petitioner's off duty conduct. In N.C.D.E.N.R. v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (N.C. 2004), the Supreme Court enunciated the applicable tests for determining just cause in state personnel cases. Since Carroll, lower courts, the State Personnel Commission, and the Office of Administrative Hearings have respected and applied the rules and reasoning of Carroll to just cause cases. Some cases have interpreted Carroll and have provided helpful guidance in deciding this case and other just cause cases.

4. Carroll arose from Officer Carroll's on duty conduct, which was in violation of agency policy and law, in response to a call that his mother's medical condition had deteriorated. In Carroll, the fact that his mother's medical condition in part caused Petitioner's conduct was significant. Here, the medical condition in issue is much more direct and significant in that it was Petitioner's medical condition and first dosage of a powerful psychoactive medicine that were causal factors in the off-duty behavior in issue.

5. In Carroll, the Supreme Court explained that the fundamental question is whether: "the disciplinary action taken was 'just'. Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." 358 N.C. at 669. In Carroll, the Supreme Court explained that "'just cause,' like justice itself, its not susceptible of precise definition." The Court explained that just cause is a "flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." 358 N.C. at 669. The Supreme Court concluded that "not every violation of law gives rise to 'just cause' for employee discipline." 358 N.C. at 669.

6. In light of the testimony of former Colonel Clay, Dr. Griggs, and the other evidence of record, Respondent failed to properly consider and correctly apply the required factors mandated by the Supreme Court in Carroll and its progeny. Respondent failed to engage in a proper and sufficient weighing and balancing of the necessary factors for determining whether it had just cause for termination of Petitioner's employment.

7. Respondent's consideration of Sergeant Bulloch's medical condition, medication, and behavior was mechanical, incomplete, and inadequate and failed correctly to apply the concepts of medical analysis and explanation, equity, fairness, and justice required by Carroll.

8. Respondent's failure to follow through on Colonel Clay's directive that Sergeant Bulloch undergo a specialized medical examination was arbitrary, inequitable, and unjust. The medical examination was to be completed as per Highway Patrol policy. The failure to have the specialized medical examination completed demonstrates a fundamental and material failure in the investigation and evaluation of Sergeant Bulloch's behavior. The requested medical examination likely would have provided especially relevant evidence that was necessary for proper personnel decisionmaking consideration under Carroll.

9. Respondent's failure to complete the medical fitness for duty examination that Colonel Clay, Dr. Griggs, and Dr. Arigues thought was necessary and Respondent's failure to make reasonable efforts to understand the impact of Sergeant Bulloch's medical condition and medicine on his behavior was arbitrary, unjust, and inconsistent with proper personnel decisionmaking.

10. Applying Carroll and other just cause law and principles, there was no just cause for the termination of Petitioner in light of the totality of all of the evidence. For additional authority, see Kenneth T. Hill v. N.C. Department of Crime Control and Highway Patrol, 04 OSP 1538 (Chess, ALJ), adopted by the State Personnel Commission. There, Judge Chess and the State Personnel Commission explained in an alleged trooper misconduct case with medical

issues how just cause is not a simple mechanical concept; rather it involves an analysis of a number of important factors including medical factors. Here, the Patrol failed to appropriately consider, weigh, and apply those important just cause factors.

11. In Hill, Trooper Hill allegedly overreacted with too much force on a suspect, with belligerent language and a death threat. Judge Chess and the State Personnel Commission cited the testimony of Dr. George Franks, who explained Trooper Hill's behavior and conduct as arising from having been struck in the head with probable resulting medical issues. Hill and other authorities demonstrate that understanding of relevant medical evidence and medical causes for behavior is vitally important in just cause cases.

12. In Hill, the medical condition of Trooper Hill provided an explanation and understanding of Trooper Hill's behavior and conduct that militated against just cause for termination. That reasoning is applicable here.

13. In Hill, Judge Chess and the State Personnel Commission provided an excellent explanation of just cause law and a number of analytical factors, some of which were tailored to the particulars of the Hill case:

In Carroll v. N.C. Department of Environment and Natural Resources, 358 N.C. 649, 599 S.E. 888 (2004), our Supreme Court enunciated the current applicable just cause test under the North Carolina State Personnel Act. Applying the Carroll test to the facts and circumstances of this case, the Court concludes that Respondent did not have just cause under N.C.G.S. 126-35 to terminate Petitioner's employment. The Court in Carroll found that just cause is a "flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." 358 N.C. at 669. The Supreme Court concluded that "not every violation of law gives rise to 'just cause' for employee discipline." The Court's reasoning in Carroll demonstrates that just cause determinations are not simple or technical. Rather, the *totality of the circumstances* must be assessed using equity and fairness. The Carroll factors have been historically analyzed in determining whether there is just cause to discipline police officers. These factors necessitate a broad judicial review of a number of subfactors, which include: a) The officer's training and education on the relevant points of inquiry; b) The officer's history on the relevant points of inquiry including the officer's quantity of experience; c) Whether the conduct is isolated or a part of a pattern or practice of the officer; d) The motivation of the police agency in the suspension including whether there was any improper considerations; e) Did the officer intentionally violate clear agency policy and whether the violation was substantial; f) Was the officer acting under any duress or injury that may have contributed to his or her conduct; g) Was the officer motivated by any improper personal self gain; h) Was the officer acting consistent with Departmental practice or custom; i) What was the officer's conduct and performance history; and j) Any other significant mitigating factors.

14. In adjudicating personnel cases involving alleged unbecoming conduct, proper adjudication should follow the Carroll and Hill standards and consider each case individually in light of the totality of the circumstances, including all extenuating, aggravating, and mitigating circumstances.

15. Under Carroll and its progeny, a North Carolina State employer may not determine that a violation of a particular policy is necessarily appropriate for discipline without considering the totality of the true facts and circumstances, without applying the just determination factors from Carroll and its progeny, and without considering any aggravating and mitigating circumstances.

16. Respondent failed to follow through and comply with an important part of its own policy, to have an employee appropriately medically examined following a critical incident. Respondent's failure to follow the medical recommendation of Dr. Griggs for the requested specialized medical fitness for duty examination of Sergeant Bulloch is troubling and arbitrary. That especially is true because of Respondent's initial treatment of the behavior as medical, Respondent's collection of the medical records of Sergeant Bulloch, and the pursuit of medical evidence in the internal affairs investigative process.

17. Respondent's failure to have the requested fitness for duty medical examination conducted demonstrates both arbitrariness and irrationality in the consideration of Sergeant Bulloch's rights under agency policy and the State Personnel Act. Respondent's course of actions and omissions regarding medical analysis violates the spirit of the State Personnel Commission's reasoning in Hill and Carroll.

18. As Carroll and many other cases have demonstrated, even if there were a violation of the employer's policy and/or law, there are many more considerations in determining whether there is just cause for discipline. The reasoning of the State Personnel Commission and the Supreme Court in Carroll make clear that a state employee's violation of a clear agency policy is only the starting point for just cause analysis. Much more analysis is required under Carroll's requirements of the required considerations of equity and justice.

19. Title 25 NCAC 1B .0413 provides that "all relevant factors and considerations" must be weighed "including factors of mitigation..." See Dietrich; see also Etheridge v. N.C. Dept. of Administration, 2006 WL 3290507 (August 3, 2006; Lassiter, ALJ). The evidence here demonstrates that Respondent failed to consider and credit substantial, appropriate mitigation evidence in Sergeant Bulloch's favor.

20. *Off-duty* conduct cases are contextually and legally different than *on-duty* conduct cases, with resulting different standards of proof. In Eury v. N.C. Employment Security Commission, 115 N.C. App. 590, 446 S.E.2d 383 (1994), the Court of Appeals addressed a state employee termination case premised upon actual off-duty criminal conduct. There, the conduct was far more egregious and gave rise to an actual felony criminal charge and a plea to a crime. Here, there was no criminal charge against Sergeant Bulloch. However, both cases are predicated upon off-duty conduct that the employers believed were sufficient for termination.



21. In Eury, the Court of Appeals held that the agency must demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of conduct committed and the potential adverse impact on the employee's future ability to perform for the agency. 115 N.C. App. at 611. The Court of Appeals explained:

It is well established that administrative agencies may not engage in arbitrary and capricious conduct. [Citations omitted]. Accordingly, we hold that in cases in which an employee has been dismissed based upon an act of off-duty criminal conduct, the agency must demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency. [Citations omitted].

22. Based upon Eury, and consistent with the analysis of the State Personnel Commission and Judge Chess in Hill and other cases, the undersigned finds that Petitioner's underlying medical condition, including the pharmacological effect of his first dosage of the psychoactive drug Litium, constitutes an especially important factor for consideration in the required just cause analysis of this case.

23. Because this case undisputedly is an off-duty conduct case, the burden on Respondent to show just cause involves a different standard with additional burdens on Respondent. Eury has been reaffirmed and followed in a recent state personnel case, Kelly v. N.C.D.E.N.R., 192 N.C. App. 129, 684 S.E.2d 625 (2008).

24. Virtually all of these Eury and Kelly factors mitigate in Sergeant Bulloch's favor. Each factor is identified below.

A. The degree to which, if any, the conduct adversely may have affected clients or colleagues.

There was no evidence that Sergeant Bulloch's isolated conduct in issue adversely affected Respondent. There was no adverse or other publicity which in any way imputed any misconduct to Respondent, Sergeant Bulloch, or to any of Respondent's personnel. No client or colleague adversely was affected.

B. The relationship between the type of work performed by the employee for the agency and the type of criminal conduct committed.

There was no criminal conduct committed by Sergeant Bulloch.

C. The likelihood of recurrence of the questioned conduct and the degree to which the conduct may affect work performance, work quality, and the agency's good will and interests.

There was no evidence offered by the Patrol suggesting any likelihood of any recurrence. In fact, the undisputed evidence was to the contrary. Sergeant Bulloch resumed his distinguished law enforcement career with the Town of Franklinton and has excelled in service there for over four years without any adverse incident, medical or otherwise.

D. The proximity or remoteness in time of the conduct to the commencement of the disciplinary proceedings.

This factor is not particularly relevant here. The underlying conduct occurred in 2004. The disciplinary proceedings commenced in a timely manner, however, those proceedings did not await a proper medical analysis of Sergeant Bulloch's acknowledged, underlying medical condition and its impact upon his behavior.

E. The extenuating or aggravating circumstances, if any, surrounding the conduct.

There are numerous extenuating circumstances identified herein. There are no aggravating circumstances.

F. The blameworthiness or praiseworthiness of the motives resulting in the conduct.

Sergeant Bulloch has demonstrated a most professional attitude about the incident in question from the aftermath of the incident until the present. Sergeant Bulloch has fully cooperated with everyone including his employer, Respondent's medical director, all of his physicians, and other medical providers. Sergeant Bulloch has been remorseful, apologetic, and has worked diligently to remain a professional example of the best of law enforcement service.

G. The presence or absence of any relevant factors in mitigation.

25. There are no aggravating factors, but there are several mitigating factors in Sergeant Bulloch's favor.

26. In addition to the analysis and factors from Eury, traditional just cause factors also must be considered and applied. Of the seven just cause factors from Enterprise Wire,<sup>1</sup> as

1. The State Personnel Commission has recognized the application of the Enterprise Wire seven factor just cause test. See Burgess v. N.C. Highway Patrol, 07 OSP 0052, adopted by N.C. Personnel Commission. Further, in Foard v. N.C. Highway Patrol, 07 OSP 0135, Judge Webster's decision for the Petitioner was recently adopted by Superior Court Judge Henry Hight. Judge Webster and Judge Hight recognized the seven factor just cause test. 09 CVS 003519. The following seven questions should be posed in determining whether there is just and proper cause for termination:



recognized by the State Personnel Commission and other authorities, virtually all of those factors are in Sergeant Bulloch's favor.

27. Traditional just cause analysis requires consideration of whether the employer has conducted an appropriate and complete investigation of the totality of the relevant facts and circumstances. Applying the seven factor just cause test, the fourth factor requires consideration of the completeness and fairness of the underlying personnel investigation. In Foard v. N.C. Highway Patrol, 07 OSP 0135, Judge Webster addressed a Patrol discipline case involving issues of an inadequate investigation. Judge Webster found that the underlying investigation of the alleged conduct was not complete. Judge Webster's decision was adopted by the Wake County Superior Court. See Ralph Mitchell Foard v. N.C. Department of Crime Control, 09 CVS 0035 19 (November 10, 2009, order of the Honorable Henry W. Hight, Jr.).

28. An inadequate, incomplete, or improper underlying personnel investigation may result in an arbitrary and capricious personnel decision. Scores of cases have condemned arbitrary and capricious public personnel decisions.<sup>2</sup> The underlying personnel investigation in

- 1) Did the employer provide the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
- 2) Was the employer's rule or managerial order reasonably related to a) the orderly, efficient and safe operation of the employer's business and b) the performance that the employer might properly expect of the employee?
- 3) Did the employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of employer management?
- 4) Was the employer's investigation conducted fairly and objectively?
- 5) In the investigation, did the employer obtain substantial evidence or proof that the employee was guilty as charged?
- 6) Whether the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
- 7) Was the degree of discipline administered by the employer in a particular case reasonably related to a) the seriousness of the employee's proven offense and b) the record of the employee in his service with the employer?

Arbitrator Daugherty's decision explained that an answer of "no" to any one or more of the seven questions normally signifies that just and proper cause did not exist. See Abrams and Noland, Toward a Theory of "Just Cause" in Employee Discipline Cases, 85 Duke Law Journal 594 (1985).

2. E.g. Weiman v. Updegraff, 344 U.S. 183, 192 (1952); Toomer v. Garrett, 155 N.C. App. 462 (2002); Johnson v. Branch, 364 F.2d 177 (4<sup>th</sup> Cir. En banc 1967); Wall v. Stanly Board of Education, 259 F. Supp. 238, 249 (M.D.N.C. 1966), rev'd on other grounds, 378 F.2d 275 (4<sup>th</sup> Cir. 1967). Cf. Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886) ("Our institutions of government . . . do not mean to leave room for the play and action of purely personal and arbitrary power.")

Petitioner's case was incomplete and resulted in a termination decision that was arbitrary and capricious.

29. Respondent has not carried its burden of proof of a *rational nexus* under Eury and other authorities. Respondent has not proven that there was a rational nexus between Sergeant Bulloch's off-duty behavior and any potential adverse impact on his future ability to perform for the Patrol.

30. The lack of progressive discipline in this case also works in Sergeant Bulloch's favor. See Granger v. UNC, 2006 WL 42583390 at page 10 (December 22, 2006)(isolated occurrence for 19 year veteran did not constitute just cause for discipline). Here, the evidence demonstrated that Sergeant Bulloch earned an exemplary record of conduct and performance in his sixteen year career, and the single isolated incident of December 14, 2004, was an aberration and completely inconsistent with Sergeant Bulloch's excellent work and conduct history.

31. Selective enforcement of agency policy should be considered under both State Personnel policy and as one of seven recognized factors in determining whether there is just cause for discipline.<sup>3</sup> State personnel policy also requires the consideration of selective enforcement evidence. See N.C. State Personnel Manual, Section 7, page 11: The employer "should examine a number of factors....[including]...The disciplinary actions received by other employees within the agency/work unit for comparable performance or behaviors."

32. Petitioner's evidence shows that there has been some selective enforcement and disparate treatment in Patrol personnel decisionmaking. Some other members of the Patrol have engaged in conduct which is much more egregious than Sergeant Bulloch and were not terminated. See, e.g., Exhibit 22 and Davis v. N.C. Depart. of Crime Control, 151 N.C. App. 513, 565 S.E.2d 716 (2002); Poarch v. N.C. Highway Patrol, 03 OSP 2004 (referencing numerous examples of selective enforcement and disparate treatment), adopted in part and rejected in part, N.C. State Personnel Commission. See Petitioner's Exhibit 22, which included 24 examples of discipline by the Patrol. The sixth just cause factor of disparate treatment/selective enforcement militates in Sergeant Bulloch's favor.

33. The State Personnel Commission has ruled that Respondent's unbecoming conduct policy is "vague and ambiguous." See Dietrich v. N.C. Highway Patrol, 2001 WL 34055881 (Decision dated August 13, 2001, adopted by N.C. State Personnel Commission). The recognized vagueness of the same policy in issue in this case is another factor that militates in Sergeant Bulloch's favor.

3. See Burgess v. N.C. Highway Patrol, 07 OSP 0052, adopted by N.C. State Personnel Commission; Poarch v. N.C. Highway Patrol, 03 OSP 2004, aff'd in part and rejected in part, N.C. State Personnel Commission; Enterprise Wire Co., 46 LA 359 (1966); Koven and Smith, Just Cause: The Seven Tests (2nd ed. 1992, Farwell Rev.) See also Toomer v. Garrett, 155 N.C. App. 462, 574 S.E.2d 76 (2002), disc. rev. denied, 357 N.C. 66, 579 S.E.2d 576 (2003)(Law enforcement officers held to be free from disparate treatment and selective enforcement by their employers).

34. The undersigned has weighed and balanced all of the interests of Sergeant Bulloch and the North Carolina Highway Patrol, including all factors in determining just cause and factors in mitigation and aggravation. The undersigned has weighed and balanced all of the factors set forth in Carroll, Eury, Dietrich, Hill, Enterprise Wire, and other cases cited herein. The undersigned concludes that the totality of all the pertinent factors militate in Sergeant Bulloch's favor and that there was no adequate just cause for termination. Respondent's termination of Sergeant Bulloch was neither just nor equitable and therefore was in violation of the letter and spirit of the State Personnel Act, Carroll, and its progeny.

35. In light of the totality of the evidence, there is no sufficient justifiable basis, in law, fact, or reason, for the termination of Sergeant Bulloch under these unique and particular facts and circumstances.

36. The North Carolina State Personnel Commission has found and recognized that there is an alternative ground for not imposing formal discipline where an agency fails to comply with its own policy as in this case. See Dietrich v. N.C. Highway Patrol, 2001 WL 34055881 (Decision dated August 13, 2001, adopted by N.C. State Personnel Commission). In addition to the State Personnel Commission's ruling in Dietrich, the Commission's decision is supported by numerous other cases recognizing that rule. Governmental employers long have been required to comply with their own regulations by Supreme Court and lower court authority.<sup>4</sup> It would be fundamentally inconsistent and inappropriate to condone an agency not complying with its own rules but at the same time permit termination of an employee allegedly for violating one of the agency's rules.

37. In this case, Respondent has failed to comply with its own policy, the North Carolina State Highway Patrol directive requiring the medical referral. This non-compliance with Patrol policy is especially significant in this case in light of the Patrol's recognition and acknowledgement of the need for the directed specialized medical fitness for duty examination.

38. Dr. Artigues' testimony and the other evidence of record demonstrates that the off-duty conduct in issue followed and was proximately caused by Petitioner's Bipolar Disorder medical condition and his first ingestion of a prescribed medication, Lithium. This first ingestion of this new medicine, which combined with Petitioner's medical condition and some alcohol,

4. See, e.g., Vitarelli v. Seaton, 359 U.S. 535, 546 (1959) (Frankfurter, J. concurring, joined by Clarke, Whittaker & Stewart); Securities & Exchange Comm. v. Cherery, 318 U.S. 80, 87 - 88 (1942); Service v. Dulles, 354 U.S. 363 (1957); Beacom v. EEOC, 500 F. Supp. 428 (D. Ariz. 1980) (public employee must be accorded benefit of agency's regulations). In United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969), the Fourth Circuit included a thoughtful discussion of Shaughnessy and other United States Supreme Court cases which stand for this central proposition. The Court observed that in Shaughnessy, that the Supreme Court vacated a governmental decision because "the procedure leading to the order did not conform to the relevant regulations. The failure of the board and of the Department of Justice to follow their own established procedures was held a violation of due process." 420 F.2d at 812. See Yellin v. U.S., 374 U.S. 109 (1963). "The Accardi Doctrine was subsequently applied by the Supreme Court in Service v. Dulles, 354 U.S. 363 (1959), and Vitarrelli v. Seaton, 359 U.S. 535 (1959), to vacate the discharges of government employees." 420 F. 2d at 812.

proximately caused Petitioner to contemplate suicide, discharge a weapon into the floor at his home, and some related behaviors.

39. Sergeant Bulloch did not do anything on December 14, 2004, to intentionally violate any Patrol policy. T567 Sergeant Bulloch did not commit any willful unbecoming conduct on December 14, 2004. T571

40. The totality of the evidence demonstrates that there has been no damage to Sergeant Bulloch's reputation or his ability to continue to successfully serve with and perform for the Patrol in the future. Sergeant Bulloch's very successful four year police career with the Franklinton Police Department, without any medically related or other adverse incident, substantially supports and corroborates the other compelling evidence that Sergeant Bulloch's conduct of December 14, 2004, has not and will not impact his ability to return to the Patrol and continue to successfully serve the Patrol.

41. Colonel Clay initially followed the medical advice of his Patrol medical director, Dr. Griggs, in ordering a specialized medical analysis, but ultimately deprived himself of that analysis by failing to follow through. Respondent's failure to follow through on Colonel Clay's decision to have Sergeant Bulloch examined by a specialized doctor was arbitrary and capricious, especially in light of the request by Dr. Griggs that it was necessary for Sergeant Bulloch to be medically evaluated by a specialized medical group, *Law Enforcement Services, Inc. (LESI)*.

42. The totality of the evidence demonstrates that there was a substantial medical basis for Sergeant Bulloch's behavior on December 14, 2004. T459, 462 Sergeant Bulloch's behavior on December 14, 2004, was a direct result of his underlying medical illness and the pharmacological effect of his first dosage of the psychoactive drug, Lithium. T463

43. The whole record demonstrates that the decision to terminate Sergeant Bulloch, under the circumstances, was arbitrary and capricious because, among other reasons, Respondent failed properly to consider substantial and highly relevant facts and circumstances regarding Sergeant Bulloch's medical history, his underlying medical and pharmacological conditions on December 14, 2004, the effect those conditions exerted on his behavior on that night, and his ability to continue to serve.

44. Respondent failed to prove that there was a rational nexus between Sergeant Bulloch's off-duty conduct on December 14, 2004 and any significant appreciable adverse affect on Petitioner or his ability to perform for Respondent in the future. There was no significant evidence of any injury or damage to the Highway Patrol by Sergeant Bulloch's off-duty conduct on December 14, 2004. Respondent also failed to prove that there was a substantial likelihood of an adverse impact on Respondent or Petitioner in the future.

45. Sergeant Wade B. Bulloch has earned decades of respect, honor, and an extraordinary record of professionalism in performance and conduct in military and civilian law enforcement service. The off-duty unintentional behavior of Petitioner on December 14, 2004 is insufficient to rise to the required level for just cause for termination.

### **DECISION**

Based upon the foregoing findings of fact and conclusions of law, I find that the evidence produced in this contested case demonstrates that Respondent's decision to terminate Petitioner's employment for unacceptable personal conduct was based upon an incomplete investigation and decision-making process; was violative of Respondent's own rules and order of the Commander; was arbitrary and capricious because it failed to consider a known, underlying medical condition; is not supported by substantial evidence constituting just cause; and is REVERSED.

Petitioner is entitled to reinstatement as a Line Sergeant retroactive to his date of termination on May 06, 2005; back pay compensation from the date of discharge through the date of reinstatement; reimbursement of all lost back benefits, including all leave and Retirement System contributions; counsel fees and costs, including expert witness fees; and all other benefits which Petitioner would have been entitled to but for his termination from Respondent's employment.

### **ORDER**

The North Carolina State Personnel Commission will make the final decision in this contested personnel case. N.C.G.S. §150B-36 enumerates the standard of review and procedures that the agency must follow in making its final decision, and in adopting or not adopting the findings, conclusions, or decision of the Administrative Law Judge.

In accordance with N.C.G.S. §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.

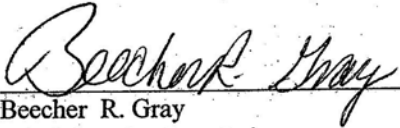
It hereby is ordered that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statutes Section 150B-36(b).

### **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' attorney of record.

This the 15 day of January, 2010.

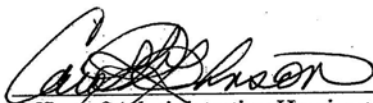
  
Beecher R. Gray  
Administrative Law Judge

A copy of the foregoing was mailed to:

J. Michael McGuinness  
The McGuinness Law Firm  
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ATTORNEY FOR PETITIONER

Tamara S. Zmuda  
Hal S. Askins  
NC Dept of Justice  
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ATTORNEYS FOR RESPONDENT

This 19<sup>th</sup> day of January, 2010.



Office of Administrative Hearings  
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STATE OF NORTH CAROLINA

COUNTY OF EDGEcombe

C. VANN PIERCE, EXECUTIVE OFFICER, HERITAGE CARE OF ROCKY MOUNT, LICENSEE, LICENSE NO. HAL-033-005,

Petitioner,

vs.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, ADULT CARE LICENSURE SECTION,

Respondent.

Filed

2009 NOV -3 PM 4: 00

IN THE OFFICE OF  
ADMINISTRATIVE HEARING  
08-DHR-2732

**DECISION**

**THIS MATTER** came on for hearing on August 26, 2009, before Administrative Law Judge Melissa Owens Lassiter in Greenville, North Carolina. On September 29, 2009, the undersigned issued an Order holding that Respondent had acted erroneously and otherwise substantially prejudiced Petitioner's rights when it ordered Petitioner to pay an unabated Type B administrative penalty for \$1760.00. Pursuant to the undersigned's Order, on October 15, 2009, Petitioner filed a proposed Decision with the Office of Administrative Hearings.

**APPEARANCES**

For Petitioner: James C. Wrenn  
Hopper, Hicks & Wrenn, PLLC  
Attorneys at Law  
111 Gilliam St., P.O. Box 247  
Oxford, NC 27565

For Respondent: Joseph E. Elder  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602



**ISSUES**

1. Whether Respondent acted erroneously and otherwise substantially prejudiced Petitioner's rights when Respondent ordered Petitioner to pay an unabated Type B administrative penalty for \$1,760.00 for failing to prohibit smoking inside Petitioner's facility, and for failing to correct the alleged Type B Violation by March 21, 2008?

2. Whether Petitioner complied with all provisions of N.C. Gen. Stat. §§ 131D-4.4 and 131D-21 and the licensing rules for Long Term Care Facilities found at 10A N.C. Admin. Code 13F as they apply to smoking inside the facility?

**APPLICABLE STATUTES AND RULES**

N.C. Gen. Stat. § 131D-4.4  
N.C. Gen. Stat. § 131D-21  
N.C. Gen. Stat. § 131D-34  
N.C. Gen. Stat. § 150B-23  
N.C. Gen. Stat. § 150B-36  
10A N.C. Admin. Code 13F.0704  
10A N.C. Admin. Code 13F.1211

**PETITIONER'S WITNESSES**

1. Bobbie Williams, Administrator of Heritage Care of Rocky Mount

**RESPONDENT'S WITNESSES**

1. Karen Miles, Licensure Consultant, Adult Care Licensure Section, N.C. Dept. of Health and Human Services, Division of Health Service Regulation
2. Gail Proctor, Licensure Consultant, Adult Care Licensure Section, N.C. Dept. of Health and Human Services, Division of Health Service Regulation
3. Cynthia McGuffy, Licensure Consultant, Adult Care Licensure Section, N.C. Dept. of Health and Human Services, Division of Health Service Regulation
4. Marie Rodgers, Branch Manager, Adult Care Licensure Section, N.C. Dept. of Health and Human Services, Division of Health Service Regulation
5. Barbara Ryan, Chief, Adult Care Licensure Section, N.C. Dept. of Health and Human Services, Division of Health Service Regulation

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner: 6, 7, and 8

For Respondent: 1 - 8

**FINDINGS OF FACT**

Based upon careful consideration of the sworn testimony of the witnesses presented at the hearing, the exhibits introduced into evidence, and the entire record in this proceeding, the Undersigned finds as follows:

**Background**

7. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this case.

8. The parties were properly served with a Notice of Hearing on July 8, 2009.

9. Respondent is the agency responsible for licensure and regulatory oversight of adult care facilities in the State of North Carolina pursuant to Chapter 131D of the North Carolina General Statutes.

10. Respondent is charged with conducting annual and complaint-based facility surveys during which a facility's operations are reviewed for compliance with the laws and administrative rules governing licensed adult care facilities.

11. Petitioner, C. Vann Pierce, is the Executive Officer of Heritage Care of Rocky Mount.

12. Petitioner's facility is a 126 bed adult care facility licensed by Respondent under adult care license number HAL-033-005, and is located at 1650 Cokey Rd., Rocky Mount, Edgecombe County, North Carolina.

13. On October 15, 2008, Respondent assessed a \$1760.00 administrative penalty against Petitioner for allegedly violating N.C. Gen. Stat. § 131-21 (Adult Care Home Resident's Bill of Rights), and 10A NCAC 13F (Adult Care Home licensing rule) for failing to prohibit smoking inside Petitioner's facility. Respondent attached the following to its penalty assessment notice: Respondent's September 16, 2008 Penalty Recommendation Sheet, the May 28, 2008 Administrative Penalty Proposal, and the PRC's October 9, 2008 recommendation of this assessment. On the Penalty Recommendation Sheet, Respondent stated:

During the annual survey completed on February 6-8, 2008, the Division of Health Service Regulation determined the facility failed to prohibit smoking inside the facility, which resulted in a Type B violation.

During a follow-up survey on April 14-15, 2008 conducted by the Division of Health Service Regulation, it was determined that the facility failed to correct the Type B violation within the time specified for correction, March 21, 2008. Thereby, the type B violation was unabated.

During the second follow-up survey conducted by the Division of Health Service Regulation on June 12, 2008, it was determined that the Type B Violation had been abated effective May 8, 2008.

Failing to prohibit smoking inside an adult care home had the potential to affect the health, safety, and welfare through the potential for facility fires, which places residents at substantial risk that serious physical harm and/or death may occur.

(See Penalty Recommendation Sheet, no. 6)

14. On November 17, 2008, Petitioner filed a contested case petition with the Office of Administrative Hearings appealing Respondent's \$1760.00 administrative penalty assessment as follows:

Respondent assessed a \$1760.00 unabated Type B penalty against Petitioner for alleged violations of G.S. 131D-21 and 10A NCAC 13F (which are hereby denied). . . .

Petitioner respectfully submits that it was in compliance with N.C.G.S. § 131D-4.4, 10 NCAC 13F .0704, 10 NCAC 13F .1211 and all other rules concerning smoking by residents of long-term care facilities. Petitioner vigorously enforced its smoking policy at all times relevant and continues to enforce it. Neither Petitioner nor any other operator of a long-term care facility is able to prevent residents from violating a smoking policy. The relevant law and rules do not make a resident's violation of the facility's smoking policy a strict-liability regulatory offense for the Petitioner. Petitioner's responsibility is to comply with applicable law and rules and to enforce its smoking policy. It has complied with these requirements.

15. At hearing, the undersigned accepted and admitted into evidence a Joint Exhibit List and Stipulation. That document is incorporated by reference into this decision.

#### Adjudicated Facts

16. On February 4-6, 2008, Respondent conducted an annual survey of the facility. During such survey, Respondent reviewed Petitioner's Smoking Policy, which specifically prohibited smoking inside the facility. Under that policy, Petitioner first issues a warning to a resident who is smoking inside the facility. If the resident does not

abide by the rules, Petitioner's staff will supervise the resident's smoking by keeping the resident's smoking supplies. Upon a resident's request, staff will give smoking materials to a resident to smoke in the designated smoking area. As a last resort, Petitioner issues a Notice of Discharge from the facility to the resident if he continues to violate Petitioner's smoking policy.

17. The survey revealed that Petitioner posted "No Smoking" Signs in numerous locations throughout the facility. Petitioner issued its Smoking Policy to all residents of the facility upon admittance to the facility, and again whenever the Smoking Policy was revised.

18. Petitioner's "No Smoking" Sign in the 200 hallway of the facility read:

The back porch is the designated smoking area. Level 1 is residents where no supervision of smoking is required and they are allowed to keep their smoking materials in their possession. Level 2 residents need complete supervision and their smoking materials are kept in the front office.

(Pet Ex 1, Survey Report p 67 of 74) Petitioner also made residents aware of the location of the designated smoking area.

19. The February 2008 survey revealed that on occasion, multiple residents in the facility violated Petitioner's Smoking Policy by smoking inside the facility. The survey showed that Petitioner had problems with Resident # 107, and # 69 smoking in non-smoking area inside the facility. Resident # 107 smoked in his room about 6 months ago, and was no longer allowed to keep his own cigarettes. Resident # 69 also smoked, but kept her cigarettes. An interview with staff on 2/6/08 showed that the facility found Resident # 107 smoking inside the facility. The survey revealed that occasionally, cigarette butts have been found in resident rooms, and in the C and D Halls.

20. While conducting the February 4-6, 2008 survey, Respondent's employees observed used cigarette filters in the lounge trashcans, and cigarette butts in residents' rooms. On 2/04/08, Respondent's employees smelled fresh or stale odor of smoke in a resident's room on 2 occasions. Random observations of residents' rooms who smoked revealed no odors of cigarette smoke, and no observations of burned marks on furniture or bedding.

21. Progress notes in Resident # 107's records showed that staff observed Resident # 107 smoking in the hallway of the facility on December 14, 2007, and staff removed the cigarette from the resident's mouth. On December 27, 2007, Resident # 107 was smoking inside his room and in the hallway. His cigarettes were in the medication room.

22. The administrator indicated that she had spoken with Resident # 107's wife numerous times regarding the resident smoking in the facility. The administrator

planned to direct staff to: (1) give Resident # 107 only 1 cigarette at a time, and (2) observe Resident # 107 for cigarettes, when staff are observing wandering residents, every 15 minutes, and (3) document their observations. The administrator would also tell other residents not to give Resident # 107 any cigarettes.

23. Progress notes in Resident # 69's records revealed entries from December 2007 that Resident # 69 was smoking in her room on December 4, 2007, the resident's room had a smoke odor on December 5, 2007, and the resident had been smoking in her room on December 23, 2007.

24. Respondent did not detect a smoke odor, ashes, cigarette butts, or burn marks on furniture and bedding during its 2/06/08 observation of Resident # 69's room. The administrator indicated on February 6, 2008 that she was unaware staff had observed Resident # 69 smoking in her room, in the hallway, or inside the facility. During an interview on February 4, 2008, a medication aide advised Respondent indicated that Resident # 69 had not smoked in her room since December 2007.

25. A preponderance of the evidence showed that when Petitioner's employees caught a resident smoking, the employees explained the facility's Smoking Policy to the resident, and directed the resident to extinguish the lighted smoking product.

26. After the February 2008 survey, Respondent cited Petitioner with a Type B Violation for the facility's failure to prohibit smoking inside the facility, and ordered the Petitioner to correct the violation by March 21, 2008. Respondent based this violation on its finding that:

Observations, resident and staff interviews, and record reviews, the facility failed to to [sic] assure smoking was prohibited inside the facility by three of five sampled smoking residents (Resident # 28, #66, and # 101).

(Pet Exh 7, p 6-7 of 14)

27. By letter dated April 7, 2008, Respondent notified Petitioner that Respondent had received and approved Petitioner's plan to correct the rule violations or deficiencies Respondent had noted in its February 2008 Statement of Deficiencies. (Pet Exh 8)

28. On April 14-15, 2008, Respondent conducted a follow-up survey. During that follow-up survey, Respondent learned that multiple residents had violated Petitioner's Smoking Policy by smoking inside the facility since the last survey. On April 14, 2008, Respondent observed a "No Smoking" sign located on the wall between rooms 106 and 108. Next to the posted "No Smoking" sign was a sign listing the House Rules. The House Rules explained that the facility was a non-smoking facility, designated the smoking areas, and requested visitors and family refrain from providing smoking materials to residents. It also explained the purpose of the policy, levels of

supervision of resident smoking, and consequences of noncompliance with the rules. (Pet Exh 7, p 7-8 of 14)

29. During Respondent's April 14, 2008 interview with the administrator, the administrator revealed that three residents, Residents # 66, # 101 and #72, had continued to use smoking materials inside the building. The facility kept the smoking materials for these residents, and provided the smoking materials to residents upon their requests. The administrator reported to Respondent that these residents did not smoke inside the building now. That day, resident # 66 was seen holding a pack of menthol cigarettes and lighter in her hand as she stood by the 300 hall nursing station. That resident walked outside to the back porch and smoked. An April 3, 2008 progress note in Resident # 66's record showed that Resident # 66 "was smoking in room at 10:00. Resident was also smoking at 11:15 pm." On April 14, 2008, Medication Aide "A" opened Resident # 66's bedroom door to give medication, and caught the resident smoking in bed. Medication aide "A" asked the resident if she was smoking. The staff's system involves checking on Resident #66 every 30 minutes on all shifts. (Pet Exh 7)

30. During an April 15, 2008 interview with Respondent, the administrator advised that she had reviewed its Smoking policy and House Rules with all residents. All residents signed the new facility policy. The administrator met with Resident # 66 on 2/7/08 and 4/14/08 to discuss smoking in the facility. The administrator discussed Resident # 66's smoking issues with the resident's psychiatric nurse. She advised Respondent that she would give Resident # 66 the 30 day Notice of Discharge. (Pet Exh 7)

31. In Petitioner's April 29, 2008 progress note, Petitioner stated that Resident # 66 was discharged from the facility for noncompliance with the smoking policy. (Pet Exh 7)

32. Progress notes dated April 10, 2008 – April 15, 2008 revealed that Petitioner's staff observed Resident # 101 every 30 minutes during the night for smoking in the building, and documented any smoking occurrences. No smoking in the building was documented for Resident # 101. Respondent observed one used cigarette butt on the floor next to Resident # 101's bed while visiting the facility. (Pet Exh 7)

33. After completing the April 14-15, 2008 survey, Respondent concluded that Petitioner had failed to prohibit smoking inside the facility by March 21, 2008, the time specified by the Respondent for correction. In the Statement of Deficiencies, Respondent did not find that Petitioner's staff failed to enforce Petitioner's "No Smoking" policy. (Pet Exhs 6 & 7)

34. On June 12, 2008, Respondent conducted a second follow-up survey at Petitioner's facility, and determined that the Type B violation [noted above] "had been abated effective May 8, 2008." (Resp Exh 7)

35. On October 15, 2008, Respondent issued its \$1,760.00 administrative penalty assessment to Petitioner for the unabated Type B Violation, citing N.C. Gen. Stat. §§ 131D-4.4 and 131D-21(2) as grounds for such penalty. Respondent cited Petitioner for failing "to assure smoking was prohibited inside the facility." (Pet Exh 7) However, N.C. Gen. Stat. § 131D-4.4 does not require that Petitioner as a long-term care facility "assure" or "guarantee" that no smoking will occur inside facility. (See Bobbie Williams' testimony)

36. Respondent concluded that Petitioner allowed residents to continue smoking in the facility, and that either Petitioner's system failed or Petitioner did not have a definite system with specific consequences in place to stop residents from smoking in the facility. Respondent thought it was possible to create a policy eliminating smoking in the facility, but Petitioner did not do so.

37. In determining the amount of the civil penalty assessment against Petitioner, Respondent considered the scope and severity of potential harm to the residents by Petitioner's failure to prohibit smoking inside the facility, Petitioner's reasonable diligence to comply with other statutes, Petitioner's effort to correct the violations, and the number and type of prior violations in the past 36 months.

38. The evidence at hearing showed that no fires had occurred at the facility.

39. The preponderance of evidence at hearing showed that N.C. Gen. Stat. § 131D 4.4, 10A N.C.A.C 13F.1211(a)(11), and 10A N.C. A.C. 13F.0704(a)(2) are the only substantive laws or rules which address the requirements of the person who owns, manages, operates, or otherwise controls a long-term care facility, must perform, to prohibit smoking in a long-term care facility under such person's control. Respondent expected Petitioner, as the adult care facility licensee, to implement additional measures to stop smoking inside its facility in order to comply with N.C. Gen. Stat. § 131D-4.4. Respondent required Petitioner submit a plan of correction to abate the alleged violations. Yet, Respondent did not specify what additional, reasonable measures the facility must implement to ensure that absolutely no smoking occurs inside the facility, or what appropriate resulting consequences the facility must implement if someone continues to smoke inside the facility in violation of its policies.

### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case under N.C. Gen. Stat. § 150B-23 et seq. There is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in this matter.



2. N.C. Gen. Stat. § 131D-2 et seq authorizes Respondent to regulate, monitor, and promulgate rules and regulations pertaining to adult care homes in the State of North Carolina. N.C. Gen. Stat. § 131D-34 authorizes Respondent to assess administrative penalties against adult care facilities for violations of relevant federal and State laws, rules, and regulations of adult care homes.

3. Petitioner Heritage Care of Rocky Mount is a 126-bed adult care facility licensed by Respondent under adult care license number HAL-033-005.

4. Before October 1, 2007, smoking was permitted inside long-term care facilities.

5. During the 2007 legislative session, Governor Easley signed into law, "AN ACT TO PROHIBIT SMOKING INSIDE LONG-TERM CARE FACILITIES." As codified, this Act amended N.C. Gen. Stat. § 131D-4.4, designating the previously existing provisions as the present (a), and adding subsections (b) through (d). Effective October 1, 2007, N.C. Gen. Stat. § 131D-4.4, titled "Adult care home minimum safety requirements; smoking prohibited inside long-term care facilities penalties," provides:

- (a) In addition to other requirements established by this Article or by rules adopted pursuant to this Article or other provisions of law, every adult care home shall provide to each resident the care, safety, and services necessary to enable the resident to attain and maintain the highest practicable level of physical, emotional, and social well-being in accordance with:
  - (1) The resident's individual assessment and plan of care; and
  - (2) Rules and standards relating to quality of care and safety adopted under this Chapter.
- (b) Smoking is prohibited inside long-term care facilities. As used in this section:
  - (1) "Long-term care facilities" include adult care homes, nursing homes, skilled nursing facilities, facilities licensed under Chapter 122C of the General Statutes, and other licensed facilities that provide long-term care services.
  - (2) "Smoking" means the use or possession of any lighted cigar, cigarette, pipe, or other lighted smoking product.
  - (3) "Inside" means a fully enclosed area.
- (c) The person who owns, manages, operates, or otherwise controls a long-term care facility where smoking is prohibited under this section shall:
  - (1) Conspicuously post signs clearly stating that smoking is prohibited inside the facility. The signs may include the



international "No Smoking" symbol, which consists of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it.

- (2) Direct any person who is smoking inside the facility to extinguish the lighted smoking product.
  - (3) Provide written notice to individuals upon admittance that smoking is prohibited inside the facility and obtain the signature of the individual or the individual's representative acknowledging receipt of the notice.
- (d) The Department may impose an administrative penalty not to exceed two hundred dollars (\$200.00) for each violation on any person who owns, manages, operates, or otherwise controls the long-term care facility and fails to comply with subsection (c) of this section. A violation of this section constitutes a civil offense only and is not a crime.
3. Petitioner has the burden of proving that Respondent acted erroneously in assessing a penalty for an unabated Type B Violation in this matter.
4. In this case, Petitioner complied with all provisions of N.C. Gen. Stat. § 131D-4.4. Specifically, Petitioner (1) conspicuously posted signs stating that smoking is prohibited inside the facility; (2) directed individuals caught smoking inside the facility to extinguish the lighted smoking product; and (3) informed residents upon admittance that smoking is prohibited inside the facility.
5. 10A N.C.A.C. 13F.1211(a)(11) requires the Petitioner to develop a written policy on smoking. Petitioner complied with this regulation by having such a smoking policy.
6. 10A N.C.A.C. 13F.0704 (a)(2) requires Petitioner provide residents with a copy of the facility's Smoking Policy upon admittance to the facility, and whenever the facility's smoking policy is changed. The preponderance of the evidence showed that Petitioner complied with this requirement. The preponderance of the evidence also showed that Petitioner implemented a supervision and monitoring program for the residents who continued to violate Petitioner's Smoking policy. Petitioner discharged Resident # 66 after the resident continually failed to comply with Petitioner's Smoking policy, and with N.C. Gen. Stat. § 131D-4.4.
7. Respondent cited Petitioner for failing "to assure smoking was prohibited inside the facility." (Pet Exh 7) However, N.C. Gen. Stat. § 131D-4.4 does not require that Petitioner as a long-term care facility "assure" or "guarantee" that no smoking will occur inside facility. (See Bobbie Williams' testimony)

8. N.C. Gen. Stat. § 131D-4.4, 10A N.C.A.C 13F.1211(a)(11), and 10A N.C. A.C. 13F.0704(a)(2) are the only substantive laws or rules which address what the person who owns, manages, operates, or otherwise controls a long-term care facility, must do to prohibit smoking in a long-term care facility under such person's control. The language of this statute and these rules do not specify what additional measures a long-term care facility must implement to address repeated infractions of this smoking prohibition. Neither does Respondent cite any other rule, policy, or otherwise provide interpretative guidance to Petitioner regarding the application of N.C. Gen. Stat. § 131D-4.4 in its facility. Instead, without further guidance or rule, Petitioner is responsible for providing Respondent with a plan of correction for Respondent's approval.

9. Given the language of N.C. Gen. Stat. § 131D-4.4, 10A N.C.A.C 13F.1211(a)(11), and 10A N.C. A.C. 13F.0704(a)(2), it was not reasonable to assess a civil penalty against Petitioner for a Type B violation under the facts in this case, when Petitioner met all the requirements of N.C. Gen. Stat. § 131D-4.4, 10A N.C.A.C 13F.1211(a)(11), and 10A N.C. A.C. 13F.0704(a)(2).

10. N.C. Gen. Stat. § 131D-21, "Declaration of residents' rights," provides as follows:

Each facility shall treat its residents. . . Every resident shall have the following rights:

(2) To receive care and services which are adequate, appropriate, and in compliance with relevant federal and State laws and rules and regulations.

11. Petitioner did not otherwise violate any of the regulations, standards and requirements set forth in N.C. Gen. Stat. § 131D-21, or applicable state or federal laws and regulations governing the licensure or certification of Petitioner's facility as they relate to smoking.

12. Petitioner met its burden of proof by showing that Respondent acted erroneously and otherwise substantially prejudiced Petitioner's rights when Respondent found that Petitioner violated N.C. Gen. Stat. §§ 131D-4.4 and 131D-21(2), 10A N.C.A.C 13F.1211(a)(11), and 10A N.C. A.C. 13F.0704(a)(2), and in assessing a civil penalty against Petitioner for failing to correct the Type B violation.

13. Given the above determination, the undersigned does not address the reasonableness of the amount of civil penalty assessed Petitioner.

### **DECISION**

**NOW, THEREFORE**, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned Administrative Law Judge determines that Respondent should

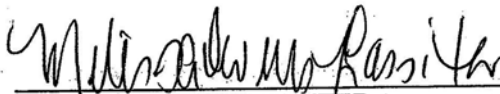
REVERSE its October 15, 2008 decision to impose a \$1,760 penalty for an unabated Type B Violation.

**NOTICE AND ORDER**

The North Carolina Department of Health and Human Services, Division of Facility Services 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 to 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 3rd day of November, 2009.

  
MELISSA OWENS LASSITER  
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

James C. Wrenn  
Hopper, Hicks & Wrenn, PLLC  
Attorneys at Law  
111 Gilliam St., P.O. Box 247  
Oxford, NC 27565  
Attorney for Petitioner

Joseph E. Elder  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602  
Attorney for Respondent

This the 3<sup>rd</sup> day of November, 2009.



Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
Phone: (919) 431 3000  
Fax: (919) 431-3100

Carol

STATE OF NORTH CAROLINA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
08 EDC 3035

COUNTY OF FORSYTH

7009 SEP 30 A 8:20

Frederick Moore  
Petitioner,

v.

State Board of Education  
Dept of Public Instruction  
Respondent.

**DECISION**

This matter came on to be heard for hearing before Administrative Law Judge J. Randall May on August 24, 2009, in High Point, North Carolina.

For the Petitioner: Frederick P. Moore  
562 Caladium Court  
Kernersville, NC 27284

For the Respondent: Laura E. Crumpler  
Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602

**FINDINGS OF FACT**

1. Petitioner applied for a license to teach in North Carolina.
2. Petitioner indicated on his application that he had been convicted of multiple crimes. He had convictions for various drug offenses, larceny, breaking and entering, trespass, possession of a stolen vehicle, shop lifting, resisting a police officer, financial card fraud, and financial card theft.
3. Petitioner had been imprisoned twice, once for two years, 1984-86, and second time for over eight years, from October 1998 until March 2007.
4. Petitioner was called in to be interviewed by the Superintendent's Ethics Committee in September 2008. The Superintendent's Ethics Committee is made up of professional educators appointed by Superintendent June Atkinson to review applications for teaching license where the applicant has indicated he or she has a prior conviction. Petitioner was

interviewed by members of the Committee and admitted that he had been convicted of the crimes in question and had spent several years in prison for his crimes.

5. The Ethics Committee recommended to Superintendent Atkinson that petitioner be denied a license due to the criminal history and the effect that the criminal history had upon Petitioner's ability to be a role model for students.
6. Petitioner admitted in his Prehearing Statement that he was convicted of the crimes in question.
7. Subsequent to the filing of the Petition giving rise to this action, Petitioner was permitted a second opportunity to present his case to the Ethics Committee and to explain or justify his prior criminal conduct and to try to persuade the Committee that a license should be awarded. Thus, on March 13, 2009, the Ethics Committee met again and interviewed Petitioner. Except for one of its members, Lillian McDavid, this second Ethics Committee consisted of different individuals from those who had previously interviewed Petitioner in September 2008. This second interview, before a panel of unbiased professionals, again resulted in a recommendation to Superintendent Atkinson to deny Petitioner a teaching license.
8. The State Board of Education may revoke or deny a teaching license for conviction of a crime, including a plea of guilty to a crime, if there is a reasonable and adverse relationship between the underlying crime and the continuing ability of the person to perform any of his/her professional functions in an effective manner. 16 N.C.A.C. 6C.0312(a)(3) The State Board of Education may also revoke or deny a teaching license for any illegal, unethical or lascivious conduct if there is an adverse relationship between that conduct and the continuing ability of the person to be an effective teacher. 16 N.C.A.C. 6C.0312(a)(8)
9. There is no dispute here that Petitioner has been convicted of numerous crimes. The only issue is whether those convictions bear an adverse relationship to the continuing ability of Petitioner to be an effective teacher.
10. There is no question here that Petitioner's criminal activities – as outlined above – render him unfit to receive a license to teach the children of this State. Teachers are required in this State, both by Rule and by case law, to maintain the highest level of ethical and moral standards, and to serve as a positive role model for children. 16 N.C.A.C. 6C.0602(b)(2); Faulkner v. New Bern-Craven Board of Education, 311 N.C. 42, 59, 316 S.E.2d 281, 291 (1984)
11. As our Supreme Court observed in Faulkner:
  - i. Our inquiry focuses on the intent of the legislature with specific application to teachers who are entrusted with the care of small children and adolescents. We do not hesitate to conclude that these men and women are intended by

parents, citizenry, and lawmakers alike to serve as good examples for their young charges. *Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil.* It is not inappropriate or unreasonable to hold our teachers to a *higher standard of personal conduct*, given the youthful ideals they are supposed to foster and elevate.

Id. (emphasis added)

12. In this case, Petitioner has applied to be a teacher and has admitted his convictions for egregious criminal activities involving dishonesty, drug "use", and other conduct unbecoming a teacher. Teachers in this State are expected to be role models for their students. Petitioner's past behavior simply does not demonstrate the kind of honesty and integrity expected of any employee, much less the higher standard expected of teachers. Parents are entitled to have their children entrusted to individuals of the highest moral character. Ex-inmates and persons convicted of serious crimes simply do not meet the threshold requirement demanded by communities and parents for the schoolteachers we expect to be examples for our children.
13. The conduct with which Petitioner was charged in this case, and for which he was found guilty, fails to adhere to the high standards of moral behavior demanded of teachers in this State and there is clearly an adverse relationship between Petitioner's conduct and his ability to perform his duties in a professionally effective manner.
14. The Undersigned continues to be dismayed that the Respondent does not have the ability to independently screen an applicant's criminal history. This should certainly be a requisite for any, if not all, applicants.

#### CONCLUSIONS OF LAW

1. The burden is on Petitioner to demonstrate, by a preponderance of the evidence that the State Board of Education erred in denying his request for a teaching license. Peace v. Employment Sec. Comm'n, 349 N.C.315, 507 S.E. 2d 272 (1988)
2. Petitioner's conduct bears a "reasonable and adverse relationship" to the Petitioner's ability to perform any of his professional functions in an effective manner.
3. Petitioner's conduct is not consistent with the high standards of conduct expected of teachers in this State. See Faulkner v. Board of Education, 311 N.C. 42, 316 S.E.2d 281 (1984)
4. Respondent did not act arbitrarily or capriciously in revoking Petitioner's license to teach in North Carolina.

5. Respondent did not and has not unlawfully deprived Petitioner of any property to which he is entitled.
6. Respondent has not prejudiced the right of Petitioner, exceeded its authority, acted erroneously, failed to use proper procedure, or failed to act lawfully.

Based on the foregoing, the undersigned makes the following:

**DECISION**

The Undersigned affirms the Respondent's properly denial of Petitioner's application for a license to teach.

**ORDER**

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with the North Carolina General Statute 150B-36(b).

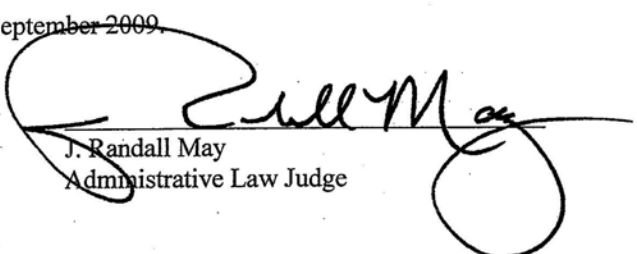
**NOTICE**

The Agency that will make the final decision in this contested case is the North Carolina State Board of Education.

The Agency is required to give each party an opportunity to file exceptions to the 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.

ORDERED this the 27 day of September 2009.

  
J. Randall May  
Administrative Law Judge

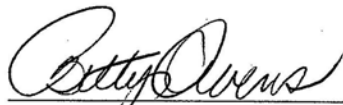


A copy was mailed to:

Frederick P Moore  
562 Caladium Court  
Kernersville NC 27284  
PETITIONER

Laura E Crumpler  
Assistant Attorney General  
NC Department of Justice  
PO Box 629  
Raleigh NC 27602-0629  
ATTORNEY FOR RESPONDENT

This 5th day of September 2009.



Office of Administrative Hearings  
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STATE OF NORTH CAROLINA

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COUNTY OF CHATHAM

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
08 EHR 2474

FRIENDS OF THE ROCKY RIVER, INC.,  
Office of Administrative Hearings )  
Petitioner, )

v. )

NORTH CAROLINA DEPARTMENT OF )  
ENVIRONMENT )  
AND NATURAL RESOURCES, DIVISION OF )  
WATER QUALITY, )

DECISION

Respondent, )

and )

TOWN OF SILER CITY, )

Intervenor. )

This contested case was heard on June 3, 4, and 29, 2009 before Administrative Law Judge Beecher R. Gray in Raleigh, North Carolina.

#### APPEARANCES

Petitioner was represented by John D. Runkle, Esq. Respondent was represented by Jane L. Oliver, Assistant Attorney General, North Carolina Department of Justice, and Carolyn Goodridge, legal intern with the Department of Justice, under the supervision of Jane L. Oliver. Intervenor was represented by William C. Morgan, Jr., Esq., of the Brough Law Firm.

#### ISSUES

1. Whether Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in issuing NPDES Permit No. NC0026441 to Intervenor by:

- (A) failing to issue an NPDES permit which meets water quality standards for "best uses" in Class C waters;
- (B) failing to issue an NPDES permit which protects and preserves downstream "existing uses" in the Rocky River;
- (C) failing to address all cumulative and secondary impacts of all other pollution sources within the Rocky River watershed before issuing the permit.

2. If so, whether any such error substantially prejudiced any rights of Petitioner.

**BURDEN OF PROOF**

Petitioner has the burden of proof on the issues.

**WITNESSES**

The following witnesses were called by Petitioner:

Sonny Keisler  
John Fountain, Ph.D.  
Susan Dayton  
Elaine Chiosso  
Kathleen Hundley  
LeToya Fields  
Brian Wrenn  
Nora Deamer-Melia  
Joel Brower  
John Alderman

The following witnesses were called by Respondent:

LeToya Fields  
Brian Wrenn

The following witness was called by Intervenor:

Joel Brower

**EXHIBITS**

Petitioner's Exhibits:

- 1A – Petition for Contested case hearing
- 1B – Petitioner's Prehearing Statement
- 2 – NPDES Permit NC00026441, issued 8/29/08
- 3 – Amendment to memorandum of agreement between DWQ and UCFRBA
- 4 – Friends of Rocky River Comments and Attachments
- 5 – Comments Presented by Friends of Rocky River at Public Hearing
- 6 – Powerpoint Presentation made by Friends of Rocky River
- 7 – Revised Comments of Susan Dayton (without attachments)
- 8 – Vitae for John Fountain, Ph.D
- 9 – Proposed Plan for Monitoring Rocky River developed by Dr. Fountain

- 10A – Comments Submitted by Chatham Environmental Review Board
- 10B – Comments submitted by Haw River Assembly
- 10C – Revised Comments submitted Chatham Environmental Review Board
- 12 – Studies listed by Sonny Keisler
- 15 – Map of Rocky River watershed
- 16 – Comments presented by Consultant Alderman
- 17 – Resume of John Alderman

Respondent's Exhibits:

- 1 - Map of Rocky River (DWQ 2005 Basinwide Plan)
- 2 – Application for Renewal of NPDES Permit with cover Letter dated 4/25/06
- 3 – Draft Permits with Cover Letter, dated 9/12/07
- 4 – Letters Requesting Public Hearing
- 5 – Hearing Officers' Report with Attachments
- 6 – Email from Brian Wrenn to Coleen Sullins, dated 8/21/08  
With response from Ms. Sullins on same date
- 7 – Final NPDES Permit NC0026441 with Cover letter dated 8/29/08

Intervenor's Exhibits:

- 1 – Amendment to Memorandum of Agreement between DWQ and UCFRBA
- 2 – Permit for Residuals Land Application, dated 4/8/08
- 3 – Annual land Application Certification Form
- 4 – Report on Proposed Reclassification of Two segments of Rocky River
- 5 – Siler City Ordinances and Regulations
- 6 – May 11, 2009 DWQ Inspection Report
- 7 – Comments Submitted at Public Hearing by Joel Brower

**FINDINGS OF FACT**

- 1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each party stipulated on the record that notice was proper.
- 2. Petitioner, Friends of the Rocky River, Inc., is a 501(c) organization located in Pittsboro, North Carolina. It was founded to protect the natural resources of Chatham County, including the Rocky River. Kathleen Hundley currently is president of the organization. (T vol I pp 138-39, Pet Exh 1)
- 3. Section 402 of the Clean Water Act (CWA) establishes a program known as the National Pollution Discharge Elimination System (NPDES) for issuing, modifying, denying, monitoring, and enforcing permits for wastewater discharges. In order to discharge wastewater through a point source into surface waters, a facility must obtain authorization

to do so in the form of an NPDES permit. The Environmental Protection Agency (EPA) is authorized to administer and implement the NPDES Program. EPA has established procedures and standards that must be used for the issuance of NPDES permits. Under the CWA, a state may request authority to administer the NPDES Program for discharges into surface waters within the jurisdiction of the state. EPA must approve a state's program before delegating authority to the state to administer the NPDES program. EPA has delegated the authority to issue NPDES permits to North Carolina under an approved State program. (Fields, T vol II pp 306-07) See also: 33 U.S.C § 1342(a)(1) and (5); 40 CFR Part 122, N.C. Gen. Stat. § 143-215.1, N.C. Gen. Stat. § 143-215.3(a)(14).

4. North Carolina has adopted the federal requirements for administering the NPDES Program in its General Statutes and administrative rules. EPA retains oversight of the NPDES Program and the State must provide notice to EPA of each permit it proposes to issue. EPA and North Carolina have a Memorandum of Agreement under which EPA plays an active role in North Carolina's NPDES permitting process and reviews all NPDES permit applications, draft permits, and final permits for major facilities in the State. EPA has promulgated regulations and also offers guidance on how to develop permit limits that are protective of water quality. Each permit must include technology-based effluent limitations and standards based on effluent limitations and standards established by the State in accordance with Section 301 of the CWA. No permit may be issued if the conditions of the permit do not provide for compliance with applicable requirements of the CWA, regulations promulgated under the CWA, and State water quality standards. If EPA determines that the State, in issuing a proposed permit, has not complied with federal regulations or EPA's interpretation of such regulations, EPA may assert its authority to issue the permit or to take over the State's NPDES compliance and enforcement programs. No permit may be issued if EPA objects to the issuance of the permit. (Fields, T vol II pp 307-08, 311) See also 33 U.S.C. §§ 1342(d)(1), (2) and (4); 33 C.F.R. 123.44(c) and 40 CFR 122.4; N.C. Gen. Stat. § 143-215.1; 15A NCAC 2H.0100 et seq.
5. Municipal wastewater treatment plants which treat municipal sewage and industrial wastewater must obtain an NPDES permit in order to discharge treated wastewater into streams or other surface waters. See also: 40 CFR 122.2.
6. The Environmental Management Commission (EMC) has been delegated authority by the General Assembly to administer State programs and requirements under the CWA. The EMC has sub-delegated the authority to issue NPDES permits to the director of the DWQ or her designee. See N.C. Gen. Stat. § 143-214.3(a)(14); 15A NCAC 2H.0107 and 2H.0112.
7. Intervenor, the Town of Siler City (the Town or Siler City), operates a municipal wastewater treatment plant (the plant) that receives domestic sewage from both residential and commercial sources and wastewater from industrial sources. The Town has an NPDES permit, identified as NPDES Permit NC0026441 (the Permit), which authorizes the Town to discharge treated wastewater from the plant through a point source or outfall into Loves

Creek, a tributary of the Rocky River, in the Cape Fear River Basin. (Resp Exh 2)

8. Siler City has provided some level of wastewater treatment since the 1920's. The Town has been operating its current wastewater treatment plant since it was built in 1994 to replace an older facility that had been built in the mid-1970's. The current plant has a design flow rate of 4.0 million gallons per day and provides primary, secondary, and tertiary treatment. The Town also uses technology for phosphorus removal. Siler City's Permit contains phosphorus and ammonia limits that are more stringent than those of many similar facilities statewide. (T vol II p 236; Resp Exh 2; Resp Exh 3, p 10)
9. Siler City also operates two reservoirs and a water treatment plant to provide drinking water to the residents and businesses in Siler City. The two water supply reservoirs are located on the Rocky River upstream from the confluence of Loves Creek and the Rocky River. The lower reservoir was built in 1934 and the upper reservoir was built in 1965. Since 1994, Siler City has been required to discharge a "minimum release" from its reservoir to help protect flow levels in the Rocky River. (T vol I pp 20-21; T vol II pp 238-41)
10. Siler City currently is expanding its lower reservoir. During the process of reviewing the proposed expansion, Siler City requested to have segments of the Rocky River above Highway 64 reclassified as Class WS-III-CA waters. During the reclassification process, DWQ staff worked with the N.C. Wildlife Resources Commission and the U.S. Fish and Wildlife Service to develop operating procedures which will increase the minimum release during normal and low flow conditions. The operating procedures also provide for pulse releases which are intended to maintain flow conditions which would exist in the river if there were no reservoir. In many cases, release flows will be higher than would occur naturally to offset drought conditions and to ensure adequate water for fish reproduction. The minimum release flows are based on a field study and modeling of downstream flow and aquatic habitat and incorporate differences in flow needs. A Reservoir Management Team was established as part of the expansion project. The Reservoir Management Team includes various state agencies, the Friends of the Rocky River, and the Town of Siler City. The Reservoir Management Team will evaluate the revised minimum release schedule. Siler City also has installed a monitoring gauge near the Highway 64 crossing to monitor not only flow but certain water quality parameters as well. (T vol II pp 242-43; Pet Exh 4, Att E)
11. The expanded reservoir is not expected to impact the Cape Fear shiner habitat on the Rocky River because the closest critical habitat is located approximately fifteen miles downstream. However, the revised minimum release schedule is expected to improve flow conditions such that the new flow regime is expected to have a beneficial impact on freshwater mussels. (Pet Exh 4, Att E)
12. The Rocky River is a flash river which is made up of a series of riffles and pools. After rain, the water level rises quickly and then quickly falls back to low levels. Bear Creek is the largest tributary to the Rocky River and Tick Creek is the second largest. Harland Creek

(west of Pittsboro), Loves Creek and Varnell Creek are smaller tributaries of the Rocky River. Approximately 8 miles of Tick Creek and a 2.9 mile segment of Loves Creek are on the State's impaired waters list. The Tick Creek area has many animal operations. (T vol I pp 56-62, 64-68; Pet Exh 6, p 7)

13. Within the Rocky River watershed, there are two minor NPDES wastewater dischargers. These discharges are located on Bear Creek. One is a small domestic wastewater treatment plant serving a rest home that has had problems with excessive ammonia, among other things, in its discharge. The other also is a small wastewater plant at a school which releases nutrients in its discharge. The confluence of Bear Creek and the Rocky River is approximately twenty miles downstream from Loves Creek. (T vol I pp 60-62; Resp Exh 1)
14. Both Loves Creek and the Rocky River, below the water supply reservoirs, are classified as Class C Waters. Best uses for Class C waters include aquatic life propagation and maintenance of biological integrity (including fishing and fish), wildlife, secondary recreation, and agriculture. The term "secondary recreation" is defined to include wading, boating, and other activities for which contact between the human body and the water is infrequent and incidental. [Swimming, diving, and skiing are designated as "primary recreational use." Primary recreation use is not included as a "best use" of Class C waters.] (T vol I pp 86, 162) See also 15A NCAC 2B.0211(1) and 15A NCAC 2B.0202(52) and (57).
15. Based upon basin-wide reports and ambient water quality data, best uses of the Rocky River as a Class C stream are being protected. The Rocky River currently is used by recreationalists for fishing, canoeing, and kayaking. In addition, even though swimming is not included in the definition of "secondary recreation," it is a popular place for swimming. Nothing in the Cape Fear Basinwide Management reports or in ambient monitoring data for the Rocky River presents a health concern which would prevent anyone from swimming in the Rocky River. Ambient monitoring data indicates that there are no water quality standard violations on the main stem of the Rocky River and that the Rocky River is not an impaired water. (T vol I pp 150, 125-26, 199-200, 224)
16. The lower Rocky River, along with the lower Deep and Haw Rivers, provides critical habitat for the federally endangered Cape Fear shiner. Two areas on the Rocky River have been designated critical habitat of the Cape Fear shiner: (1) from the 902 bridge down to SR 1010 (above the Woody's dam area) and (2) below Woody's dam to the HW 15-501 bridge and up into Bear Creek. The Cape Fear shiner has not been found in significant numbers above Woody's dam since between the mid-seventies or mid-eighties, when there was an acute event, most likely a major spill of a contaminant. There is a very small population of the Cape Fear shiner in this location now and it is very vulnerable. The shiner population below the dam, on the other hand, is quite healthy. The construction of dams and impoundments historically has been a major problem for survival of the Cape Fear shiner because impoundments eliminate lotic habitat and dams separate populations making them more vulnerable. (T vol III pp 374-76, 397-99; Pet Exh 15)

17. The Rocky River also is home to at least fourteen species of freshwater mussels. Most of the populations are found below Woodys dam. None of the species that have been identified in the Rocky River are on the federally endangered species list but three are listed as species of special concern. Several have been identified by the State as endangered, threatened, or species of special concern. None of the freshwater mussels in the Rocky River are endemic to North Carolina and most have wide ranges of habitat beyond North Carolina from Georgia and, for some, into Canada. Unlike the Carolina heelsplitter, which is a federally endangered species of freshwater mussel, DWQ is not required to establish recovery or management plans for any of the freshwater mussels found in the Rocky River. However, Consultant Alderman recommends protecting 200-foot buffers on perennial streams and 100-foot buffers on intermittent streams to help control microclimate and to help to prevent nutrients, sediment, and other toxic substances from getting into streams where freshwater mussels live. Siler City is the only local government within the Rocky River sub-basin that has established 200-foot buffers on all perennial and intermittent streams within 2500 feet of the Rock River. Stable stream channels and stable stream banks also are critically important for recovery of freshwater mussels. (T vol III pp 377-80, 391-96, 401, 412; Pet Exh 16)
18. John Alderman has a B.A. degree in interdisciplinary studies with an emphasis in ecology, other natural sciences, and taxonomy from UNC-CH. He worked for the N.C. Wildlife Resources Commission for approximately eighteen years. He now owns a private consulting firm which conducts biological surveys. Consultant Alderman does not study water quality but does biological assessments by surveying aquatic populations and biodiversity within waterbodies. (T vol III pp 366-67, 380; Pet Exh 17)
19. Consultant Alderman is concerned about the degradation of habitat for freshwater mussels and other aquatic species in the Rocky River and elsewhere. He recently surveyed several areas on the Rocky River and noticed a decrease in population and diversity of freshwater mussels downstream from Siler City's wastewater treatment plant. Consultant Alderman sees similar data almost everywhere that he works, which includes piedmont areas from Georgia to Virginia. Consultant Alderman recommends that studies be conducted to identify specific pollutants in point source effluent and to determine the impacts of those pollutants on aquatic organisms, not only in the Rocky River but in general. There is "so very little understood about [the impacts of] wastewater, and particularly, for a body of water such as the Rocky River." Consultant Alderman also is concerned about nonpoint source pollution, especially from agriculture and urban areas, and its impacts on aquatic organisms. (T vol III pp 388-90, 403, 405)
20. Based upon ambient monitoring performed four miles downstream from Loves Creek, it appears that Siler City's discharge has high nitrogen levels. However, since the testing site is four miles downstream, it is unclear what impact the plant's discharge is having on the Rocky River. Other potential sources of nitrogen include agricultural sources, through both run-off and groundwater seepage. Any use of fertilizer is a potential source. There is a large



golf course in the area. There are many animal operations in this area, some of which use land application as a method for managing waste. The North Carolina Ecosystem Enhancement Program and DWQ's Raleigh Regional Office have reported that cows in the creeks are a significant problem both as a direct source of nutrients and as a cause of habitat degradation within the Rocky River watershed. Staff from the Raleigh Regional Office previously located a hatchery that illegally was discharging animal waste through a floor drain directly into a small creek that runs into Loves Creek. The creek was described as looking as if it had black tar running through it. DWQ was able to stop the illegal discharge and noted that conditions were improving. Septic and sewage disposal systems in the watershed and sludge disposal fields also may be potential sources of nutrients. (T vol I pp 65-67, 99-100; Pet Exh 4, Att C; Resp Exh 3 p 11)

21. There are no State or federal water quality standards or limits for nitrogen in Class C waters. Nitrogen limits may be imposed on point source discharges where the downstream waters have been supplementally classified to be nutrient sensitive. (T vol I pp 178-79; Resp Exh 3)
22. Susan Dayton from the Blue Ridge Environmental Defense League is concerned about potential impacts of sewage sludge on the Rocky River. Susan Dayton does not know how many permitted sludge fields within the Rocky River Basin, including those permitted for Siler City, are being used. She is not aware of any actual harm to Rocky River caused by sludge fields but she is concerned about potential harm. (T vol I pp 109, 114-15, 118)
23. John Fountain, Ph.D, is a geochemist whose studies primarily have focused on contaminants in groundwater and the movement of contaminants from groundwater to surface water. Dr. Fountain has conducted extensive studies related to nutrient contamination in the Neuse River Basin. (T vol I pp 89-91)
24. Dr. Fountain recently was hired as a co-principal investigator in a study of the geochemistry of Tick Creek and its drainage basin. The purpose of the study is to assess nutrient pollution in Tick Creek. The study is being funded through a 319 grant obtained through DWQ. Excess nutrients contribute to the growth of algae and other microorganisms in streams. Excessive algae growth sometimes can cause ecological damage in that when the algae die microorganisms that feed on the dead algae can deplete oxygen in streams, which can kill all animal life in the streams. The Tick Creek study just is getting started with sampling for the study set to begin in the summer of 2009. (T vol I pp 91-92, 98-99)
25. Dr. Fountain also has been asked by the Friends of the Rocky River to help with perceived degradation of water quality in the Rocky River. Dr. Fountain noted that DWQ, through its ongoing monitoring program, looks at the entire range of pollutants that might be present in a water body and that DWQ has a substantial amount of data for the Rocky River. Dr. Fountain has reviewed data from monitoring by DWQ and other groups and believes that the data is not sufficient to determine exactly how much pollution is in the Rocky River and exactly

where it comes from. Dr. Fountain has developed a proposed plan to monitor and analyze pollutants in the Rocky River, identify pollution sources, and quantitatively measure the contribution of each source for the entire Rocky River. This type of basin-wide study would assess the quantitative impacts of all potential pollution sources, including the Siler City wastewater treatment plant, on the river. The information derived from a scientific study could be used as one factor, among many other appropriate factors, in determining whether a particular point source should be permitted. Dr. Fountain currently is working to get a basin-wide study started. (T vol I pp 93, 95-98; Pet Exh 9)

26. Dr. Fountain is not familiar with procedures for the issuance of NPDES permits and does not know how DWQ looks at cumulative impacts when issuing an NPDES permit. Dr. Fountain is somewhat familiar with the system for the classification of surface waters in North Carolina but he does not know the classification for the Rocky River or what water quality standards are applicable to the Rocky River. (T vol I pp 103-04)
27. Sonny Keisler currently serves as a board member and secretary of the Friends of the Rocky River. He has a Ph.D. in public administration with a focus in environmental policy. Sonny Keisler has lived on the Rocky River for six and one-half years. His property is located approximately twenty-two miles downstream from the discharge point of Siler City's wastewater treatment plant. Sonny Keisler worked in the planning department during Gov. Bob Scott's administration and has done some teaching in planning, but has received the majority of his compensation as a real estate developer. He has developed numerous large-lot upscale residential subdivisions in Chatham County. (T vol I pp 17, 46-59)
28. Sonny Keisler has observed that, during periods of extreme drought, there is an increase in filamentous algae growth on the Rocky River downstream from the 15-501 bridge. In October 2006, an algae survey was conducted by DWQ and filamentous algae was found at SR1010, east of Highway 902, and at Kathleen Hundley's property approximately two miles from the confluence of the Rocky River and the Deep River. The filamentous algae at SR1010 covered approximately 20 to 30 feet of the area along the bank and could not be classified as a noxious bloom. The algal growth is likely the result of low flow during dry summer months or drought conditions and elevated nutrient levels in the river. (T vol I pp 22-23, 49-50; 53-54; 138; Pet Exh 4, Att C)
29. Sonny Keisler does not know whether most streams in North Carolina have problems with algae growth in the summer or dry months. He has had no training in either wastewater disposal systems or in the removal of nutrients from wastewater. He has heard that someone is working on a proposal for removal of nutrients for the Siler City wastewater treatment plant but he does not know whether the proposal would be financially feasible for Siler City, which currently is suffering economically. (T vol I pp 76-79)
30. During dry months, there is increased algae growth on the Rocky River both upstream and downstream from Siler City's plant, including near Liberty, a community north of the

reservoirs. (T vol II p 347-48)

31. Siler City has taken significant steps through its Unified Development Ordinance and its Watershed Protection Ordinance to address stormwater as a potential source of nutrients in the Rocky River watershed. Siler City expanded its extra-territorial jurisdiction (ETJ) so that its ETJ along the river has increased from six miles to eighteen miles. Siler City established a River Protection Corridor by requiring that 200-foot vegetated riparian buffers be maintained not only along the Rocky River and but also along perennial streams and intermittent streams which are located within 2500 feet of the Rocky River. These riparian buffer protections are more stringent than any others within the watershed. In areas outside of the 2500-foot corridor, Siler City requires protection of 100-foot riparian buffers along perennial streams and 50-foot buffers along intermittent streams. Siler City does not allow new construction in the flood zone and encourages the use of grass swales instead of curb and gutter where possible. Siler City also prohibits the direct discharge of stormwater into surface waters. (T vol I pp 54-55; T vol II pp 340-44, Int Exh 4 and 5)
32. Chatham County protects 100-foot riparian buffers along the river. Sonny Keisler has covenants on his property to protect 100-foot buffers along the river. (T vol I pp 99-100)
33. On April 25, 2006, the Town of Siler City submitted an application to Respondent to renew its existing permit. In its application for a permit renewal, the Town did not seek to expand capacity for the plant or to make any changes from its existing permit. (T vol II pp 258, 309-10; Resp Exh 2) See also: 40 CR 122.21(d).
34. At the time the application was submitted, the plant was processing wastewater from approximately 7,000 residents of Siler City and from four industrial users. The industrial users were Townsends, Inc., Mastercraft Fabrics, LLC, Gold Kist, Inc., and Brookwood Farms, Inc. Each industrial user is required to comply with pretreatment limits. Each industrial user must provide some level of treatment to its process water, thereby limiting the strength of wastewater that each user sends to the plant. In May 2008, one of the industrial users, a chicken processing plant, shut down. This business closure, one of the plant's largest customers, has reduced the amount of wastewater being received at the Siler City plant by approximately 650,000 gallons per day and significantly has reduced the nutrient load going into the Town's wastewater treatment plant. (T vol I pp 82-83; T vol II pp 256-57; Resp Exh 2)
35. In its application, the Town included, among other things, effluent monitoring data, expanded effluent testing data, and whole toxicity test results that had been collected during the four and one-half year period prior to the date of the application and all required information relating to its industrial users. (Resp Exh 2) See also 40 CFR 122.21(j).
36. A copy of the permit renewal application was reviewed by EPA. LeToya Fields was the person in DWQ who was primarily responsible for reviewing Siler City's permit renewal

application. Engineer Fields has a B.S. degree from Columbia University in chemical engineering with a minor in mechanical engineering. After graduating from Columbia in 1999, Engineer Fields worked for three and one-half years in Washington, D.C., for an environmental engineering consulting firm on a project that provided support for EPA's National NPDES Program. At the time she reviewed Siler City's application for a permit renewal, Engineer Fields had been working as an Environmental Engineer I in DWQ's NPDES program for approximately three and one-half years. As an Environmental Engineer I, Engineer Fields reviewed NPDES permit applications, performed water quality models, reviewed engineering alternative analyses, and issued permits. Engineer Fields was promoted to the position of Environmental Engineer II in the NPDES Program before DWQ issued the final permit to Siler City. In that position, she reviewed permits developed by other DWQ staff, developed permit renewals for major municipal and industrial facilities, and assisted in developing policy. (T vol I pp 159-60; T vol II pp 305-06)

37. Engineer Fields reviewed Siler City's permit application to make sure that all the information required by the EPA was included. The EPA also reviewed the application and found it to be complete. Engineer Fields then proceeded to develop a draft permit in accordance with EPA regulations and guidance and State procedures and regulations. Every NPDES permit must include conditions and limits to meet applicable federal and State water quality standards. (T vol I p 161; T vol II pp 311, 321) See also: 40 CFR 122.21(e) and (j); 40 CFR 122.44.
38. Because Loves Creek, the receiving waters, is a Class C stream, Engineer Fields evaluated the limits in Siler City's existing permit to determine whether the permit limits would meet water quality standards that have been established to protect best uses for Class C waters. Engineer Fields conducted a reasonable potential analysis for the plant's effluents using 7Q10 conditions. EPA requires that 7Q10 conditions be used to determine impacts for Class C waters. This analysis is used to assess the potential impact of discharge on the receiving waters. The 7Q10 flow is a statistical estimation of the lowest seven-day average flow that would occur within a ten-year period. The summer 7Q10 flow represents drought flow or critical flow conditions and the analysis assumes maximum discharge from the wastewater treatment plant. EPA recommends that this analysis be used to determine what effluent limits are needed to protect water quality. Although there are no other permitted point sources on Loves Creek, by incorporating this conservative low flow analysis, the evaluation considers point source discharges during extreme low streamflow conditions when impacts from nonpoint source inputs likely would be less. (T vol I pp 162, 164, 166-67, 176-77, T vol II p 329)
39. The 7Q10 flow for Loves Creek is 0.25 cubic feet per second, according to US Geologic Survey data. Because the application was for reissuance of a permit, Engineer Fields was able to examine several years of monitoring data for effluent from the Siler City plant. Siler City had submitted standard effluent testing data required for all NPDES permits and expanded effluent testing data that is required for larger facilities and facilities with pretreatment programs. Siler City also included in its application screening analyses for a

wide range of pollutants as well as whole toxicity test data and monitoring and flow data for the pretreatment program. Engineer Fields performed a statistical analysis based upon several years of data from testing and analysis of effluent as well as pretreatment data to determine the highest level of pollutants likely to be discharged. (T vol I pp 164-65, 170-72, T vol II pp 312-14, 327; Resp Exh 2)

40. Engineer Fields evaluated data from effluent monitoring and analysis to make sure that the discharge would not violate water quality standards established for the protection of best uses of Class C waters. These water quality standards are designed to protect best uses identified in State regulations. Engineer Fields performed statistical modeling recommended by EPA, comparing data from several years of monitoring and testing of pollutants in the plant's effluent to the amount of dilution in the receiving waters to determine whether the wastewater discharge would have an adverse impact on aquatic life, biological integrity, and secondary recreation in the receiving stream. (T vol I pp 170-73, 176-79, 198-99) See 15A NCAC 2B.0211.
41. The NPDES permitting process does not require that the permitting agency consider cumulative impacts of all possible pollution sources within the watershed in which the receiving waters are located when reviewing an application for a NPDES permit. [North Carolina only requires a full evaluation of cumulative and secondary impacts when a project is subject to the North Carolina Environmental Policy Act (SEPA). Since this permit was a simple renewal with no request for flow expansion, it was not subject to SEPA requirements for cumulative/secondary impact evaluation. N.C. Gen. Stat. §§ 113A-1 et seq.] There are no other permitted point source dischargers in the upper Rocky River or on Loves Creek. (T vol I p 169; Resp Exh 1)
42. In January 2007, Petitioner submitted a letter to DWQ expressing concerns about potential impacts of the Siler City wastewater treatment plant on the Rocky River. In the letter, Petitioner noted that the Rocky River is home to the federally endangered Cape Fear Shiner. However, there was no scientific data presented to show that effluent from the Siler City plant is having any impact on the Rocky River's Cape Fear Shiner population. (T vol I pp 180, 190; Resp Exh 3 pp 2-3)
43. Engineer Fields reviewed extensive data from whole effluent toxicity (WET) testing which had been conducted by Siler City during the four and one-half year period preceding the application date. Wastewater treatment plants are required under the NPDES program to take a sample of treated effluent at the final effluent discharge point below all treatment processes and subject indicator species, such as *Ceriodaphnia* or the flathead minnow, to the effluent at the percentage that the effluent makes up of the receiving waters. Whole effluent toxicity testing measures the aggregate toxic effect of the combination of pollutants in a facility's effluent on aquatic species. The purpose of the test is to determine whether the effluent has a toxic effect on aquatic life. The tests measure for growth, mortality, and reproduction. Siler City conducted twenty whole effluent toxicity tests in the preceding four and one-half years.

These tests were conducted to observe whether the effluent from Siler City's plant, at an effluent concentration of 90%, caused growth inhibition or significant mortality to *Ceriodaphnia dubia*. Use of *Ceriodaphnia* has been shown to be protective of the Cape Fear shiner because of its greater sensitivity to pollutants. Siler City had one WET test failure in March 2004 and was required to test for the following two consecutive months. The plant failed one of the subsequent tests and passed the other. Before and after that time, the Siler City plant had not had any whole effluent toxicity test failures. The permits limits are protective of aquatic life. (T vol I pp 178-79, 203-04; T vol II pp 314-16; Resp Exh 2 and 3) See also: 40 CFR 122.1.

44. Engineer Fields reviewed the 2005 Cape Fear River Basin Plan (Basin Plan) as well as instream monitoring data for the Rocky River provided by the Upper Cape Fear River Basin Association (UCFRBA). The Basin Plan is based upon ambient monitoring by DWQ and by various coalitions within the Basin as well as benthic macroinvertebrate and fish data collected by DWQ. The data is assessed and evaluated within the context of State water quality standards. DWQ then compares the data with water quality standards applicable to a particular stream or surface water. If one of the water quality standards is violated, the stream or surface water is an "impaired water." (T vol I pp 218-19, 222; T vol II pp ; Rep Exh 3)
45. The 2005 Basin Plan for the Cape Fear watershed identified 2.9 miles of Loves Creek as being impaired for aquatic life because of "fair" benthic community ratings at three sites. The impaired segment is both upstream and downstream of the plant's discharge point. A stressor study showed that the main stressor to the benthic community was toxic substances in run-off as well as streambank erosion, sedimentation, and excessive algae growth. Siler City's plant and agricultural sources were listed as pollution sources but they were not identified as the main stressors. Based on ambient monitoring data, the impairment on Loves Creek is not causing similar impairment on the Rocky River. There are no water quality standards being violated on the main stem of the Rocky River and it is not listed as an impaired water. (T vol I pp 218-19; T vol II pp 325-26; Resp Exh 3)
46. Engineer Fields also looked at the Town's compliance history and found the plant had met all permit limits except for one violation for pH. All inspection reports indicated that the facility was well-operated and maintained. Engineer Fields also consulted with DWQ's Pretreatment program about the contribution from industrial users. (T vol II p 309-10, 318)
47. After her review, Engineer Fields issued a draft permit that included several significant changes from Siler City's existing permit. Engineer Fields added a requirement for an annual pollutant scan. She revised the frequency of monitoring requirements for copper, zinc, and chlorides so that the permit requirements would be consistent with frequency requirements in surface water monitoring rules. (T vol II pp 322-23; Resp Exh 3) See 15A NCAC 2B.0500.



48. Although there are no water quality standards or limits for phosphorus and nitrogen in Class C waters and neither Loves Creek nor Rocky River have been classified as nutrient sensitive waters, Engineer Fields included a new requirement in the draft permit that would require Siler City to develop a Nutrient Removal Optimization Plan based on concerns about nutrient levels in Loves Creek and in Rocky River. This condition, while not mandated by NPDES statutes or rules, would require Siler City to evaluate sources of nutrients (particularly nitrates) to the plant, provide current removal rates, and discuss how their current technology and treatment process might be used to optimize nutrient removal. (T vol I pp 178-79, T vol II p 319; Pet Exh 4, Att C; Resp Exh 2)
49. EPA reviewed the draft permit and fact sheet which provides a basis for the decisions made about the permit. EPA made a few comments which were incorporated into the draft permit. (T vol II pp 308, 323-24)
50. On September 12, 2007, Engineer Fields sent a copy of the draft permit with a cover letter and fact sheet to Siler City for review. Public notice of the draft permit was issued so that the public and interested parties could review the draft permit and submit public comments. Copies of Siler City's permit renewal application, the draft permit, and a fact sheet explaining the basis for permit limits in the draft permit were sent for review and comments to EPA, the NC Wildlife Resources Commission, and to DWQ's Raleigh Regional Office, which is responsible for conducting compliance inspections of the facility. (T vol I p 161; T vol II pp 307-08; Resp Exh 2)
51. Based on the level of public interest expressed, the Director of DWQ determined that it would be in the public interest to have a public hearing on the draft permit. The notice of public hearing was printed in the local newspaper and copies of the draft permit were made available. (Resp Exh 5 pp 43-45)
52. On 17 April 2008, DWQ held a public hearing in Siler City on the draft permit. DWQ gave a presentation about the procedure for issuing an NPDES permit. Interested parties were allowed to speak, make presentations, and submit comments at the hearing. Brian Wrenn and Ed Beck were assigned as hearing officers in the permitting process. Brian Wrenn and Ed Beck presided over the public hearing. Engineer Fields also was present. Joel Brower, Town Manager for Siler City, and several members of Friends of the Rocky River spoke or made presentations. (T vol I pp 161, 187)
53. Elaine Chiosso, executive director of the Haw River Assembly and chair of the Chatham County Environmental Review Board (CCERB), presented recommendations at the public hearing on behalf of both entities. CCERB recommended that the following conditions, among others, be added to the permit: (1) Siler City be required to conduct a watershed study of the Rocky River that considers direct, secondary, and cumulative impacts from all sources of pollution, including nutrients and pharmaceuticals; (2) Siler City be required to upgrade its plant to remove more nutrients and heavy metals; (3) Siler City require all industrial users to

install and use state of the art water recycling technology; (4) Siler City be required to develop a conservation plan for federal and state listed threatened and endangered species that considers direct, indirect, and cumulative impacts of the plant's discharge on these species; and (5) monitoring requirements be increased, not lessened. The Haw River Assembly presented similar but less extensive recommendations. (T vol I pp 123-27; Pet Exh 10A and 10B)

54. Elaine Chiosso is not aware of any regulatory basis for restricting the discharge of nitrogen or phosphorus into surface waters except where a particular waterbody has been classified as either nutrient sensitive or impaired. Ms. Chiosso did not know whether the Rocky River is listed as an impaired water or supplementally has been classified as nutrient sensitive. (T vol I pp 132-36)
55. According to Elaine Chiosso, the Rocky River still is a popular stream for wading, swimming, and paddling. (T vol I p 126)
56. In the presentation made in cooperation with the Rocky River Heritage Foundation at the public hearing (and in a similar presentation presented as evidence in this contested case hearing), the Friends of the Rocky River identified Loves Creek as being on North Carolina's list of "severely impaired" streams. A 2.9 mile segment of Loves Creek is listed as impaired, but not severely impaired, for aquatic life because of "fair" benthic community ratings at three sites. In their presentation, the Friends of the Rocky River and the Rocky River Heritage Foundation neglected to identify an approximately eight-mile segment in Tick Creek, which is the Rocky River's second largest tributary, as being impaired. Tick Creek joins the Rocky River several miles downstream of Loves Creek and upstream from Highway 902. The presentation presented by Petitioner at the contested case hearing also failed to reflect the closure in May 2008 of one of the chicken processing plants in Siler City. (T vol I pp 57-58, 82-83; Pet Exh 6 pp 23, 30; Pet Exh Resp Exh 3 p 9)
57. Consultant John Alderman also made a presentation at the public hearing about biodiversity in the Rocky River. Consultant Alderman has not read Siler City's NPDES permit and he does not know what parameters are being tested. (T vol III pp 421, 435)
58. Hearing Officer Wrenn has a B.S. degree in biology from UNC-Chapel Hill and two years of graduate study in marine science at UNC-Wilmington. He has had training in the inspection of wastewater treatment plants. He has attended wastewater treatment plant operating schools, EPA's Water Quality Standards Academy, and the U.S. Army Corps of Engineers', training in wetland delineation. Hearing Officer Wrenn has worked for DWQ for eleven years. He has worked as an inspector and compliance coordinator for wastewater treatment plant land application and spray irrigation programs. A lot of facilities using non-discharge disposal systems have similar wastewater treatment processes as the NPDES Program does. Hearing Officer Wrenn currently is the supervisor with DWQ's Transportation Permitting Program that reviews the Department of Transportation's projects under Section 401 of the



CWA. (T vol I pp 186-87, 199-200)

59. Hearing Officer Wrenn and Hearing Officer Beck were responsible for submitting a report and recommendations on the Siler City NPDES permit to the Director of DWQ based upon information gathered during the application process and the public notice and comment period. After the public hearing, Hearing Officer Wrenn reviewed the application, the draft permit, comments made in the requests for a public hearing, the comments presented at the public hearing, comments submitted after the public hearing, the Upper Rocky River Local Watershed Plan, which includes information about nonpoint sources such as agriculture and urban run-off, DWQ's 303(d) studies, articles which had been provided by representatives of the Friends of the Rocky River, such as "the Influence of Water Quality and Associated Contaminants on Survival and Growth of the Endangered Cape Fear Shiner," and other data that he collected. He also discussed the permit with Engineer Fields; Matt Matthews, DWQ's point source supervisor; Susan Wilson, DWQ's coordinator for the western NPDES unit; and Dana Foley in DWQ's pretreatment program. (T vol I pp 187-90)
- 59 The hearing officers Wrenn and Beck took an extensive tour of the plant and found it to be "well-maintained and competently operated." The Town's employees who were responsible for operating the plant were "knowledgeable and informative." (Resp Exh 5 p 2)
60. The hearing officers talked with the Upper Cape Fear River Basin Association staff about accessibility to the Rocky River for sampling. They also asked about monitoring of wastewater treatment plants in other waterbodies which have been designated "nutrient-sensitive waters." As a result, the hearings officers recommended putting a year-round total phosphorus limit in Siler City's permit instead of just having a phosphorus limit during the months of April through September. (T vol I pp 212-13)
61. One of the articles which had been provided by the Friends of the Rocky River was "Assessing Contaminant Sensitivity of Endangered and Threatened Aquatic Species, Effluent Toxicity Tests," which was published in a 2005 Environmental Contamination and Toxicology journal. The article reported a study in which *Ceriodaphnia dubia*, the flathead minnow, and several threatened and endangered species, including the Cape Fear Shiner, were subjected through standard effluent test procedures described by EPA to a 7-day exposure to individual chemicals, simulated complex effluent mixtures, and field-collected effluents from domestic and industrial wastewater treatment facilities. Several of the field collected effluents were from North Carolina wastewater treatment plants and one of these samples was from the Siler City wastewater treatment plant. The purpose of the study was to determine whether whole toxicity effluent testing used by EPA's NPDES program adequately protected aquatic ecosystems, specifically, listed species and their habitats. (T vol I pp ; T vol III pp ; Resp Exh 4 pp 114-23)
62. The article concluded that *Ceriodaphnia dubia* had the greatest sensitivity to toxicity overall when compared with sensitivity of the threatened and endangered species, including the Cape

Fear Shiner. The flathead minnow sensitivity was generally comparable to listed fish including the Cape Fear Shiner. All three species were tested using three North Carolina effluent samples. In two tests, all three showed 100% survivability. In one of the tests, *Ceriodaphnia dubia* showed the greatest sensitivity, followed by the shiner and then the flathead minnow. The study tended to show that the flathead minnow is a good indicator species when testing for toxicity for listed species but that use of *Ceriodaphnia dubia* is more protective due to its greater sensitivity. Siler City uses *Ceriodaphnia* in its whole effluent toxicity testing. (T vol I pp 204, 206-08; T vol III pp 419-2; Resp Exh 4 pp 114-23)

63. The article does not support Petitioner's public comment assertion that discharge into Loves Creek from the Siler City wastewater treatment plant was a leading cause of extirpation of the Cape Fear Shiner population in the Rocky River. Petitioner's witness, Consultant Alderman, a biologist with an emphasis in wetland ecology and taxonomy who conducts biological assessments, believes that the extirpation of the Shiner population in the Rocky River occurred as the result of a catastrophic spill of some kind in the late 1970's to mid-1980's. Consultant Alderman has recommended that the Cape Fear Shiner be re-introduced in the upper stretch of the Rocky River because it might have a good chance of surviving there based upon physical habitat characteristics. Impoundments that destroy riffles and create deeper pools are a known cause of the decline of the Cape Fear Shiner and restoration efforts have focused primarily on restoring physical habitats, such as removing dams and impoundments. (T Vol I pp 71-72; 203-08; T vol III pp 419-20; Pet Exh 4, Att H)
64. Another scientific article submitted by the Friends of the Rocky River published the results of a study of various sites on the Haw, Deep, and Rocky Rivers to evaluate potential reintroduction sites. The study looked at different water quality factors that might be affecting growth, survivability, and lipid storage of the Cape Fear shiner. The fish were put in cages at various sites for 28 days with water samples taken and analyzed for these sites. The study identified some pollutants in the water, including chlordane, which has been banned since the 1980's, but was not conclusive as to the sources of the various pollutants identified. The study indicated that survivability of the Cape Fear shiner at two Rocky River sites, including the one closest to the Siler City plant, was as high or higher than some sites on the Deep River. One of the sites on the Rocky River was used as the reference site because it presents the most favorable conditions for habitat for the Cape Fear shiner. In contrast, according to the study, the Haw River sites presented serious water quality concerns for survivability of the shiner. (T vol I pp 190, 202, 208-11; Resp Exh 5 pp 25-35)
65. On July 14, 2008, Hearing Officer Wrenn and Hearing Officer Beck issued a report with recommendations to Coleen Sullins, Director of DWQ. The hearing officers addressed many public comments in their report. Based on concerns expressed at the public hearing and in the comments, the hearing officers recommended that several changes be made to the draft permit. The hearing officers added tighter restrictions on nutrient inputs into Loves Creek and ultimately the Rocky River and enhanced downstream monitoring. Specifically, the hearing officers recommended: (1) increasing the frequency of monitoring requirements for

total nitrogen from monthly (added to the draft permit) to weekly and adding additional testing parameters; (2) changing the monitoring requirement for total phosphorus so that compliance with phosphorus limits would be based on a monthly average of weekly monitoring; (3) adding a monitoring location on the Rocky River closer to the confluence with Loves Creek than the existing downstream monitoring location, which is approximately four miles downstream from the plant. Hearing Officer Wrenn thought the four mile distance provided a significant drainage area which could be impacting the results at this monitoring site and thought it would be prudent to conduct monitoring closer to the wastewater treatment plant to get a better understanding of impacts from the plant's discharge on the river. (T vol I pp 193-96, 211, 213; T vol II pp 333-35; Resp Exh 5, p 6)

66. EPA reviewed and approved the final permit. (T vol II p 308)
67. After the report was issued, Hearing Officer Wrenn met with Ms. Sullins, Paul Rawls, Surface Water Protection Section Chief, and Matt Matthews, Point Source Branch Chief, to discuss his recommendations and the permit requirements. As a result of that discussion, on August 21, 2008, Hearing Officer Wrenn recommended a year-round total phosphorus limit (0.5 mg/L in summer and 2.0 mg/L in winter). The current permit has a seasonal phosphorus limit of 0.5 mg/L from April 1 through September 30 with year-round monitoring. (Resp Exh 6)
68. The hearing officers also made recommendations which were not directly related to the NPDES permit requirements. They recommended that a watershed analysis of the Rocky River be conducted "to determine the significant threats to water quality, major contributors of pollutants, and potential solutions to water quality threats." In the public comments, a lot of general concerns were raised about various pollutant sources and potential problems but no one identified specific sources, other than the Siler City plant, or quantified impacts from other sources. (T vol I p 936; Resp Exh 5, p 6; Resp Exh 6)
69. On August 28, 2008, the Director of DWQ issued NPDES Permit NC0026441 which included significant changes from the preceding permit. DWQ added a winter phosphorus limit and increased the frequency of total nitrogen monitoring and expanded the reporting requirements to include total nitrogen, nitrates, nitrites, and total kjeldahl nitrogen. DWQ also added monitoring locations and included the requirement for a Nutrient Removal Optimization Plan. The frequency of monitoring at some locations later was amended by an agreement between DWQ and the UCFRBA. The expiration date for this permit is October 31, 2011. (T vol I p 174, 196-97, 211; T vol II pp 244-45, 255-56, 260-62; Resp Exh 6 and 7; Int Exh 1) See also: 15A NCAC 2H.0114.
70. Siler City is complying with all the requirements in the NPDES Permit issued on August 28, 2008 even though a final decision on the permit has not been issued. On May 19, 2009, DWQ conducted a surprise inspection and found no effluent violations and only a few minor problems at the facility. (T vol II pp 344-45; Int Exh 6)

71. Petitioners offered no evidence to show that the analysis conducted by DWQ was inadequate or that any other appropriate modeling would have resulted in different permit limits or restrictions or precluded issuance of the permit. Section 303 of the CWA requires states to establish water quality standards in accordance with EPA guidance and subject to EPA approval. 33 U.S.C. § 1312. State water quality standards define the goals of a water body “by designating the use or uses to be made of the water and by setting criteria necessary to protect such uses.” 40 CFR § 131.2.
  
72. Water quality standards “serve the dual purpose of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls . . .” 40 CFR § 131.2
  
73. States must specify and designate the “uses” for all water bodies within the state. Typically, each water body will have several uses, such as public water supply, propagation of fish and shellfish, primary or secondary recreational uses, agricultural uses, and other uses. 40 CFR § 131.10.
  
74. Water quality criteria are elements contained in water quality standards which, “when met, will generally protect the designated use.” 40 CFR § 131.1(b). Water quality criteria “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect” designated uses, including the most sensitive use. 40 CFR § 131.11(a). Criteria may be “expressed as constituent concentrations, levels, or narrative statements” which represent a quality of water that supports a particular use. 40 CFR § 131.3(b).
  
75. The North Carolina General Assembly has delegated the State’s authority to administer the federal CWA to the Environmental Management Commission (EMC). N.C. Gen. Stat. § 143B-282(u). Under this authority, the EMC has adopted State water quality standards and classifications for the purpose of classifying each water body in the State. The water quality classifications and standards were adopted by the EMC “to promote the policy and purposes of the [State’s Air and Water Resources Act] most effectively.” N.C. Gen. Stat. § 143-214.1(a)(1).
  
76. The EMC also has given each water body in the State a designated classification under N.C. Gen. Stat. § 143-214.1(a)(3). See 15A NCAC 2B.0100-.0301.
  
77. Loves Creek and the Rocky River have been classified as Class C waters and are, therefore, subject to the water quality standards set forth in 15A NCAC 2B.0211.
  
78. The best uses on Class C waters are: aquatic life propagation and maintenance of biological integrity (including fishing and fish), wildlife, secondary recreation, agriculture, and any other usage except for primary recreation or as a source of water supply for drinking, culinary, or food processing purposes. 15A NCAC 2B.0211(1).

79. The water quality standards set forth in 15A NCAC 2B.0211 do not include limits for nutrients, such as phosphorus and nitrogen.
80. The EMC "may classify any surface waters of the state as nutrient sensitive waters (NSW) upon a finding that such waters are experiencing or are subject to excessive growths of microscopic or macroscopic vegetation." Excessive growths of vegetation are "growths which the Commission determines impair the use of the water for its best usage as determined by the classification applied to such waters." 15A NCAC 2B.0223.
81. Where the EMC has classified a water body as "nutrient-sensitive," the EMC may require individually permitted wastewater treatment facilities which discharge into such waters to limit the concentration of nitrogen in the discharge to a total nitrogen concentration of 5.5 mg/l. For such facilities, the EMC must establish a compliance date which no more than five years from the date of the classification of "nutrient sensitive." N.C. Gen. Stat. §§ 143-215.1(c1) and (c6).
82. Neither Loves Creek nor the Rocky River has been classified as nutrient-sensitive by the EMC.

#### **CONCLUSIONS OF LAW**

1. The parties properly are before the Office of Administrative Hearings and the Office of Administrative Hearings has jurisdiction over this contested case.
2. N.C. Gen. Stat. § 143-215.1(b)(2) requires Respondent to act on all permits so as to prevent violation of water quality standards because of the cumulative effects of permit decisions. There are no other discharges on Loves Creek or in the upper Rocky River. Respondent conducted water quality modeling which indirectly accounted for other potential discharges into the receiving waters before re-issuing NC0026441 to the Town of Siler City.
3. N.C. Gen. Stat. § 143-215.1(b)(2) does not require or authorize Respondent, when considering an application for the subject facility, to consider or act to prevent secondary impacts which might occur upon issuance of the Permit.
4. Petitioner has failed to meet its burden of proof in this matter. Petitioner has failed to show that NPDES Permit No. NC0026441, issued by Respondent on August 28, 2008, fails to meet or to protect any applicable State and federal standards and limitations. More specifically, Petitioner has failed to show that the Permit does not meet water quality standards for best usage in Class C waters.
5. Petitioner has failed to establish that Respondent was required to consider the cumulative impacts of all possible pollutant sources within the Rocky River watershed either in its review of Siler City's application for renewal of the NPDES permit which authorizes Siler City to operate its wastewater treat plant or in its issuance of the Permit.

6. Petitioner has failed to meet its burden to show that that NPDES Permit No. NC0026441, issued by Respondent on August 28, 2008, fails to protect downstream "existing uses" in the Rocky River.

**DECISION**


Respondent's August 29, 2008 decision to issue NPDES Permit No. NC0026441 to Intervenor Town of Siler City, is supported by a preponderance of admissible evidence, and is **AFFIRMED**.

**NOTICE AND ORDER**

The decision of the Administrative Law judge in this contested case is made under the authority of G.S. 150B-34 and will be reviewed by the agency making the final decision according to the provisions of G.S. 150B-36. The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency that will make the final decision in this contested case is the Environmental Management Commission.

This the 28 of September, 2009.

  
\_\_\_\_\_  
Beecher R. Gray  
Administrative Law Judge

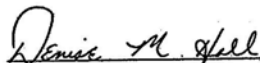
A copy of the foregoing was mailed to:

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Jane L. Olier  
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ATTORNEY FOR RESPONDENT

This the 28th day of September, 2009.



Office of Administrative Hearings  
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Filed

STATE OF NORTH CAROLINA

2009 DEC -7 PM 3: 53

IN THE OFFICE OF

COUNTY OF BEAUFORT

Office of  
Administrative Hearings

ADMINISTRATIVE HEARINGS

09 OSP 1903

David S Nateman  
Petitioner

vs.

North Carolina Department of Cultural  
Resources  
Respondent


**ORDER AMENDING DECISION**

Pursuant to 26 NCAC 03 .0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Decision, issued from this Office on December 7, 2009, is amended as follows:

**DECISION**

The Undersigned finds and **REVERSES** Respondent's decision to demote Petitioner for unacceptable personal conduct and/or subordination in that Respondent did not have just cause to demote Petitioner within the meaning of N.C.G.S. Section 126-35. Petitioner shall be reinstated to his former pay scale prior to demotion up until his termination. Petitioner shall be awarded any back pay, reimbursement of all lost benefits due for the period between his demotion and his termination. Petitioner shall also be awarded attorney fees and costs solely for counsel time and costs attributed to Petitioner's demotion.

This the 7<sup>th</sup> day of December, 2009.

  
Joe L. Webster  
Administrative Law Judge




A copy of the foregoing was mailed to:

David G. Schiller  
Schiller & Schiller  
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ATTORNEY FOR PETITIONER

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ATTORNEY FOR RESPONDENT

This the 8th day of December, 2009.

  
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STATE OF NORTH CAROLINA

COUNTY OF BEAUFORT

DAVID S. NATEMAN,  
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF  
CULTURAL RESOURCES,  
Respondent.

Office of  
Administrative Hearings

Filed

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
2009 DEC -7 PM 2:53 SP 1903

**DECISION**

**THIS MATTER** came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge, on July 23 and 24, 2009, in New Bern, 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 Petitioner:**

David G. Schiller  
Schiller & Schiller, PLLC  
Professional Park at Pleasant Valley  
5540 Munford Road, Suite 101  
Raleigh, NC 27612

**For Respondent:**

Karen A. Blum, Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602-0629

**ISSUES**

1. Whether the Department had just cause to demote Petitioner for just cause?
2. Whether the Department had just cause to dismiss Petitioner for just cause?

**APPLICABLE STATUTES AND RULES**

1. N.C. GEN. STAT. § 126-35. Just cause; disciplinary actions for State employees;

1. N.C. GEN. STAT. § 126-35. Just cause; disciplinary actions for State employees;
2. 25 N.C.A.C. 01J .0604. Just Cause for Disciplinary Action;
3. 25 N.C.A.C. 01J .0605. Dismissal for Unsatisfactory Performance of Duties;
4. 25 N.C.A.C. 01J .0608. Dismissal for Personal Conduct;
5. 25 N.C.A.C. 01J .0612. Demotion; and
6. 25 N.C.A.C. 01J .0614. Definitions.

**EXHIBITS**

The following exhibits offered by the Petitioner were received into evidence:

- |      |            |   |
|------|------------|---|
| P1.  | 01/09/2007 | E-mail from Crow to Nateman   |
| P2.  | 01/10/2007 | E-mail from Crow to Backstrom with forward of Nateman E-mail  |
| P7.  | 06/25/2007 | Response to Written Warning for Unsatisfactory Job Performance from Nateman to Crow                                     |
| P9.  | 02/13/2008 | E-mail from Howard to Nateman   |
| P10. | 02/27/2008 | E-mail from McKinney to Nateman   |
| P11. | 01/29/2008 | State of North Carolina Work Plan for Nateman   |
| P12. | 01/29/2008 | State of North Carolina Work Plan with Comments for Nateman   |
| P13. | 05/01/2008 | E-mail from Nateman to Perry  |
| P14. | 07/10/2008 | Demotion Letter   |
| P15. | 08/16/2008 | Position Description Form for Museum Curator, SG 70   |
| P16. | 09/02/2008 | E-mail from Howard to Nateman   |
| P17. | 10/15/2008 | Notice of Dismissal   |
| P18. | 05/27/2008 | Outgoing QAR Item Form  |
| P19. |            | Respondent's Answers and Responses to Petitioner's First Set of Interrogatories and Request for Production of Documents |

The following exhibits offered by Respondent were received into evidence:

- |      |            |  |
|------|------------|--|
| R5.  | 01/09/2007 | E-mails between Crow and Nateman                             |
| R6.  | 10/28/2008 | Nateman Grievance Form (dismissal)                           |
| R7.  | 07/20/2008 | Nateman Grievance Form (demotion)                            |
| R8.  | 05/01/2008 | E-mail from Nateman to Perry                                 |
| R10. | 08/1999    | Collections Policy of the North Carolina Maritime Museum     |
| R12. | 08/2006    | North Carolina Maritime Museum Collections Management Policy |
| R18. | 2006-07    | Nateman Work Plan  |
| R20. | 07/10/2008 | Demotion Letter from Crow to Nateman                         |
| R21. | 10/15/2008 | Dismissal Letter from Crow to Nateman                        |

**PROFFER OF EXHIBITS 1 and 2**

The undersigned finds that Respondent's Exhibits 1 (June 2008 Special Review Report re: Boat Dockage Fees) and 2 (September 2008 Special Review Report re: Loan of QAR Artifacts) should be admitted into evidence and are to be given appropriate weight by the undersigned.

**WITNESSES**

Petitioner called as witnesses:

Petitioner Dr. David S. Nateman

Respondent called as witnesses:

Mr. Bryan Andrew Strickland

Dr. Jeffrey J. Crow

Mr. Heyward McKinney, Jr.

Mr. Kenneth Bartlett Howard

Mr. Richard Timothy Stone

Ms. Darlene Marie Perry

**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 interest, 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. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Decision, which is tendered to the Office of State Personnel for a final decision.

**STIPULATED FACTS**

The Parties have stipulated that the following facts are undisputed:

1. Mr. Pat Croce has long been interested in pirates and began collecting authentic pirate-related artifacts with his purchase of the 1684 first-edition copy of Exquemelin's *Buccaneers of America*.

2. Pat Croce, along with daughter and partner Kelly Croce Sorg, hired Gallagher & Associates (Holocaust Museum, International Spy Museum) to help design the Pirate Soul Museum in Key West.
3. Pat Croce developed a relationship with both the North Carolina Maritime Museum (for the loan of pieces from its Blackbeard collection) and with the Delaware Art Museum (for its Howard Pyle pirate paintings).
4. With the help of other pirate collectors, Pat Croce's Pirate Soul Museum opened in Key West, Florida, in January 2005.
5. In or around May 2008, Pat Croce met with DreamWorks representatives to pitch the idea of a Blackbeard movie.
6. Before the meeting with DreamWorks, Petitioner Nateman, at Pat Croce's request, shipped gold dust to Pat Croce's office to use in his pitch to DreamWorks.
7. Ultimately, Spielberg and DreamWorks purchased the film rights to develop a motion picture based on the story of Blackbeard that Pat Croce had pitched.
8. David Franzoni, the Oscar-Award winning screenwriter of "Gladiator," as well as Steven Spielberg's "Amistad", is engaged to write the screenplay for the Blackbeard movie.

### **FINDINGS OF FACT**

#### **Demotion**

1. Petitioner David S. Nateman (hereinafter "Petitioner") was hired as Director of the North Carolina Maritime Museum on May 1, 2003. (T. p. 270)
2. The North Carolina Maritime Museum (hereinafter "Maritime Museum") is part of the seven-museum Division of State History Museums within the Department of Cultural Resources (hereinafter "Department"). (T. pp. 96, 109)
3. In addition to offering museum exhibits, the Maritime Museum also offers public outreach programs such as sailing, boat building, and summer science and underwater archaeology classes. (T. pp. 36, 281)
4. The Friends of the Maritime Museum (hereinafter "Friends") is a non-profit organization organized in 1979 that supports the Maritime Museum through membership, programming, fund-raising, volunteers, equipment, and other resources. (T. pp. 9, 36, 274, 287)
5. Mr. Kenneth Bartlett Howard has served as the Director of the North Carolina Museum of History (hereinafter "Museum of History") and the Division of State History Museums since March 1, 2007. (T. p. 109)

6. The Museum of History is the flagship museum of the Division of State History Museums. (T. p. 109)
7. The Division of State History Museums is organized within the Office of Archives and History in the North Carolina Department of Cultural Resources. (T. pp. 63-64, 71)
8. The Office of Archives and History employs approximately 565 employees and also includes the Division of State Historic Sites and the Division of Historical Resources. (T. pp. 63-64, 71)
9. Dr. Jeffrey J. Crow is Deputy Secretary of the Office of Archives and History and oversees all of the history programs in the State, including the Maritime Museum. (T. pp. 63, 65)
10. Crow has served as deputy secretary since 2001 and has been employed by the Department of Cultural Resources (hereinafter "the Department") for 35 years. (T. p. 64)
11. Howard reports directly to Crow. (T. p. 110)
12. Mr. Heyward McKinney, Jr., has served as Operations Officer for the Division of State History Museums since 2006. (T. pp. 95-96)
13. Petitioner initially reported directly to Howard, then, after a re-organization a few months later, he reported directly to McKinney. (T. pp. 96-97, 111)
14. Mr. Bryan Andrew Strickland, the Department's internal auditor, was asked by the Department's senior management to conduct a review of the collection of boat dockage fees at the Maritime Museum. (T. p. 27)
15. Strickland reports directly to the secretary of the Department. (T. p. 26)
16. On July 10, 2008, Crow sent Petitioner a disciplinary letter demoting Petitioner from his position as Director of the Maritime Museum, grade 75T at \$62,407, to Curator of Special Projects for the North Carolina Museum of History, grade 70T at \$56,166, effective August 1, 2008. (T. p. 271; Resp.'s Ex. 20)
17. Crow demoted Petitioner for unacceptable personal conduct and insubordination for willfully failing or refusing to carry out a reasonable directive from the Secretary of the Department. (T. p. 71; Resp.'s Ex. 20)
18. Crow relied on a special review compiled by Strickland in making his decision. (T. pp. 65-66, 71)
19. The special review included notes from Strickland's interview with Petitioner on 13 May 2008. (Resp.'s Ex. 1, pp. 11-14)
20. Strickland made findings and recommendations and presented it to the Department's secretary and chief deputy secretary in June 2008. (Resp.'s Ex. 1, pp. 2-8)

21. Crow reviewed Strickland's report in its entirety because the Maritime Museum is one of the museums under his supervision. (T. pp. 65-66)
22. After reviewing Strickland's report, Crow concluded that Petitioner "was still depositing funds into the Friends account when we had specifically set up a custodial account for the museum to manage those funds in March 2007." (T. p. 71; *see generally* Resp.'s Ex. 1)
23. In 1997, the Friends purchased approximately 35-acres of waterfront property at Gallants Channel using mostly legislative appropriations, in addition to \$100,000 they had raised. (T. pp. 92, 273)
24. The Friends acquired the property to develop and donate to the State for the Maritime Museum's expansion. (T. p. 273)
25. In 1999, the North Carolina Council of State approved the transfer of Gallants Channel to the State. (T. p. 93)
26. For unknown reasons, the deed was not recorded and the State did not take possession at that time. (T. p. 93)
27. In 2006, the Maritime Museum and the Friends helped host an event for tall ships in the Western Hemisphere to congregate in Beaufort, North Carolina. (T. pp. 68-69). The event was called the "Pepsi Americas Sail" event and the Friends spent close to \$4 million on improvements to Gallants Channel in preparation for the event. (T. p. 273)
28. The Friends used the Gallants Channel property as collateral for approximately \$4 million to underwrite the tall ships event, and had no way to pay off the debt. (T. pp. 69, 94)
29. The Friends incurred significant debt—up to \$7 million—by the end of the Tall Ships event. (T. pp. 67, 114)
30. The Friends deeded Gallants Channel to the State in October 2006. (T. pp. 53-54; 93-94)
31. In response to bad publicity over the Tall Ships event, in late 2006 or early 2007, Libba Evans, the secretary of the Department of Cultural Resources, in consultation with the Governor's Office, directed that the Maritime Museum and Friends separate its business dealings, including programming, finances and other activities, until the Friends could liquidate its debts. (T. pp. 31, 66, 69-70, 75-79, 90, 99, 104, 114; Resp.'s Ex. 20, p. 1)
32. Secretary Evans's directive to Dr. Nateman specifically "addressed programs." T. Vol. II, p. 277, lines 14-15. Dr. Nateman sent an email to Dr. Crow regarding some questions about what was expected of him. Petitioner's Exhibit 2. Dr. Nateman's email states: "all of our attentions were focused on programs because the Secretary had said she wanted the museum to take over responsibility for programs that had been administered by the friends." T. Vol. II, p. 284, lines 2-5. Dr. Nateman stated in a June 25, 2007 letter to Dr. Crow what he understood the goal of the directive to be, as it was explained to him: "for the museum to



take on administrative responsibilities relative to museum programs that the Friends of the Museum had traditionally taken on because of the inability of the museum historically to take on said services." T. Vol. II, p. 288, lines 7-12; Petitioner's Ex. 7. Dr. Nateman never received any correction from Dr. Crow or anyone else regarding his understanding of the goal of the directive. T. Vol. II, p. 288, lines 13-19.

33. To comply with the directive, in March 2007 the Department established a custodial account to handle any funds coming into the Maritime Museum. (T. pp. 31, 37, 80, 113, 114-16)

34. These funds had previously been handled by the Friends. (See T. p. 114)

35. The Department recognized that a complete separation would not be possible. (Petr.'s Ex. 2)

36. Heyward McKinney, the Chief Operations Officer of the Department and one of Dr. Nateman's supervisors understood the directive to separate the friends to mean that the Museum would "take over programming" that was previously run by the Friends so that the Friends could focus on paying off their debt from the Pepsi America's Sail. T. Vol. I, p. 99, lines 3-7. The kinds of programs that McKinney understood the directive to mean in separating dealings with the Friends were educational programs, including sailing programs and field trips, which the Friends previously assisted to fund and operate for the Museum. T. Vol. I, p. 105, lines 5-17.

37. There is no evidence in the record that the dockage fees were used for programming. T. Vol. II, p. 318, lines 3-6. Docking boats at Gallants Channel was "not a program of the museum." T. Vol. II, p. 316, lines 2-3.

38. The "Judgment" Section on Dr. Nateman's work plan states: "Misunderstanding on depositing program revenues only into custodial account. Should have discussed further. Not given written instructions." T. Vol. II, p. 299, lines 14-17; Petitioner's Ex. 12. Secretary Evan's directive regarding the Friends was only verbal, and not in writing. T. Vol. II, p. 279, line 16.

39. Dr. Crow acknowledged that in some instances the Museum would have to continue to work with the Friends. There could never be a complete separation between the Museum and the Friends.

40. Heyward McKinney and Ken Howard, both supervisors of Dr. Nateman, opposed Dr. Crow's decision to demote Dr. Nateman. T. Vol. I, p. 86, lines 21-25; p. 87, lines 1-2.

41. The Friends owned all boats used for sailing programs, equipment in watercraft center and fabrication shop, and owned several of the buildings used by the Maritime Museum. (T. pp. 278-79; Petr.'s Ex. 2)

42. In his demotion Grievance dated July 20, 2007, Petitioner states, "There was never any guidance provided by DCR Administration beyond general, vague statements regarding this directive." (Resp.'s Ex. 7)



43. After receiving the directive from Secretary Evans, Crow met with Petitioner on 8 January 2007 to discuss the directive. (T. p. 75)

44. Petitioner had a list of 10-15 questions, which he and Crow went over line by line. (T. p. 76)

45. On January 9 and 10, 2007, Petitioner followed up with several more questions via electronic mail on January 9, 2007, Petr.'s Ex. 1, and January 10, 2007, Petr.'s Ex. 2. (T. pp. 76, 359-61)

46. Petitioner sought no further clarification of the directive from Crow. (T. p. 79)

47. A few months after becoming Director of the Division of State History Museums on March 1, 2007, Howard spoke with Petitioner and instructed him not to deposit any more funds into the Friends accounts. (T. pp. 115-16)

48. On June 15, 2007, Crow warned Petitioner about following the directive. (T. p. 312; Petr.'s Ex. 7, p. 4; Resp.'s Ex. 20, p. 2)

49. Petitioner responded to Crow on June 25, 2007 by stating, "As Director of [the Maritime Museum], I have a responsibility to call to the attention of DCR administration decisions and policies that may result in negative publicity, result in adverse effects that may, in the long run, do more damage than good." (Petr.'s Ex. 7, p. 4).

50. Petitioner further stated that a complete separation would be "impractical," and "[t]o have made a complete break would have resulted in circumstances that I believe would have been very embarrassing for the Secretary and DCR. It has seemed prudent to do what makes sense." (Petr.'s Ex. 7, p. 5; Resp.'s Ex. 20, p. 3). In Petitioner's communication with Dr. Crowe, he sets forth how he had attempted to separate the Museum's affairs from that of the Friends, including following the directive not to attend any Friends' Board meetings. Petitioner points out that many of the assets of the Friends are necessary for the functioning of the museum and its programs, all of the boats used in the museum's very successful Jr. Sailing Program are owned by the Friends as well as many of the traditional vessels used for museum programs. Petitioner also pointed out that most, if not all of the equipment in the Watercraft center and the Fabrication Shop are owned by the Friends. Petr. Ex. 7, p. 5.

51. Petitioner testified that the only matter that was never addressed was the issue of the restricted fund accounts where people made donations; that his understanding was shared by his business manager, Bob Springle, and it was also shared by the executive director of the Friends, Brent Creelman. Mr. Creelman and some of the board members of the Friends attended several additional meetings with Secretary Evans trying to understand exactly what Secretary Evans wanted in terms of the separation. Dr. Crow admitted and acknowledged that there could not be a complete separation. Petitioner further testified about the assets owned by the Friends consistent with his earlier communications with Dr. Crow and that the only way to completely sever ties with the Friends would have been to dissolve the Friends organization. Petitioner also testified that it was within these parameters that he was trying to work, and at the same time he was trying to maintain goodwill in the community towards

Raleigh; that for years there had been friction between Eastern North Carolina, Beaufort and Raleigh. (T. pp. 278-279)

52. Petitioner continued to deposit some Maritime Museum funds into the Friends' account after the account was established. (T. p. 71; Resp.'s Ex. 2, p. 182)

53. In February 2008, a Beaufort newspaper made a public records request of the Department for information about boats berthing at Gallants Channel and dockage fees being collected. (T. pp. 56, 74)

54. Crow was unaware of and did not authorize boats docking at Gallants Channel for a fee. (T. pp. 66, 74)

55. Other than the MEKA II and ROYALISTE, McKinney, Petitioner's immediate supervisor, was also unaware of and did not authorize boats docking at Gallants Channel for a fee. (T. pp. 66, 102)

56. Petitioner admitted that he interpreted the directive without consulting McKinney, about the Maritime Museum's authority to collect dockage fees and the propriety of depositing checks made out to the Maritime Museum in the Friends' account. (Resp.'s Ex. 20, p. 3)

57. As a result of the newspaper's request, Strickland, the Department's internal auditor, was directed to investigate the dockage fees, and to investigate further the separation of the Maritime Museum and the Friends as required by the Department's secretary. (T. pp. 29-30, 42-43, 66; Resp.'s Ex. 20, p. 1)

58. Strickland conducted his special review between February 2008 and June 2008. (T. p. 56)

59. During that time, he collected documentation and interviewed Petitioner, Brent Creelman, executive director of the Friends, Bobby Springle, the Maritime Museum's business officer, and Cindy Jones, Springle's assistant. (T. pp. 38, 41, 54-55)

60. Strickland also examined the Maritime Museum's custodial account and the Friends' general ledger. (T. p. 38)

61. Strickland examined the general ledger to identify checks made payable to the Friends, then identified invoices to reconcile the amounts and determine why money was transferred between the Maritime Museum and the Friends. (T. p. 38)

62. Strickland's investigation revealed that, between January 2007 and January 2008, nine boats had docked at Gallants Channel. (T. pp. 57, 62; Resp.'s Ex. 1, pp. 176-196)

63. As of 31 March 2008, approximately \$3500 had been collected in dockage fees. (Resp.'s Ex. 20, p. 2)

64. Petitioner knew there was no policy or agreement in place for collecting dockage fees. (T. pp. 72, 102, 303-04, 315; Resp.'s Ex. 20, p. 1)
65. Petitioner knew a draft policy or agreement had been sent to senior management in Raleigh but had not yet been approved. (T. p. 303; Resp.'s Ex. 1, p. 12; Resp.'s Ex. 7)
66. The Department had conferred with the attorney in the Attorney General's Office who represents the State Property Office about how to collect dockage fees. (T. pp. 73-74)
67. The attorney advised the Department that the Department was not authorized to collect dockage fees. (T. p. 73-74)
68. Crow concluded that the Department should not collect dockage fees at Gallants Channel. (T. p. 74)
69. Crow testified that, had he known about boats docking at Gallants Channel, he would have sought the advice of attorneys in the Attorney General's Office representing the Department and the State Property Office. (T. p. 74)
70. Dr. Nateman did not seek the advice of counsel nor his supervisor's approval before allowing boats other than the MEKA II and ROYALISTE to dock at Gallants Channel. (T. pp. 74-75, 101-03; see Resp.'s Ex. 1, p. 180; Resp.'s Ex. 20, p. 2) Dr. Nateman was never provided with a specific instruction that boats were not to dock at the Gallants Channel. T. Vol. I, p. 89, lines 19-23.
71. According to information provided by Creelman and BB&T, the Friends bank, at least three of the checks made payable to the Maritime Museum had been deposited into a Friends' account. (T. pp. 50-51; Resp.'s Ex. 1, pp. 183-85)
72. The three checks were dated October 30, 2007, November 16, 2007, and January 2, 2008. (Resp.'s Ex. 1, pp. 183-85)
73. The other checks for dockage fees were made payable to and placed into the account of the Friends. (T. p. 52)
74. Documents received by Strickland from the Friends indicate that the monies received were for "Rental Income," "Ship Rental Income," "Dockage" or "dockage fee." (Resp.'s Ex. 1, p. 154, 165, 176-96)
75. Petitioner told Strickland during his investigation on May 13, 2008 that "he did not think that putting the funds into a restricted account was considered doing business with the Friends." (Resp.'s Ex. 1, p. 12)
76. In his July 20, 2007 response filed with his demotion grievance, Petitioner stated, "My rationale for having these checks deposited into the Friends' restricted account was that they were not program revenue." (Resp.'s Ex. 7)

77. Petitioner also stated that, with the exception of monies collected for the MEKA II and ROYALISTE, the monies were considered donations. (T. pp. 315-16; Resp.'s Ex. 7)

78. At hearing, Petitioner testified that he "did not consider these kinds of moneys to be state funds." (T. p. 313)

79. On January 24, 2008, \$250 for the dockage of the Mistress was deposited into the Director's Discretionary Fund. (T. p. 53; Resp.'s Ex. 1, p. 154)

80. On January 24, 2008, the Gallants Channel property was owned by the State of North Carolina. (T. pp. 53-54)

81. The undersigned finds that based upon the longstanding history of the very close and financially intertwined relationship between the Museum and the Friends, Petitioner reasonably complied with the Department's directive to separate the two entities within a reasonable time after it was made completely clear to him what needed to be done. After Dr. Nateman communicated with Maryanne Friend, the director of marketing and publicity for the Department, that he was putting money collected at Gallants Channel into the Friend's Gallants Channel Maintenance account, she said she would check if this was correct. T. Vol. II, p. 320, lines 4-6; p. 319, lines 1-13. When Dr. Nateman was told to stop putting funds into the Friends' account and to put them into the custodial account, he stopped and removed the money that had been in the Friends' account and placed it into the custodial account. T. Vol. II, p. 319, lines 14-21.

82. The undersigned finds that the Secretary's directive with respect to all aspects of separating the Museum from the Friends was not sufficiently clear to Petitioner or his supervisors.

83. The undersigned finds there was no evidence in the record that the moneys collected for dockage fees or donations were improperly used by Petitioner, converted to his own use or used by the Friends.

84. The undersigned finds Petitioner's testimony credible concerning his efforts to comply with Respondent's directive to separate the Museum from the Friends.

#### Dismissal

85. On 15 October 2008, Crow sent Petitioner a disciplinary letter dismissing Petitioner from his position as Curator of Special Projects for unacceptable personal conduct and unsatisfactory work performance. (Resp.'s Ex. 21)

86. Crow dismissed Petitioner for unacceptable personal conduct in loaning artifacts from the shipwreck purported to be Blackbeard's *Queen Anne's Revenge* (hereinafter "QAR") to several individuals or museums and for willful violation of work policies. (T. pp. 125, 214; Resp.'s Ex. 21)

87. Crow relied on a special review compiled by Strickland in making his decision. (T. p. 222)
88. The special review included notes from Strickland's interview with Petitioner on September 4, 2008. (T. p. 222; Resp.'s Ex. 2, pp. 68-70)
89. After conducting an investigation, Strickland drew conclusions and made recommendations, which he submitted to the secretary and chief deputy secretary of the Department. (T. p. 131; *see generally* 123-146; Resp.'s Ex. 2, pp. 285-96)
90. Crow agreed with the recommendations in Strickland's special review. (T. p. 223; *see generally* Resp.'s Ex. 2)
91. After Petitioner's demotion, the Department discovered some irregularities in the loans of several *QAR* artifacts. (T. p. 210)
92. On or around August 25, 2008, the Department was contacted by the Carteret News-Times about loans of gold dust salvaged from the *QAR* to Pat Croce, a private individual, or his Pirate Soul Museum in Key West, Florida. (T. pp. 210-11; Resp.'s Ex. 2, p. 152-53)
93. At the end of August 2008, Strickland was asked by the Department's senior management to conduct a review of loans of *QAR* artifacts. (T. p. 124; Resp.'s Ex. 2, p. 286)
94. Strickland interviewed Petitioner, Ms. Darlene Perry, the Maritime Museum's collections manager, Mr. Bobby Springle, and Ms. Cindy Jones, and collected documents related to *QAR* artifacts and loans to determine what policies were in place and whether any policies had been violated. (T. pp. 125, 132-33)
95. Strickland reviewed a November 1, 2004 agreement executed by Petitioner and Pat Croce of Pirate Soul, LLC, for the 10-year loan of *QAR* artifacts. (T. p. 128; Resp.'s Ex. 2, pp. 44-48)
96. Strickland also reviewed more recent loans of gold dust to Croce to pitch a Blackbeard movie to Steven Spielberg's DreamWorks, Resp.'s Ex. 2, pp. 219-26, and loans to other for-profit museums, including the National Museum of Crime and Punishment, Resp.'s Ex. 2, p. 255, and the Door County Maritime Museum, Resp.'s Ex. 2, pp. 13-14. (T. pp. 139, 219, 221, 325; Stipulated Facts 5-6; *see generally* Resp.'s Ex. 2, pp. 207-83)
97. Strickland identified the August 1999 Collections Policy of the North Carolina Maritime Museum (hereinafter "1999 Collections Policy") and 2006 North Carolina Maritime Museum Collections Management Policy (hereinafter "2006 Collections Policy") in place at the time of the loans.
98. The 2006 Collections Policy was written by Perry and approved by Petitioner. (T. pp. 155, 171-72; Resp.'s Ex. 12)



99. Petitioner violated the Maritime Museum's collections policies by approving loans to a for-profit, non-American Association of Museums (hereinafter "AAM") accredited museum. (T. p. 126)
100. The August 1999 Collections Policy of the North Carolina Maritime Museum, Resp.'s Ex. 10, was in effect at the time of the 2004 10-year loan to Pirate Soul. (T. pp. 129, 134-35; Resp.'s Ex. 2, pp. 82-87)
101. Subsection II.A.4.c) of the 1999 Collections Policy states: "No artifacts, objects, or biological specimens shall be loaned to any for-profit institutions or any individual for personal use." (T. p. 134; Resp.'s Ex. 2, p. 84)
102. According to the Facility Report sent by Pirate Soul to Petitioner on 18 October 2004, Pirate Soul is not a non-profit, educational organization under the provisions of IRS Code 501(c). (Resp.'s Ex. 2, p. 40; see Resp.'s Ex. 2, pp. 38-43, 190-94)
103. The loans to Pirate Soul and other non-profit museums may have jeopardized the Department's September 1, 1998 agreement with Intersal and Maritime Research Institute giving to the Department certain rights, including rights to the *QAR* artifacts. (T. pp. 214-15; Resp.'s Ex. 2, pp. 257-69)
104. Paragraph 21 of that agreement states: "MRI and the State of North Carolina jointly shall have the exclusive right to nationally and internationally tour and exhibit a representative cross section of the artifacts, if MRI establishes its compliance with standard museum practices with regard to a proposed tour and exhibit. Either entity may initiate and administer such a tour, and either entity may participate in a tour initiated and administered by the other. Each entity shall be responsible for the costs incurred by their participation in such a tour and funds generated by each entity on such a tour may be used to cover that entity's costs." Paragraph 21 further states, "Nothing in this paragraph shall affect the Department's responsibility and authority with regard to the curation of the artifacts and their display for non commercial purposes." (T. pp. 216-17; Resp.'s Ex. 2, pp. 263-64)
105. Crow witnessed the September 11, 1998 agreement for the State of North Carolina. (T. p. 215; Resp.'s Ex. 2, p. 269)
106. Petitioner admitted that he was aware of the agreement when he authorized the loan to Croce. (T. p. 350)
107. Subsection II.A.4.c) of the 1999 Collections Policy states: "Certain valuable artifacts, biological specimens, or large teaching collections can only be loaned to AAM accredited museums meeting certain specific standards concerning conservation, security, insurance, shipping, and exhibition set forth by the Director, Curators, Manager, and Registrar." (T. p. 130; Resp.'s Ex. 2, p. 84)
108. The Maritime Museum is accredited through the American Association of Museums because it meets specific standards for conservation, security, insurance, shipping, and exhibition. (T. pp. 130, 148, 218-19)

109. Pirate Soul is not an AAM-accredited museum. (T. pp. 126-27, 130; Resp.'s Ex. 2, p. 182)
110. Petitioner also violated the 1999 Collections Policy by making a 10-year loan of *QAR* artifacts. (T. pp. 131-32)
111. Subsection II.A.4.c) goes on to state that certain valuable artifacts "can be loaned up to one year and request for renewal must be in writing 30 days in advance." (T. p. 132; Resp.'s Ex. 2, p. 84)
112. Subsequent loans to Pirate Soul, National Museum of Crime and Punishment, and Door County Museum also violated the 2006 Collections Policy's requirement that loans be made to non-profit institutions.
113. The 2006 Collections Policy states, "Loan of objects from the collection to other non-profit, educational institutions will be considered on a case-by-case basis, and all outgoing loans are subject to the approval of the Director." (Resp.'s Ex. 2, p. 98)
114. The National Museum of Crime and Punishment and Door County Museum are for-profit museums. (T. pp. 173, 220)
115. Petitioner also violated the 2006 Collections Policy by loaning *QAR* artifacts to an individual. (T. pp. 134, 141)
116. The Loans section of the 2006 Collections Policy states: "Under no circumstances will objects from the museum's main collection be loaned to private individuals, businesses, or homes, or to institutions not open to the public." (Resp.'s Ex. 12, p. 11)
117. Petitioner instructed the Maritime Museum's staff to ship the vials of gold dust via FedEx overnight delivery to Croce's home. (T. pp. 160-61; Resp.'s Ex. 2, p. 8)
118. On May 1, 2008, Croce sent Petitioner an e-mail stating that he was finally pitching his Blackbeard movie in Hollywood and needed a favor: "Could you lend me a couple pieces of gold dust from your Queen Anne's Revenge recovery. . . . My hope is to use the gold dust as part of our presentation to make our pitch come to life." (Resp.'s Ex. 2, p. 10)
119. Petitioner responded in part, "Not a problem, my friend. I have no problem lending you one of the small vials of gold dust—be sure to have a magnifying box to use with it. Where do you want me to send it? I will need to look into an art handler, have someone deliver it, or you may need to send someone to pick it up since you need it so soon. Please send me details and we will proceed." (Petr.'s Ex. 13)
120. Croce replied, "You are the best!! Please send it to my home address at 835 Mt Moro Rd, Villanova, PA 19085. Don't you think insured overnight fedex delivery would suffice? I leave early Tuesday morning for LA. This will make great buzz when the movie eventually gets picked up—how we used real Blackbeard gold for the pitches!! PC" (Petr.'s Ex. 13)

121. Petitioner forwarded the string of e-mails to Perry and requested that she look into an appropriate means for shipping the gold and inquiring, "Would overnight fedex delivery work?" (Petr.'s Ex. 13; Resp.'s Ex. 8; T. p. 157)
122. Perry had been the Collections Manager at the Maritime Museum since 15 June 2006. (T. p. 147)
123. Perry told Strickland that she confronted Petitioner and told him he could not loan the artifacts to a private individual. (Resp.'s Ex. 2, p. 2; T. pp. 157-59)
124. Petitioner later instructed Perry to change the loan form to show the loan's going to Pirate Soul, but to send the vials to Croce's home via FedEx. (T. p. 160-61; Resp.'s Ex. 2, pp. 8, 74, 219-26)
125. The Loans section of the 2006 Collections Policy states, "To qualify for a loan, the borrowing institution must supply an AAM Standard Facility Report, or [a Maritime Museum] Facilities Report, a certificate of insurance, agree to bear all cost of packing and transporting objects in a manner agreeable to [the Maritime Museum], and agree to protect the object in ways consistent with sound museum practices, subject to stipulations by the Collections Department." (Resp.'s Ex. 12, p. 11; see T. p. 168)
126. FedEx is not an authorized art handler or shipper. (T. pp. 169, 221-22; see 197-99)
127. Petitioner admitted to Strickland that he did not ask anyone about the propriety of the gold dust loan to Croce. (Resp.'s Ex. 2, p. 69)
128. Petitioner told Strickland that he made an exception for the loan to Croce, stating that policies were not etched in stone but were merely guidelines and could be bent under special circumstances. (Resp.'s Ex. 2, p. 69)
129. Petitioner also told Strickland that it was only a little gold dust and the Maritime Museum had more. (Resp.'s Ex. 2, p. 70)
130. Petitioner testified that the vials of gold dust "were valuable artifacts, but they weren't priceless or uniquely priceless in that sense." (T. p. 343)
131. The Permanent Collection section of the 2006 Collections Policy states: "Objects recovered from the shipwreck *Queen Anne's Revenge* are highly valuable due to history surrounding Blackbeard." (T. p. 182; Resp.'s Ex. 12, p. 3)
132. McKinney testified that a "precious artifact" such as the gold dust should have been shipped by courier and in the custody of a museum official. (T. p. 198)
133. Before coming to the Museum of History in 2006, McKinney was the Chief Operating Officer at the North Carolina Museum of Art. (T. pp. 95-96, 197)
134. When asked if it was common to ship an artifact directly to an individual to use as a prop, McKinney testified, "I've never known that to happen in any - in the museums that I've



worked with. The Art Museum, of course, loaned art objects frequently, but they were always loaned to other institutions and they were always shipped by a fine arts carrier or either a courier. Someone from the museum would physically carry the object to wherever it was going." (T. pp. 197-98)

135. Crow testified that the museums he oversees would normally ship artifacts using an authorized art handler that provides proper security and shipping standards. (T. pp. 221-22)

136. Petitioner also violated the 1999 Collections Policy because he failed to seek the approval of the Collections Committee before authorizing the loans. (T. p. 135-36)

137. Subsection I.C.5. of the 1999 Collections Policy states: "A Collections Committee consisting of the Director, Curator of History and Technology, Curator of Education, Collection Manager, Registrar, and one board member from the Museum's Friends Organization will meet monthly, if needed to approve objects for donation, designate placement in the Permanent or Teaching Collections, advise as to methods of conservation of objects, approve long-term loans to and from the museum." (Resp.'s Ex. 2, p. 83; Resp.'s Ex. 10)

138. Long-term loans are more than one year. (T. p. 171)

139. There is no evidence in the record that Petitioner sought or received the approval of the Collections Committee prior to authorizing the 10-year loan to Pirate Soul. (T. pp. 136, 219)

140. Strickland also concluded that funds from loans of State-owned artifacts had been placed in the Friends' account instead of a State account. (T. pp. 137-39)

141. Financial documents from the Friends indicate that, as of February 21, 2008, the Friends had deposited \$43,168 into its account for rental income from Pirate Soul for QAR artifacts. (T. p. 138; Resp.'s Ex. 2, p. 78)

142. Petitioner knew that the funds from the loans were being deposited with the Friends. (Resp.'s Ex. 2, p. 70)

143. Petitioner admitted that on Tuesday, July 15, 2008, he sent an e-mail to Croce stating, "Pat, I hate to ask this, but can you please return that last item to NCMM, attention Bob Springle, ASAP. I would appreciate it greatly. If we need to chat about it, please don't hesitate to call me on my cell." (T. pp. 356-57)

144. Petitioner also admitted that the same day, he received a reply from PC@PirateSoul.com stating, "Sure, bro. Right away." (T. p. 357)

145. Petitioner admitted that on July 16, 2008, he sent an email to [BobSpringle@ncmail.net](mailto:BobSpringle@ncmail.net) stating, "Bobby, thanks for letting me know things are back where they should be." (T. p. 358)

146. On July 16, 2008, the Registrar for the Maritime Museum sent a letter to Croce acknowledging receipt of one vial of gold dust on loan to him. (Resp.'s Ex. 2, p. 225)

147. Petitioner admitted that on July 16, 2008, he sent an e-mail to BobSpringle@ncmail.net stating, "Bobby, thanks for letting me know things are back where they should be." (T. p. 358)

148. Respondent's testimony is credible concerning Petitioner's failure to follow the collections policy.

### 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 and the subject matter as such.

2. The procedural requirements for demoting and dismissing Petitioner are not at issue in this case.

3. Respondent's Exhibits 1 and 2 are admissible and have been admitted pursuant to 26 NCAC 03.0122, § 150B-29, and Rules 803(8) and 901 of the N.C. Rules of Evidence. The exhibits are public records and reports that are relevant and their authenticity was sufficiently established. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 552 (D. Md. 2007), *Chika v. Planning Research Corp.*, 179 F. Supp. 2d 575 (D.Md. 2002).

4. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C.G.S. 126-1 *et seq.* Petitioner, therefore, could only "be warned, demoted, suspended or dismissed by" Respondent "for just cause." N.C. GEN. STAT. § 126-35 (2009); 25 NCAC 01J .0604(a).

5. Just cause is a legal basis for the termination or demotion of state employees. As such, it requires the application of legal principles and its determination is, therefore, a question of law. *Skinner v. N.C. Dep't of Correction*, 154 N.C. App. 270, 280, 572 S.E. 2d 184, 191 (2002).

6. "Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, 'whether the employee engaged in the conduct the employer alleges,' and second, 'whether that conduct constitutes just cause for [the disciplinary action taken].'" *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (alteration in original) (citation omitted).

7. "Just cause" like justice itself . . . can only be determined upon an examination of the facts and circumstances of each individual case. *Kelly v. N.C. Dep't. of Environment and Natural Resources*, \_\_\_ N.C. App. \_\_\_, 664 S.E. 2d 625 (2008) (quoting *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900-01 (2004)).

8. "Just cause" includes "unacceptable personal conduct." 25 N.C.A.C. 1J .0604(b)(2); *N.C. Dep't of Corr. v. McNeely*, 135 N.C. App. 587, 592, 521 S.E.2d 730, 734 (1999). Unacceptable personal conduct is "conduct for which no reasonable person should expect to receive prior warning," 25 N.C.A.C. 1J .0614(i)(1), and includes "the willful violation of known or written work rules." 25 N.C.A.C. 1J .0614(i)(4) (2009).

9. The North Carolina Court of Appeals has held that "a willful violation occurs when the employee willfully takes action which violates the rule and does not require that the employee intend his conduct to violate the work rule." *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

10. Insubordination is "[t]he willful failure or refusal to carry out a reasonable order from an authorized supervisor," and is also considered unacceptable personal conduct for which any level of discipline may be imposed without prior warning. 25 N.C.A.C. 1J .0614(h) (2009).

#### Demotion

1. The substantial and competent evidence of record supports a conclusion that Petitioner did not willfully violate known or written work rules and directives of his superiors with respect to separating the Maritime Museum from the Friends in violation of 25 NCAC 1J .0614 under the specific facts and circumstances of this case.

2. The substantial and competent evidence of record does not support a conclusion that employer had just cause to demote Petitioner pursuant to Section 126-34.1 & 35, and NCAC 01I .02304. Moreover, the undersigned finds that Respondent did not prove that Petitioner's conduct constituted "insubordination."

3. Respondent has not met its burden of proof and has not established substantial and competent evidence in the record that it had just cause to demote Petitioner for unacceptable personal conduct and insubordination regarding separating the Maritime Museum from the Friends pursuant to 126-35(d).

#### Dismissal

1. The substantial and competent evidence of record supports a conclusion that Petitioner did not willfully violate known or written work rules and directives of his superiors relating to separating the Maritime Museum from the Friends. Petitioner's conduct with regard to complying with the secretary's directive to separate the Maritime Museum from the Friends did not constitute insubordination and unacceptable personal conduct, and is not just cause for demotion or dismissal pursuant to N.C.G.S. Section 126-35 and 25 NCAC 1J .0614 under the specific facts and circumstances of this case. The undersigned finds as a matter of law that the Secretary's directives were not sufficiently clear to the Petitioner or his supervisors as to all aspects of the directive. Petitioner's supervisors felt that he should not have been demoted under the facts and circumstances of this case.

2. The substantial and competent evidence of records supports a conclusion that Petitioner knew about the Collections policies but chose to knowingly disregard them.

Petitioner's actions violated a known or written work rules and constitutes conduct for which no reasonable person should expect to receive prior warning. Respondent has met its burden of proof and established that it had just cause to terminate Petitioner for unacceptable personal conduct pursuant to N.C.G.S. Section 126-35 (d) and 25 NCAC 1J .0614.

On the basis of the above-noted Findings of Fact and Conclusions of Law, the undersigned makes the following:

**DECISION**

The Undersigned finds and **REVERSES** Respondent's decision to demote Petitioner for failing to unacceptable personal conduct and/or subordination in that Respondent did not have just cause to demote Petitioner within the meaning of N.C.G.S. Section 126-35. Petitioner shall be reinstated to his former pay scale prior to demotion up until his termination. Petitioner shall be awarded any back pay, reimbursement of all lost benefits due for the period between his demotion and his termination. Petitioner shall also be awarded attorney fees and costs solely for counsel time and costs attributed to Petitioner's demotion.

The Undersigned **AFFIRMS** Respondent's dismissal of Petitioner for knowingly violating Respondent's Collection Policy in that Respondent had "just cause" for such disciplinary decision within the meaning of N.C.G.S. § 126-35.

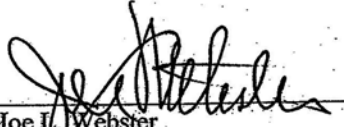
Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent has not met its burden of proof showing that it had just cause to demote Petitioner for unacceptable personal conduct and insubordination, and Respondent has met its burden of proof to dismiss Petitioner for unacceptable personal conduct relating to failure to follow the known Collections Policies.

**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. § 150B-36(a).

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 7<sup>th</sup> day of December, 2009.

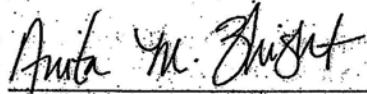
  
Joe L. Webster  
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 8th day of December, 2009.



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