

NORTH CAROLINA REGISTER

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February 15, 2013

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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.

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NORTH CAROLINA REGISTER
Publication Schedule for January 2013 – December 2013

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 th day from publication in the Register
27:13	01/02/13	12/06/12	01/17/13	03/04/13	03/20/13	05/01/13	05/2014	09/29/13
27:14	01/15/13	12/19/12	01/30/13	03/18/13	03/20/13	05/01/13	05/2014	10/12/13
27:15	02/01/13	01/10/13	02/16/13	04/02/13	04/22/13	06/01/13	05/2014	10/29/13
27:16	02/15/13	01/25/13	03/02/13	04/16/13	04/22/13	06/01/13	05/2014	11/12/13
27:17	03/01/13	02/08/13	03/16/13	04/30/13	05/20/13	07/01/13	05/2014	11/26/13
27:18	03/15/13	02/22/13	03/30/13	05/14/13	05/20/13	07/01/13	05/2014	12/10/13
27:19	04/01/13	03/08/13	04/16/13	05/31/13	06/20/13	08/01/13	05/2014	12/27/13
27:20	04/15/13	03/22/13	04/30/13	06/14/13	06/20/13	08/01/13	05/2014	01/10/14
27:21	05/01/13	04/10/13	05/16/13	07/01/13	07/22/13	09/01/13	05/2014	01/26/14
27:22	05/15/13	04/24/13	05/30/13	07/15/13	07/22/13	09/01/13	05/2014	02/09/14
27:23	06/03/13	05/10/13	06/18/13	08/02/13	08/20/13	10/01/13	05/2014	02/28/14
27:24	06/17/13	05/24/13	07/02/13	08/16/13	08/20/13	10/01/13	05/2014	03/14/14
28:01	07/01/13	06/10/13	07/16/13	08/30/13	09/20/13	11/01/13	05/2014	03/28/14
28:02	07/15/13	06/21/13	07/30/13	09/13/13	09/20/13	11/01/13	05/2014	04/11/14
28:03	08/01/13	07/11/13	08/16/13	09/30/13	10/21/13	12/01/13	05/2014	04/28/14
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28:05	09/03/13	08/12/13	09/18/13	11/04/13	11/20/13	01/01/14	05/2014	05/31/14
28:06	09/16/13	08/23/13	10/01/13	11/15/13	11/20/13	01/01/14	05/2014	06/13/14
28:07	10/01/13	09/10/13	10/16/13	12/02/13	12/20/13	02/01/14	05/2014	06/28/14
28:08	10/15/13	09/24/13	10/30/13	12/16/13	12/20/13	02/01/14	05/2014	07/12/14
28:09	11/01/13	10/11/13	11/16/13	12/31/13	01/21/14	03/01/14	05/2014	07/29/14
28:10	11/15/13	10/24/13	11/30/13	01/14/14	01/21/14	03/01/14	05/2014	08/12/14
28:11	12/02/13	11/06/13	12/17/13	01/31/14	02/20/14	04/01/14	05/2014	08/29/14
28:12	12/16/13	11/21/13	12/31/13	02/14/14	02/20/14	04/01/14	05/2014	09/12/14

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.



Pat McCrory
Governor

January 23, 2013

EXECUTIVE ORDER NO. 2

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

Pursuant to the authority vested in me as Governor by the Constitution of the State of North Carolina and N.C.G.S. §166A-19.20:

Section 1. I hereby declare that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(18) exists in the State of North Carolina as a result of a landslide obstructing both directions on U.S. Highway 441 beginning on January 15, 2013. The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) includes the following counties: Graham, Jackson and Swain and areas within the Qualla Boundary of the Eastern Band of the Cherokee.

Section 2. I order all state and local government entities and agencies to cooperate in the implementation of the provisions of this declaration and the provisions of the North Carolina Emergency Operations Plan.

Section 3. I delegate to Kieran J. Shanahan, the Secretary of the Department Public Safety, or his/her designee, all power and authority granted to me and required of me by Article 1A of Chapter 166A of the General Statutes for the purpose of implementing the State's Emergency Operations Plan and deploying the State Emergency Response Team to take the appropriate actions as is necessary to promote and secure the safety and protection of the populace in North Carolina.

Section 4. Further, Secretary Shanahan, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in G. S. § 143B-602.

Section 5. I further direct Secretary Shanahan, to seek assistance from any and all agencies of the United States Government as may be needed to meet the emergency and seek reimbursement for costs incurred by the State in responding to this emergency.

Section 6. I hereby order this declaration: (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 the Department of 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 declaration.

Section 7. This declaration does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

Section 8. Pursuant to N.C.G.S. § 166A-19.23, this declaration triggers the prohibition against excessive pricing as provided in N.C.G.S. § 75-37 and 75-38 in the declared emergency area.

Section 9. This declaration is effective Wednesday, January 23, 2013 and shall remain in effect until rescinded.

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 23rd day of January in the year of our Lord two thousand and thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.




Pat McCrory
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 Fire, 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.*

Public Hearing: *March 11, 2013, 9:00AM, NCSU McKimmon Center, 1101 Gorman Street, Raleigh, NC 27606. Comments on both the proposed rule and any fiscal impact will be accepted.*

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. Comments on both the proposed rule and any fiscal impact will be accepted. Comment period expires on April 16, 2013.*

Statement of Subject Matter:

1. Request by Tom Brown, with the NC Building Inspectors Association, to amend the 2012 NC Residential Code, Sections R101.2, R101.2.1, R101.2.2, and R202. The proposed amendment is as follows:

R101.2 Scope. The provisions of the North Carolina Residential Code for One- and Two-family Dwellings shall apply to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal and demolition of detached one- and two-family dwellings and ~~townhouses~~ multiple single family dwellings (townhouses) not more than three stories above grade plane in height with a separate means of egress and their accessory buildings and structures.

Exception: Live/work units complying with the requirements of Section 419 of the North Carolina Building Code shall be permitted to be built as one- and two-family dwellings or townhouses. Fire suppression required by Section 419.5 of the North Carolina Building Code when constructed under the North Carolina Residential Code for One- and Two-family Dwellings shall conform to Section 903.3.1.3 of the International Building Code.

R101.2.1 Accessory buildings. Accessory buildings with any dimension (plan area and mean roof height) greater than 12 feet (3658mm) must meet the provisions of this code. Accessory buildings may be constructed without a masonry or concrete foundation, except in coastal high hazard areas, provided all of the following conditions are met:

1. The accessory building shall not exceed 400 square feet (37m²) or one story in height; and
2. The building is supported on a wood foundation of a minimum 2x6 or 3x4 mud sill of approved wood in accordance with Section ~~323~~ R317; and
3. The building is anchored to resist overturning and sliding by installing a minimum of one ground anchor at each corner of the building. The total resisting force of the anchors shall be equal to 20 psf (958 Pa) times the plan area of the building.

Exception: Tree houses supported solely by a tree are exempt from the requirements of this code.

R101.2.2 Accessory structures. ~~Accessory structures are not required to meet the provisions of this code except decks, gazebos and shelters, carports, and retaining walls as required by Section R404.4, are not required to meet the provisions of this code. For swimming pools and spas, see Appendix G. and pools or spas per Appendix G.~~

Exception: Portable lightweight aluminum or canvas type carports not exceeding 400 sq. ft. or 12' mean roof height are exempt from the provisions of this code.

In Section R202 Definitions delete and replace definition of Accessory Building and Accessory Structure:

ACCESSORY BUILDINGS. ~~In one and two family dwellings not more than three stories high with separate means of egress, a building, the use of which is incidental to that of the main building and which is detached and located on the same lot.~~

A building where its use is incidental to that of the main one- and two-family dwelling and is detached and located on the same lot with its own means of egress. An accessory building is a building that is roofed over and more than 50% of its exterior walls are enclosed. Examples of accessory buildings are garages, storage buildings, workshops, boat houses, etc.

~~**ACCESSORY STRUCTURE.** Accessory structure is any structure not roofed over and enclosed that is not considered an accessory building located on one- and two-family dwelling sites which is incidental to that of the main building. Examples of accessory structures are, but not limited to; fencing, decks, gazebos, arbors, retaining walls, barbecue pits, detached chimneys, tree houses, playground equipment, yard art, etc. Accessory structures except decks, gazebos, and retaining walls as required by Section R404.4, are not required to meet the provisions of this code.~~

An accessory structure is any structure that does not meet the definition of an accessory building (roofed over and more than 50% of its exterior walls enclosed) which is detached and incidental to that of the main one- and two-family dwelling. Examples of accessory structures are fences, decks, gazebos and shelters, arbors, pergolas, retaining walls, barbecue pits, detached chimneys, playground equipment, yard art, carports, etc.

Motion – David Smith/Second – Bob Ruffner/Approved as modified. – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.

Reason Given – A better definition of "Accessory Structure" versus "Accessory Building" is needed to include when a permit is required on certain types of accessory structures like carports. NC language makes a distinction between an accessory building and an accessory structure but clarity and language separation is needed to prevent mixing of code requirements. Proposed language covers a definition modification found in Chapter 2 and an exclusion of certain types of carports along with clear language separation between accessory buildings and structures found in section R101.2 Scope by subdividing.

Fiscal Statement – This rule is not intended to decrease/increase the cost of construction but rather define the difference between accessory buildings versus accessory structures and when a permit would be required for each. Language change will assist in uniform enforcement of standards as they apply to these buildings and structures. This rule is not expected to either have a substantial economic impact or affect local and state funds. A fiscal note has not been prepared.

2. Request by Jeff Griffin, from Mecklenburg County, to amend the 2012 NC Residential Code, Chapters 3 and 7. The proposed amendment is as follows:

Revise Section R302.1 Exception #1 to read:

1. Walls, projections, openings or penetrations in walls perpendicular to the line used to determine the fire separation distance. Townhouse eave projections shall comply with R302.2.5 and R302.2.6.

Revise Section R302.2.6 Townhouse eave projections item #3 to read:

3. Eaves shall have not less than 1 ~~hour~~ layer of 5/8" type X gypsum or equivalent fire-resistive construction on the underside.

Delete Section R703.11.3 Soffit and replace with new Section R302.1.1 Soffit protection:

~~**R703.11.3 Soffit.** In one- and two-family dwelling construction using vinyl or aluminum as a soffit material, the soffit material shall be securely attached to framing members and use an underlayment material of either fire retardant treated wood, 23/32 inch wood sheathing or 5/8 inch gypsum board. Venting requirements apply to both soffit and underlayment and shall be per Section R806 of the North Carolina Residential Code. Where the property line is 10 feet or more from the building face, the provisions of this code section do not apply.~~

R302.1.1 Soffit protection. In construction using vinyl or aluminum soffit material the following application shall apply. Soffit assemblies located on buildings with less than a 10' fire separation distance shall be securely attached to framing members and applied over fire retardant treated wood, 23/32 inch wood sheathing or 5/8 inch exterior grade or moisture resistant gypsum board. Venting requirements shall be provided in both soffit and underlayments. Vents shall be either nominal 2-inch (51mm) continuous or equivalent intermittent and shall not exceed the minimum net free air requirements established in Section R806.2 by more than 50%. Townhouse construction shall meet the additional requirements of R302.2.5 and R302.2.6.

Exceptions:

1. Soffits, any portion of, having 10' or more fire separation distance.
2. Roof rake lines where soffit doesn't communicate to attic are not required to be protected per this section.
3. Soffits less than 5' from property line shall meet the projection fire rating requirements of Table R302.1.

Delete section R703.11.4 Flame spread and substitute with new Section R302.1.2 Flame spread:

~~**R703.11.4 Flame Spread.** Vinyl siding and vinyl soffit materials when used in one- and two-family dwelling construction shall have a flame spread index of 25 or less as tested in accordance with ASTM E 84.~~

R302.1.2 Flame spread. Vinyl siding and vinyl soffit materials shall have a Flame Spread Index of 25 or less as tested in accordance with ASTM E-84.

Motion – David Smith/Second – Mack Nixon/Approved – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.

Reason Given – This proposal moves items from chapter 7 to 3 where fire resistant construction is listed (better location) and then gives direction on other requirements for townhouse projections along with an allowance for specific 1 layer of 5/8" type x since there is no 1 hour tested rated assembly.

Fiscal Statement – This rule will not increase the cost of construction and with the substitutions will reduce some cost from current language since not all of the soffit will be required to be protected (only those within the 10' setback). This rule is not expected to either have a substantial economic impact or affect local and state funds. A fiscal note has not been prepared.

3. Request by Debra Foglesong, with 1st Choice Cabinetry, to amend the 2012 NC Residential Code, Part VII North Carolina State Building Code: Plumbing Code – Abridged for Residential Code, Section 405.3.1. The proposed amendment is as follows:

405.3.1 Water closets, urinals, lavatories and bidets. A water closet, urinal, ~~lavatory~~ or bidet shall not be set closer than 15 inches (381 mm) from its center to any side wall, partition, vanity or other obstruction, or closer than 30 inches (762 mm) center-to-center between adjacent fixtures. There shall be at least a 21-inch (533 mm) clearance in front of the water closet, urinal, ~~lavatory~~ or bidet to any wall, fixture or door. Water closet compartments shall not be less than 30 inches (762 mm) wide and 60 inches (152 mm) deep.

Exception: ~~For one and two family dwellings and townhouses, see the North Carolina Residential Code.~~

Motion – Mack Nixon/Second/Approved – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.

Reason Given – Many new house and townhouse designs incorporate the use of 24" or 27" vanities which don't meet the current requirement. This change allows homeowners to have functional design in their cabinetry layouts.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or affect local and state funds. A fiscal note has not been prepared.

4. Request by Wayne Hamilton, representing the NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 503.2.1 and Chapter 47. The proposed amendment is as follows:

Add exception to 503.2.1:

503.2.1 Dimensions. Fire apparatus access roads shall have an unobstructed width of not less than 20 feet (6096 mm), exclusive of shoulders, except for approved security gates in accordance with Section 503.6 and an unobstructed vertical clearance of 13 feet 6 inches (4115 mm).

Exception: Fire apparatus access roads constructed and/or maintained in accordance with NC DOT Minimum Construction Standards for Subdivision Roads, when approved by the fire code official.

Add reference to Chapter 47:

NC DOT North Carolina Department of Transportation
Std 1/2010 Subdivision Roads Minimum Construction Standards 503.2.1

Motion – Kim Reitterer/Second – Lon McSwain/Approved – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.

Reason Given – Adding the exception and reference addresses potential conflicts in roadway design between State Fire Code minimum requirements and NC DOT standards.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or affect local and state funds. A fiscal note has not been prepared.



STATE BOARD OF ELECTIONS

6400 Mail Service Center • Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

MAILING ADDRESS:
P.O. BOX 27255
RALEIGH, NC 27611-7255

January 16, 2013

Ms. Maggie Barlow
Post Office Box 10541
Raleigh, North Carolina 27605

Re: Request for Advisory Opinion pursuant to N.C. Gen. Stat. § 163-278.23

Dear Ms. Barlow:

I am in receipt of your January 9, 2013, request for an opinion in which you seek guidance as to whether it would be permissible for an active candidate committee to pay for contracted campaign finance compliance services when the candidate is not currently holding public office or running for public office.

N.C. G.S. § 163-278.16B provides the permissible purposes for which a candidate committee can spend funds. As you are aware, active candidate committees are required to file campaign finance disclosure reports even if the candidate is not currently holding public office or running for public office. Since a candidate committee is formed as a result of seeking public office and the reporting and compliance obligations continue until all debts and obligations are satisfied and all funds have been disbursed, it would be permissible to pay for compliance services to address these obligations.

This opinion is based upon the information provided in your January 9, 2013, email. If any information in that email should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code. If you should have any questions, please do not hesitate to contact me or Kim Strach, Deputy Director- Campaign Finance.

Sincerely,

A handwritten signature in cursive script that reads "Gary O. Bartlett".

Gary O. Bartlett

cc: Julian Mann III, Codifier of Rules

LOCATION: 506 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603 • (919) 733-7173

**Charlotte Mecklenburg Utilities Department – Request for Modification of
Interbasin Transfer Certificate**

NOTICE OF PUBLIC HEARING

Monday, March 4, 2013 at 7:00 PM

John M. McEwen Assembly Room

Mint Hill Town Hall

4430 Mint Hill Village Lane, Mint Hill, North Carolina 28227

The North Carolina Environmental Management Commission (EMC) will hold a public hearing to receive comments on the Charlotte Mecklenburg Utilities Department's (CMUD) draft Environmental Assessment (EA). The EA has been prepared to support CMUD's request to eliminate Condition 3 from its Interbasin Transfer (IBT) Certificate, issued by the EMC on March 14, 2002. Condition 3 excluded the Goose Creek Watershed, in Mecklenburg County, from the IBT service area due to potential impacts from future growth in the basin on the Carolina heelsplitter, a federally-listed endangered species. This request for an IBT Certificate modification does not require any change in the currently approved transfer amount of 33 million gallons per day.

The public hearing will start at 7 pm on Monday, March 4th in the John M. McEwen Assembly Room at the Mint Hill Town Hall, 4430 Mint Hill Village Lane, Mint Hill, North Carolina 28227. The public may review the draft Environmental Assessment at the Division's web site at: http://www.ncwater.org/Permits_and_Registration/Interbasin_Transfer/status/cmud/. The document may also be viewed at the hearing or during normal business hours at the offices of the Division of Water Resources (512 N. Salisbury Street, Room 1106, Archdale Building, Raleigh).

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

If you are unable to attend, you may mail written comments to Toya Ogallo, Division of Water Resources, 1611 Mail Service Center, Raleigh, NC 27699-1611. Comments may also be submitted electronically to Toya.F.Ogallo@ncdenr.gov. Mailed and emailed comments will be given equal weight. All comments must be postmarked or emailed by April 16, 2013.

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 04 – DEPARTMENT OF COMMERCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Credit Union Division intends to amend the rules cited as 04 NCAC 06B .0302-.0303; 06C .0101; .0307, .0311, .0801.

Agency obtained G.S. 150B-19.1 certification:

- ☒ OSBM certified on: November 6, 2012
- ☐ RRC certified on:
- ☐ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c): www.nccud.org

Fiscal Note if prepared posted at:

http://www.osbm.state.nc.us/files/pdf_files/COM11062012.pdf

Proposed Effective Date: June 1, 2013

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A public hearing may be demanded by written request to Tony Knox, Deputy Administrator, North Carolina of Commerce/Credit Union Division within 15 days of the publication of the Notice of Text.

Reason for Proposed Action:

04 NCAC 06B .0302 – Notice of Rule Making Hearing, amendment to correct the history notes, and change the term reasonable to actual.

04 NCAC 06B .0303 – Rule Making Hearing: General Information, amend to correct history notes, and delete the term complete control.

04 NCAC 06B .0101 – Definitions, correcting errors in this section of the code.

04 NCAC 06C .0307 – Listing of officials and operating hours, up the term committeemen to committee members and clarify time to make changes.

04 NCAC 06B .0311 – Surety Bond and Insurance Coverage, update the rule to current information, add citation of administrator's authority to approve bonds.

04 NCAC 06C .0801 – Financial Statements and other information, update the rule based on current procedures and changes at NCUA.

Procedure by which a person can object to the agency on a proposed rule: Any interested person may object to the agency in writing or orally. If in writing it should be sent to the North Carolina Department of Commerce Credit Union Division. It shall be to the attention of Tony Knox. The address is 205 W. Millbrook Road Suite 105, Raleigh, NC 27609. If an interested Person wishes to object orally then they may come to the Credit

Union Division at the address listed above. The telephone number is (919)571-4888.

Comments may be submitted to: Tony Knox, Deputy Administrator, 205. W. Millbrook Road, Suite 105, Raleigh, NC 27609, phone (919)571-4888, fax (919)420-7919, email tknox@nccud.org

Comment period ends: April 16, 2013

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 (check all that apply).

- ☒ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☒ Approved by OSBM
- ☐ No fiscal note required by G.S. 150B-21.4

CHAPTER 06 - CREDIT UNION DIVISION

SUBCHAPTER 06B - RULE-MAKING: DECLARATORY RULINGS AND CONTESTED CASES

SECTION .0300 - RULE-MAKING HEARINGS

04 NCAC 06B .0302 NOTICE OF RULE-MAKING HEARINGS

Any person or agency desiring to be placed on the mailing list for the Administrator's rule-making notices may file such request by furnishing a name and mailing address in writing to the Division at its mailing address. The request must state the

subject areas within the authority of the Administrator's office for which the notice is requested. The Administrator may require ~~reasonable-actual~~ postage and stationery costs to be paid by persons receiving such notices.

Authority G.S. 54-109.12; 54-109.21(25); 150B-21.2.

**04 NCAC 06B .0303 RULE-MAKING HEARINGS:
GENERAL INFORMATION**

The hearing officer shall have ~~complete~~ control of the proceedings, including extensions of any time requirements, order of presentations, time allotments for presentations, direction of the flow of the discussion and the management of the hearing. Each person participating in the hearing shall be given a fair opportunity to present views, data, and comments.

Authority G.S. 54-109.12; 54-109.21(25); 150B-21.2.

SUBCHAPTER 06C - CREDIT UNIONS

SECTION .0100 - GENERAL INFORMATION

04 NCAC 06C .0101 DEFINITIONS

When used in this ~~Chapter~~, Subchapter the following words and phrases shall have the following meaning, except to the extent that any such word or phrase is specifically qualified by its context:

- (1) "Administrator" shall mean the Administrator of State-Chartered Credit Unions.
- (2) "Capital" consists of shares, undivided earnings, and reserves.
- (3) "Commission" shall consist of seven members and they are vested with full power and authority to review, approve or modify any action taken by the Administrator of Credit Unions in the exercise of all powers, duties and functions vested by law in or exercised by the Administrator of Credit Unions under the Credit Union Laws of North ~~Carolina~~. Carolina pursuant to G.S. 143B-439.
- (4) "Credit union" is a cooperative nonprofit corporation organized for the purpose of promoting thrift among its members by affording them an opportunity for accumulating their savings; and to create for them a source of credit for loans for provident and productive ~~purposes; provides, and~~ It may undertake such other activities relating to the purpose of the corporation as its bylaws may ~~provide; provide,~~ such credit union being chartered under the General Statutes of North Carolina.
- (5) "Deposits" are a preferred savings account on which the Credit Union is obligated to pay a guaranteed interest rate on a continuing basis in such amounts and terms as the Board of directors approve.
- (6) "Dividend" is an operating expense of a credit union which is declared payable on share

accounts from time to time by the Board of directors.

- (7) "EDP" shall mean electronic data processing.
- (8) "Interest on deposit accounts" is an expense paid by the Credit Union for obtaining funds in a deposit account.
- (9) "Interest on loans" is an amount charged to a member for borrowing funds from a credit union at a specified rate as declared by the Board of directors, not to exceed the maximum legal rate.
- (10) "Interest refund" is a percentage of the interest collected on loans which is refunded to those members who borrowed during a specific period pursuant to action of the Board of directors.
- (11) "Members" shall mean persons or organizations who have been accepted for membership by either the Board, membership officer, or an executive committee, after having met qualifications of being within the field of membership.
- (12) "Membership" in a credit union is limited to those as stipulated in the bylaws of such credit union.
- (13) "Membership fee" is a fee that may be charged to applicants for membership as an entrance fee or as an annual membership fee as determined by the Board of directors or as the bylaws may provide.
- (14) "Reserve fund" is the portion of income to be entered on the books of the corporation to offset uncollectible loans in accordance with Section 54-109.86 of the General Statutes.
- (15) "Shares" is the primary capital owned by the members and is comprised of the savings of the members. The par value shall be as the bylaws provide.
- (16) "Unimpaired capital" shall consist of the shares, undivided surplus and reserves less any known or probable losses.
- (17) "Funds" means cash on hand; cash in the bank and investments.
- (18) "Book value of loans" is the dollar amount of loans the Credit Union has on its books.
- (19) Types of investment transactions are defined as follows:
 - (a) "Standby commitments" means an agreement to purchase or sell a security at a future date, whereby the buyer is required to accept delivery of the security at the option of the seller.
 - (b) "Cash forward agreement" means an agreement to purchase or sell a security at a future date more than five days after the agreement is made and which requires mandatory delivery and acceptance.

- (c) "Reverse repurchase agreement" means an agreement whereby a credit union enters into an understanding to sell securities to a purchaser and to repurchase the same securities from that purchaser at a future date, irrespective of the amount of consideration paid by the Credit Union or the purchaser.
- (d) "Repurchase agreement" means an agreement whereby a credit union enters into an agreement to buy securities from a vendor and to resell securities at a future date. Repurchase agreements may be of two types:
 - (i) "Investment-type repurchase agreement" means a repurchase which contains the essential elements of a sale of security as specified in Rule .1202(5) of this Subchapter.
 - (ii) "Loan-type repurchase agreement" means any repurchase agreement which does not qualify as an investment-type repurchase agreement.
- (e) "Future" means a standardized contract for the future delivery of commodities, including certain government securities, sold on designated commodities exchange.
- (20) "Corporate Credit Union" is a credit union with an institutional field of membership.
- (21) "Credit Union Service Organization" or "CUSO" is an organization formed and operated by credit union(s), or associations or organizations of credit unions, to provide revenue generating services of the highest quality to credit union members, credit unions and others which are needed or wanted and can be provided efficiently and economically with a satisfactory overall rate of return on investment.
- (22) "Branch Office" is a facility which a credit union maintains and staffs at a location other than its main office to furnish credit union services to its members.

Authority G.S. 54-109.12.

**SECTION .0300 - BASIC INTERNAL CONTROLS:
ACCOUNTING PROCEDURES AND OPERATION
STANDARDS FOR STATE-CHARTERED CREDIT
UNIONS**

**04 NCAC 06C .0307 LISTING OF OFFICIALS AND
OPERATING HOURS**

- (a) Each credit union shall notify and keep the Administrator current on the names and addresses of officers, directors, ~~committees~~ committee members, and key operating personnel. ~~Changes shall be reported in writing within 10 working days of the change.~~
- (b) Each credit union shall notify and keep the Administrator current on the days and hours it is open.
- (c) Changes shall be reported in writing within 10 working days of the change.

Authority G.S. 54-109.12.

**04 NCAC 06C .0311 SURETY BOND AND
INSURANCE COVERAGE**

- (a) It shall be the duty of the Directors to purchase a blanket fidelity bond including such other bond coverages as required by the statutes or as may be required by the Administrator.
- (b) Every state chartered credit union will maintain the minimum bond and insurance coverage as required by statute. No form of surety bond shall be used except as is approved by the Administrator. Credit Union Blanket Bond, ~~Standard Form No. 23 of the Surety Association of America~~ 500 Bond Series, plus faithful performance rider, or NCUA Optional Form 581 or its equivalent, shall be considered the minimum coverages required and are hereby the approved forms. The approved bond forms in this Paragraph provide faithful performance coverage for all employees and officials. Fidelity bonds must provide coverage for the fraud and dishonesty of all employees, directors, officials, and supervisory and credit committee members. Other forms, or changes in the amount of bond coverage, must be approved by the Administrator.
- (c) Maximum deductible limits may be applied to the required coverage contained in ~~Standard Form No. 23, 500 Bond Series~~, as specified in this Paragraph:

<u>Assets</u>	<u>Maximum Deductible</u>
0 to \$100,000	-0-
\$100,001 to \$250,000	\$500
\$250,001 to \$500,000	750
\$500,001 to \$750,000	1,000
\$750,001 to \$1,000,000	1,500
\$1,000,001 to \$2,000,000	2,000
\$2,000,001 to \$3,000,000	3,000
\$3,000,001 to \$5,000,000	4,000
\$5,000,001 to \$50,000,000	5,000
\$50,000,001 to \$100,000,000	7,500
Over \$100,000,001	10,000

Deductibles in excess of those shown must be approved by the Administrator. In no event shall any deductible be applied to the fidelity coverage or the faithful performance provision of the bond unless approved by the Administrator.

Authority G.S. 54-109.11 (5); 54-109.12; 54-109.44 (2).

SECTION .0800 - REPORTS TO ADMINISTRATOR

04 NCAC 06C .0801 FINANCIAL STATEMENTS AND OTHER INFORMATION

~~Within 31 days Each credit union shall furnish a report of condition due on the same date as designated by the federal insurer of following the end of December, March, and June and September each credit union will furnish a report of condition~~
The report is submitted to the Administrator on forms supplied by him for that purpose. Fines and penalties for delay in filing reports shall be assessed as set forth in G.S. 54-109.13 and 54-109.15 (b).

Authority G.S. 54-109.12; 54-109.13; 54-109.15 (b).

TITLE 07 – DEPARTMENT OF CULTURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Cultural Resources intends to amend the rule cited as 07 NCAC 04N .0202.

Agency obtained G.S. 150B-19.1 certification:

- ☒ **OSBM certified on:** January 31, 2013
- ☐ **RRC certified on:**
- ☐ **Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdcr.gov>

Proposed Effective Date: June 1, 2013

Public Hearing:

Date: March 4, 2013

Time: 2:00 P.M. – 2:30 P.M.

Location: Historic Sites Conference Room, Dobbs Building (second floor), 430 N. Salisbury Street, Raleigh, NC 27603

Reason for Proposed Action:

The Department of Cultural Resources Division of State Historic Sites proposes amending state rule 07 NCAC 04N .0202 State Historic Sites Fees. (See Appendix 1 for proposed rule text.) The rule change includes:

- (1) Elizabeth II
Fees for Elizabeth II (Section (e)) are being removed from the rule because the Roanoke Island Commission is exempt from Chapter 150B.
The Elizabeth II is no longer part of the Division of Historic Sites. It is part of the Roanoke Island Festival Park, which operates under the authority of the Roanoke Island Commission (RIC). RIC is exempt from Chapter 150B in regard to rules pursuant to GS 143B-131.2 (b) (9). RIC has the statutory authority to establish admission fees under subsection (b)(9) of that section.
- (2) NC Transportation Museum
The rule increases the admission fees at the North Carolina Transportation Museum

(Museum) at Spencer by \$1.00. The proposed fees are as follows:

- (a) *(General Admission: \$6.00 for adults; \$5.00 for seniors and active military; \$4.00 students (ages 3 to 12); and free for children (ages 0 to 2).*
- (b) *Group Admission (15 or more visitors): \$5.00 for adults; \$4.50 for seniors and active military; \$2.50 for students (ages 3 to 12); and free for children (ages 0 to 2).*

The purpose of the amended rule is to increase an admission fee to offset some of the loss of appropriation resulting from Session Law 2012-142 effective July 1, 2012, and Session Law 2011-145 (appropriation bills for the fiscal biennium ending June 30, 2013).

Session Law 2011-145 Section 21.1 established the North Carolina Transportation Museum special fund (enterprise fund), which shall be used to pay all costs associated with the operation and maintenance Transportation Museum. All receipts derived from admissions and fees shall be credited to the fund.

During the 2011 Session, the Legislature cut the appropriation to the Museum by 50% (\$576,258) for FY 2011-12 and by 100% for FY 2012-13 with the intent of making operations receipt supported (see page J-12 of the 2011-12 Senate Appropriations Committee Report). The Governor's Recommended Budget for 2012-13 requested an additional \$400,000 in appropriations for the Museum; however, only \$300,000 of the request was approved by the legislature, essentially cutting the budget for this fiscal year by 74% (\$852,515). Because the additional \$100,000 in appropriations was not approved, the Museum must increase the admission fee by \$1.00 in each visitor category to cover part of its operating expenses.

The Department has sought to increase revenue at the Museum through other means besides the admission fee. In fiscal year 2011-12, the Museum had receipts from special events rides, facility rentals, the gift shop, donations, and memberships. The Museum has also sought to lease some of its property. The lease has taken months to go through the State approval process and is still awaiting approval.

The Museum has sought to reduce costs, the largest of which is personnel costs. In 2010-11, before budget cuts, the Museum had 18 permanent full time staff. In FY 2011-12, with a \$576,258 budget cut, staff was reduced by half, down to nine permanent full-time staff. In FY2012-13 with a cumulative budget cut of

\$852,515, the Museum is down to eight permanent full-time staff. However, these cost reductions and increase in receipts have not been enough to offset the loss in appropriated funds.

Sources:

1. 2012-13 Conference Report on the Continuation, Capital and Expansion Budgets – Page J 5
http://www.ncleg.net/sessions/2011/budget/2012/Conference_Committee_Report_2012-06-20.pdf
2. Governor's 2012-13 Recommended Budget Adjustments – Page 79
<http://osbm.nc.gov/thebudget>
3. 2011-12 Conference Report on the Continuation, Capital and Expansion Budgets – Page J 12
<http://www.ncleg.net/sessions/2011/budget/2011/MoneyReport-5-31-11.pdf>
4. SESSION LAW 2012-142
<http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H950v7.pdf>
5. SESSION LAW 2011-145 – Pages 273 and 274
<http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H200v9.pdf>
6. Elizabeth II – G.S. 143B-131.2(b)(9). Roanoke Island Commission – Purpose, powers, and duties.
http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?s_tatute=143B-131.2

Procedure by which a person can object to the agency on a proposed rule: *Objections must be submitted in writing by mail. The objection must identify the specific reason for the objection including the negative impact(s) the amended rule change could have to stakeholders.*

Comments may be submitted to: *Keith Hardison, Director, Division of State Historic Sites and Properties; 4620 Mail Service Center, Raleigh, NC 28699-4620*

Comment period ends: *April 16, 2013*

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 (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (\geq \$500,000)
- ☒ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

CHAPTER 04 – DIVISION OF ARCHIVES AND HISTORY

SUBCHAPTER 04N - HISTORIC SITES REGULATIONS

SECTION .0200 - SITE HOURS: ADMISSION FEES

07 NCAC 04N .0202 STATE HISTORIC SITES FEES

(a) The following sites do not charge an admission fee:

- (1) Alamance Battleground,
- (2) Aycok Birthplace,
- (3) Bennett Place,
- (4) Bentonville Battleground,
- (5) Brunswick Town,
- (6) Caswell-Neuse,
- (7) Duke Homestead,
- (8) Fort Dobbs,
- (9) Fort Fisher,
- (10) Historic Halifax,
- (11) House in the Horseshoe,
- (12) Polk Memorial,
- (13) Reed Gold Mine,
- (14) Somerset Place,
- (15) Town Creek Indian Mound,
- (16) Vance Birthplace,
- (17) Charlotte Hawkins Brown Memorial,
- (18) Horne Creek Living History Farm.

(b) The following site charges an admission fee of five dollars (\$5.00) for adults, two dollars (\$2.00) for children, and one half off the regular admission price for groups of ten or more: Thomas Wolfe Memorial.

(c) The following site charges an admission fee of one dollar (\$1.00) for adults, twenty-five cents (\$0.25) for children: James Iredell House.

(d) The following site charges an admission fee of two dollars (\$2.00) for adults, one dollar (\$1.00) for children and one half off the regular admission price for groups of ten or more to each historic structure:

- (1) Historic Bath, Bonner House;
- (2) Historic Bath, Palmer-Marsh House.

~~(e) The following site charges an admission fee of three dollars (\$3.00) for adults, one dollar and fifty cents (\$1.50) for students, two dollars (\$2.00) for senior citizens, and fifty cents (\$0.50) off the regular admission price for groups of ten or more: Elizabeth II.~~

~~(f)(e)~~ The North Carolina Transportation Museum at Spencer charges admission fees as follows:

- (1) General Admission: ~~Five dollars (\$5.00)~~ Six dollars (\$6.00) for adults; ~~four dollars (\$4.00)~~ five dollars (\$5.00) for seniors and active

military; ~~three dollars (\$3.00)~~ four dollars (\$4.00) for students (ages 3 to 12); and free for children (ages 0 to 2).

- (2) Group Admission (15 or more visitors): ~~Four dollars (\$4.00)~~ Five dollars (\$5.00) for adults; ~~three dollars and fifty cents (\$3.50)~~ four dollars and fifty cents (\$4.50) for seniors and active military; ~~one dollar and fifty cents (\$1.50)~~ two dollars and fifty cents (\$2.50) for students (ages 3 to 12); and free for children (ages 0 to 2).

(e)(f) The following site charges a gold panning fee of three dollars (\$3.00) per person and two dollars (\$2.00) for groups of ten or more: Reed Gold Mine.

Authority G.S. 121-7.3.

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 .0266 and amend rules cited as 15A NCAC 02B .0262, .0265, .0267, .0270-.0271.

Agency obtained G.S. 150B-19.1 certification:

- ☒ OSBM certified on: September 27, 2012
☐ RRC certified on:
☐ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://portal.ncdenr.org/web/guest/rules>

Fiscal Note if prepared posted at:
http://www.osbm.state.nc.us/files/pdf_files/DENR09272012.pdf

Proposed Effective Date: July 1, 2014

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): As per G.S. 150B-21.2(c) and (e); send written requests to: NCDENR-DWQ-PS, Attn: Jason Robinson, 1617 Mail Service Center, Raleigh, NC 27699-1617.*

Reason for Proposed Action: *The proposed rules incorporate session law requirements. Six session laws (SLs), 2009-216, 2009-484, 2011-394, 2012-187, 2012-200 and 2012-201, either disapproved or modified portions of the Jordan Lake Nutrient Strategy that was adopted by the EMC in May 2008. In doing so, these laws direct the Commission to adopt rules and include the following from SECTION 3.(j) of SL 200-16 et seq.: "Additional Rule-Making Authority. The Commission shall adopt a rule to replace Sections 3(c) through 3(i) of this act. Notwithstanding G.S. 150B-19(4), the rule adopted by the Commission pursuant to this section shall be substantively identical to the provisions of Sections 3(c) through 3(f) of this act. Rules adopted pursuant to this section are not subject to G.S. 150B-21.9 through 150B-21.14. Rules adopted pursuant to*

this section shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2)."

Procedure by which a person can object to the agency on a proposed rule: *Objections on the proposed rules should be submitted to the following contact: Jason Robinson, Mailing Address: 1617 Mail Service Center, Raleigh, NC 27699-1617, email jason.t.robinson@ncdenr.gov*

Comments may be submitted to: *Jason Robinson, 1617 Mail Service Center, Raleigh, NC 27699-1617, fax (919)807-6497, email jason.t.robinson@ncdenr.gov*

Comment period ends: April 16, 2013

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 (check all that apply).

- ☐ State funds affected
☐ Environmental permitting of DOT affected
☐ Analysis submitted to Board of Transportation
☐ Local funds affected
☐ Date submitted to OSBM:
☒ Substantial economic impact (≥\$500,000)
☒ Approved by OSBM
☒ No fiscal note required by G.S. 150B-21.4

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 .0262 JORDAN WATER SUPPLY NUTRIENT STRATEGY: PURPOSE AND SCOPE

PURPOSE. The purpose of this Rule, 15A NCAC 02B .0263 through .0273 and .0311(p) shall be to restore and maintain nutrient-related water quality standards in B. Everett Jordan Reservoir; protect its classified uses as set out in 15A NCAC 02B .0216, including use as a source of water supply for

drinking water, culinary and food processing purposes; and maintain or enhance protections currently implemented by local governments in existing water supply watersheds. These Rules, as further enumerated in Item (3) of this Rule, together shall constitute the Jordan water supply nutrient strategy, or Jordan nutrient strategy. Additional provisions of this Rule include establishing the geographic and regulatory scope of the Jordan nutrient strategy, defining its relationship to existing water quality regulations, setting specific nutrient mass load goals for Jordan Reservoir, providing for the use of adaptive management to restore Jordan Reservoir, and citing general enforcement authorities. The following provisions further establish the framework of the Jordan water supply nutrient strategy:

- (1) **SCOPE.** B. Everett Jordan Reservoir is hereafter referred to as Jordan Reservoir. All lands and waters draining to Jordan Reservoir are hereafter referred to as the Jordan watershed. Jordan Reservoir and all waters draining to it have been supplementally classified as Nutrient Sensitive Waters (NSW) pursuant to 15A NCAC 02B .0101(e)(3) and 15A NCAC 02B .0223. Water supply waters designated WS-II, WS-III, and WS-IV within the Jordan watershed shall retain their classifications. The remaining waters in the Jordan watershed shall be classified WS-V. The requirements of all of these water supply classifications shall be retained and applied except as specifically noted in Item (6) of this Rule and elsewhere within the Jordan nutrient strategy. Pursuant to G.S. 143-214.5(b), the entire Jordan watershed shall be designated a critical water supply watershed and through the Jordan nutrient strategy given additional, more stringent requirements than the state minimum water supply watershed management requirements. These requirements supplement the water quality standards applicable to Class C waters, as described in Rule .0211 of this Section, which apply throughout the Jordan watershed.
- (2) **STRATEGY GOAL.** Pursuant to G.S. 143-215.1(c5), 143-215.8B, and 143B-282(c) and (d) of the Clean Water Responsibility Act of 1997, the Environmental Management Commission establishes the goal of reducing the average annual loads of nitrogen and phosphorus delivered to Jordan Reservoir from all point and nonpoint sources of these nutrients located within its watershed, as specified in Item (5) of this Rule, and provides for adaptive management of the strategy and goal, as specified in Item (8) of this Rule.
- (3) **RULES ENUMERATED.** The second rule in the following list provides definitions for terms that are used in more than one rule of the Jordan nutrient strategy. An individual rule may contain additional definitions that are

specific to that rule. The rules of the Jordan nutrient strategy shall be titled as follows:

- (a) Rule .0262 Purpose and Scope;
 - (b) Rule .0263 Definitions;
 - (c) Rule .0264 Agriculture;
 - (d) Rule .0265 Stormwater Management for New Development;
 - (e) Rule .0266 Stormwater Management for Existing Development;
 - (f) Rule .0267 Protection of Existing Riparian Buffers;
 - (g) Rule .0268 Mitigation for Riparian Buffers;
 - (h) Rule .0269 Riparian Buffer Mitigation Fees to the NC Ecosystem Enhancement Program;
 - (i) Rule .0270 Wastewater Discharge Requirements;
 - (j) Rule .0271 Stormwater Requirements for State and Federal Entities;
 - (k) Rule .0272 Fertilizer Management;
 - (l) Rule .0273 Options for Offsetting Nutrient Loads; and
 - (m) Rule .0311 Cape Fear River Basin.
- (4) **RESERVOIR ARMS AND SUBWATERSHEDS.** For the purpose of the Jordan nutrient strategy, Jordan Reservoir is divided into three arms and the Jordan watershed is divided into three tributary subwatersheds as follows:
- (a) The Upper New Hope arm of the reservoir, identified by index numbers 16-41-1-(14), 16-41-2-(9.5), and 16-41-(0.5) in the Schedule of Classifications for the Cape Fear River Basin, 15A NCAC 02B .0311, encompasses the upper end of the reservoir upstream of SR 1008, and its subwatershed encompasses all lands and waters draining into it.
 - (b) The Lower New Hope arm of the reservoir, identified by index number 16-41-(3.5) in the Schedule of Classifications for the Cape Fear River Basin, 15A NCAC 02B .0311, lies downstream of SR 1008 and upstream of the Jordan Lake Dam, excluding the Haw River arm of the reservoir, and its subwatershed encompasses all lands and waters draining into the Lower New Hope arm of the reservoir excluding those that drain to the Upper New Hope arm of the reservoir and the Haw River arm of the reservoir.
 - (c) The Haw River arm of the reservoir, identified by index number 16-(37.5) in the Schedule of Classifications for the Cape Fear River Basin, 15A

NCAC 02B .0311, lies immediately upstream of Jordan Lake Dam, and its subwatershed includes all lands and waters draining into the Haw River arm of the reservoir excluding those draining into the Upper and Lower New Hope arms.

- (5) **NUTRIENT REDUCTION GOALS.** Each arm of the lake has reduction goals, total allowable loads, point source wasteload allocations, and nonpoint source load allocations for both nitrogen and phosphorus based on a field-calibrated nutrient response model developed pursuant to provisions of the Clean Water Responsibility Act of 1997, G.S. 143-215.1(c5). The reduction goals and allocations are to be met collectively by the sources regulated under the Jordan nutrient strategy. The reduction goals are expressed in terms of a percentage reduction in delivered loads from the baseline years, 1997-2001, while allocations are expressed in pounds per year of allowable delivered load. Each arm and subwatershed shall conform to its respective allocations for nitrogen and phosphorus as follows:

(a) The at-lake nitrogen load reduction goals for the arms of Jordan Reservoir are as follows:

- (i) The Upper New Hope arm has a 1997-2001 baseline nitrogen load of 986,186 pounds per year and a TMDL reduction goal of 35 percent. The resulting TMDL includes a total allowable load of 641,021 pounds of nitrogen per year: a point source mass wasteload allocation of 336,079 pounds of nitrogen per year, and a nonpoint source mass load allocation of 304,942 pounds of nitrogen per year.
- (ii) The Lower New Hope arm has a 1997-2001 baseline nitrogen load of 221,929 pounds per year and a nitrogen TMDL capped at the baseline nitrogen load. The resulting TMDL includes a total allowable load of 221,929 pounds of nitrogen per year: a point source mass wasteload allocation of 6,836 pounds of nitrogen per year, and a nonpoint source mass load

allocation of 215,093 pounds of nitrogen per year.

- (iii) The Haw River arm has a 1997-2001 baseline nitrogen load of 2,790,217 pounds per year and a TMDL percentage reduction of 8 percent. The resulting TMDL includes a total allowable load of 2,567,000 pounds of nitrogen per year: a point source mass wasteload allocation of 895,127 pounds of nitrogen per year, and a nonpoint source mass load allocation of 1,671,873 pounds of nitrogen per year.

(b) The at-lake phosphorus load reduction goals for the arms of Jordan Reservoir are as follows:

- (i) The Upper New Hope arm has a 1997-2001 baseline phosphorus load of 87,245 pounds per year and a TMDL percentage reduction of five percent. The resulting TMDL includes a total allowable load of 82,883 pounds of phosphorus per year: a point source mass wasteload allocation of 23,108 pounds of phosphorus per year, and a nonpoint source mass load allocation of 59,775 pounds of phosphorus per year.
- (ii) The Lower New Hope arm has a 1997-2001 baseline phosphorus load of 26,574 pounds per year and a phosphorus TMDL capped at the baseline phosphorus load. The resulting TMDL includes a total allowable load of 26,574 pounds of phosphorus per year: a point source mass wasteload allocation of 498 pounds of phosphorus per year, and a nonpoint source mass load allocation of 26,078 pounds of phosphorus per year.
- (iii) The Haw River arm has a 1997-2001 baseline phosphorus load of 378,569 pounds per year and a TMDL percentage reduction of five percent. The

resulting TMDL includes a total allowable load of 359,641 pounds of phosphorus per year; a point source mass wasteload allocation of 106,001 pounds of phosphorus per year, and a nonpoint source mass load allocation of 253,640 pounds of phosphorus per year.

- (c) The allocations established in this Item may change as a result of allocation transfer between point and nonpoint sources to the extent provided for in rules of the Jordan nutrient strategy and pursuant to requirements on the sale and purchase of load reduction credit set out in 15A NCAC 02B .0273.

- (6) **RELATION TO WATER SUPPLY REQUIREMENTS.** ~~For all waters designated as WS II, WS III, or WS IV within the Jordan watershed, the requirements of water supply 15A NCAC 02B .0214 through .0216 shall remain in effect with the exception of Sub-Item (3)(b) of those rules addressing nonpoint sources. The nonpoint source requirements of Sub-Item (3)(b) of those rules are superseded by the requirements of this Rule and 15A NCAC 02B .0263 through .0269, and .0271 through .0273, except as specifically stated in any of these Rules. For the remaining waters of Jordan watershed, the requirements of water supply Rule .0218 and Rules .0263 through .0273 and .0311 shall be applied. For WS II, WS III, and WS IV waters, the retained requirements of 15A NCAC 02B .0214 through .0216 are the following:~~

- ~~(a) Item (1) of 15A NCAC 02B .0214 through .0216 addressing best usages;~~
~~(b) Item (2) of 15A NCAC 02B .0214 through .0216 addressing predominant watershed development conditions, discharges expressly allowed watershed wide, general prohibitions on and allowances for domestic and industrial discharges, Maximum Contaminant Levels following treatment, and the local option to seek more protective classifications for portions of existing water supply watersheds;~~
~~(c) Sub-Item (3)(a) of 15A NCAC 02B .0214 through .0216 addressing waste discharge limitations; and~~
~~(d) Sub-Items (3)(e) through (3)(h) of 15A NCAC 02B .0214 through .0216 addressing aesthetic and human health standards.~~

The following water supply requirements shall apply:

- (a) For all waters designated as WS-II, WS-III, or WS-IV within the Jordan watershed, the requirements of water supply 15A NCAC 02B .0214 through .0216 shall remain in effect with the exception of Sub-Item (3)(b) of those Rules addressing nonpoint sources. The nonpoint source requirements of Sub-Item (3)(b) of those Rules are superseded by the requirements of this Rule and 15A NCAC 02B .0263 through .0269, and .0271 through .0273, except as specifically stated in any of these Rules. For WS-II, WS-III, and WS-IV waters, the retained requirements of 15A NCAC 02B .0214 through .0216 are the following:
- (i) Item (1) of 15A NCAC 02B .0214 through .0216 addressing best usages;
- (ii) Item (2) of 15A NCAC 02B .0214 through .0216 addressing predominant watershed development conditions, discharges expressly allowed watershed-wide, general prohibitions on and allowances for domestic and industrial discharges, Maximum Contaminant Levels following treatment, and the local option to seek more protective classifications for portions of existing water supply watersheds;
- (iii) Sub-Item (3)(a) of 15A NCAC 02B .0214 through .0216 addressing waste discharge limitations; and
- (iv) Sub-Items (3)(c) through (3)(h) of 15A NCAC 02B .0214 through .0216 addressing aesthetic and human health standards.
- (b) For waters designated WS-V in the Jordan Watershed, the requirements of Rules .0263 through .0273 and .0311 shall apply. The requirements of 15A NCAC 2B .0218 shall also apply except for Sub-Items (3)(e) through (3)(h) of that Rule, which shall only apply where:
- (i) The designation of WS-V is associated with a water

(ii) supply intake used by an industry to supply drinking water for their employees; or Standards set out in 15A NCAC 02B .0218(3)(e) through (3)(h) are violated at the upstream boundary of waters within those watersheds that are classified as WS-II, WS-III, or WS-IV. This Sub-Item shall not be construed to alter the nutrient reduction requirements set out in 15A NCAC 02B .0262(5) or 15A NCAC 02B .0275(3).

(7) **APPLICABILITY.** Types of parties responsible for implementing rules within the Jordan nutrient strategy and, as applicable, their geographic scope of responsibility, are identified in each rule. The specific local governments responsible for implementing Rules .0265, .0266, .0267, .0268, and .0273 shall be as follows:

(a) Rules .0265, .0266, .0267, .0268, and .0273 shall be implemented by all incorporated municipalities, as identified by the Office of the Secretary of State, with planning jurisdiction within or partially within the Jordan watershed. Those municipalities currently are:

- (i) Alamance;
- (ii) Apex;
- (iii) Burlington;
- (iv) Carrboro;
- (v) Cary;
- (vi) Chapel Hill;
- (vii) Durham;
- (viii) Elon;
- (ix) Gibsonville;
- (x) Graham;
- (xi) Green Level;
- (xii) Greensboro;
- (xiii) Haw River;
- (xiv) Kernersville;
- (xv) Mebane;
- (xvi) Morrisville;
- (xvii) Oak Ridge;
- (xviii) Ossipec;
- (xix) Pittsboro;
- (xx) Pleasant Garden;
- (xxi) Reidsville;
- (xxii) Sedalia;
- (xxiii) Stokesdale;
- (xxiv) Summerfield; and
- (xxv) Whitsett.

(b) Rules .0265, .0266, .0267, .0268, and .0273 shall be implemented by the

following counties for the portions of the counties where the municipalities listed in Sub-Item (7)(a) do not have an implementation requirement:

- (i) Alamance;
- (ii) Caswell;
- (iii) Chatham;
- (iv) Durham;
- (v) Guilford;
- (vi) Orange;
- (vii) Rockingham; and
- (viii) Wake.

(c) A unit of government may arrange through interlocal agreement or other instrument of mutual agreement for another unit of government to implement portions or the entirety of a program required or allowed under any of the rules listed in Item (3) of this Rule to the extent that such an arrangement is otherwise allowed by statute. The governments involved shall submit documentation of any such agreement to the Division. No such agreement shall relieve a unit of government from its responsibilities under these Rules.

(8) **ADAPTIVE MANAGEMENT.** The Division shall evaluate the effectiveness of the Jordan nutrient strategy after at least ten years following the effective date and periodically thereafter as part of the review of the *Cape Fear River Basinwide Water Quality Plan*. The Division shall base its evaluation on, at a minimum, trend analyses as described in the monitoring section of the *B. Everett Jordan Reservoir, North Carolina Nutrient Management Strategy and Total Maximum Daily Load*, and lake use support assessments. The Division may also develop additional watershed modeling or other source characterization work. Any nutrient response modeling and monitoring on which any recommendation for adjustment to strategy goals may be based shall meet the criteria set forth in G.S. 143-215.1(c5), also known as the Clean Water Responsibility Act, and meet or exceed criteria used by the Division for the monitoring and modeling used to establish the goals in Item (5) of this Rule. Any modification to these rules as a result of such evaluations would require additional rulemaking.

(9) **LIMITATION.** The Jordan nutrient strategy may not fully address significant nutrient sources in the Jordan watershed in that the rules do not directly address atmospheric sources of nitrogen to the watershed from sources located both within and outside of the

watershed. As better information becomes available from ongoing research on atmospheric nitrogen loading to the watershed from these sources, and on measures to control this loading, the Commission may undertake separate rule making to require such measures it deems necessary from these sources to support the goals of the Jordan nutrient strategy.

- (10) **ENFORCEMENT.** Failure to meet requirements of Rules .0262, .0264, .0265, .0266, .0267, .0268, .0269, .0270, .0271, .0272 and .0273 of this Section may result in imposition of enforcement measures as authorized by G.S. 143-215.6A (civil penalties), G.S. 143-215.6B (criminal penalties), and G.S. 143-215.6C (injunctive relief).

Authority G.S. 143-214.1; 143-214.5; 143-214.7; 143-215.1; 143-215.3(a)(1); 143-215.6A; 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8B; 143B-282(c); 143B-282(d); S.L. 2005-190; S.L. 2006-259; S.L. 2012-187.

**15A NCAC 02B .0265 JORDAN WATER SUPPLY
NUTRIENT STRATEGY: STORMWATER
MANAGEMENT FOR NEW DEVELOPMENT**

~~(See S.L. 2009-216 and S.L. 2009-484)~~

The following is the stormwater strategy for new development activities within the Jordan watershed, as prefaced in 15A NCAC 02B .0262:

- (1) **PURPOSE.** The purposes of this Rule are as follows:
- (a) To achieve and maintain the nitrogen and phosphorus loading goals established for Jordan Reservoir in 15A NCAC 02B .0262 from lands in the Jordan watershed on which new development occurs;
 - (b) To provide control for stormwater runoff from new development in Jordan watershed to ensure that the integrity and nutrient processing functions of receiving waters and associated riparian buffers are not compromised by erosive flows; and
 - (c) To protect the water supply uses of Jordan Reservoir and of designated water supplies throughout the Jordan watershed from the potential impacts of new development.
- (2) **APPLICABILITY.** This Rule shall apply to those areas of new development, as defined in 15A NCAC 02B .0263, that lie within the Jordan watershed and the planning jurisdiction of a municipality or county that is identified in 15A NCAC 02B .0262.
- (3) **REQUIREMENTS.** All local governments subject to this Rule shall ~~develop~~ implement

stormwater management programs ~~for submission to and approval as approved by the Commission, to be implemented~~ Commission in areas described in Item (2) of this Rule, based on the standards in this Item:

- (a) An approved stormwater management plan shall be required for all proposed new development disturbing one acre or more for single family and duplex residential property and recreational facilities, and one-half acre or more for commercial, industrial, institutional, multifamily residential, or local government property. These stormwater plans shall not be approved by the subject local governments unless the following criteria are met:
 - (i) Nitrogen and phosphorus loads contributed by the proposed new development activity in a given subwatershed shall not exceed the unit-area mass loading rates applicable to that subwatershed as follows for nitrogen and phosphorus, respectively, expressed in units of pounds per acre per year: 2.2 and 0.82 in the Upper New Hope; 4.4 and 0.78 in the Lower New Hope; and 3.8 and 1.43 in the Haw. The developer shall determine the need for engineered stormwater controls to meet these loading rate targets by using ~~the loading calculation method called for in Sub-Item (4)(a)~~ Jordan and Falls Stormwater Nutrient Load Accounting Tool approved by the Commission in March 2011 or other equivalent method acceptable to the Division;
 - (ii) Proposed new development undertaken by a local government solely as a public road project shall be deemed compliant with the purposes of this Rule if it meets the riparian buffer protection requirements of 15A NCAC 02B .0267 and .0268;

(iii) New development that would exceed the nitrogen or phosphorus loading rate targets set out in this Item without the use of engineered stormwater controls shall have engineered stormwater controls that meet the design requirements set out in Sub-Item (3)(a)(v) of this Item and that achieve eighty-five percent (85%) removal of total suspended solids;

~~(iii)~~(iv) Proposed new development subject to NPDES, water supply, and other state-mandated stormwater regulations shall comply with those regulations in addition to the other requirements of this Sub-Item. Proposed new development in any water supply watershed in the Jordan watershed designated WS-II, WS-III, or WS-IV shall comply with the density-based restrictions, obligations, and requirements for engineered stormwater controls, clustering options, and 10/70 provisions described in Sub-Items (3)(b)(i) and (3)(b)(ii) of the applicable Rule among 15A NCAC 02B .0214 through .0216;

~~(iv)~~(v) Stormwater systems shall be designed to control and treat the runoff generated from all surfaces by one inch of rainfall. The treatment volume shall be drawn down pursuant to standards specific to each practice as provided in the July 2007 version of the *Stormwater Best Management Practices Manual* published by the Division, or other at least technically equivalent standards acceptable to the Division. To ensure that the integrity and nutrient processing functions of receiving waters and associated riparian buffers are not compromised by

erosive flows, stormwater flows from the new development shall not contribute to degradation of waters of the State. At a minimum, the new development shall not result in a net increase in peak flow leaving the site from pre-development conditions for the one-year, 24-hour storm event;

~~(v)~~(vi) Proposed new development that would replace or expand structures or improvements that existed as of December 2001, the end of the baseline period, and that would not result in a net increase in built-upon area shall not be required to meet the nutrient loading targets or high-density requirements except to the extent that it shall provide stormwater control at least equal to the previous development. Proposed new development that would replace or expand existing structures or improvements and would result in a net increase in built-upon area shall have the option either to achieve at least the percentage loading reduction goals stated in 15A NCAC 02B .0262 as applied to nitrogen and phosphorus loading from the previous development for the entire project site, or to meet the loading rate targets described in Sub-Item (3)(a)(i). These requirements shall supersede those identified in 15A NCAC 02B .0104(q);

~~(vi)~~(vii) Proposed new development shall comply with the riparian buffer protection requirements of 15A NCAC 02B .0267 and .0268; and

~~(vii)~~(viii) Developers shall have the option of offsetting part of their nitrogen and phosphorus loads by implementing or funding offsite management measures as follows: Before

using offsite offset options, a development shall attain a ~~maximum~~ nitrogen loading rate on-site of ~~four that does not exceed six~~ pounds per acre per year for single-family, detached and duplex residential development and ~~eight ten~~ pounds per acre per year for other development, including multi-family residential, commercial and industrial and shall meet any requirements for engineered stormwater controls described in Sub-Item (3)(a)(iii) and (iv) of this Rule. Offsite offsetting measures shall achieve ~~at least equivalent~~ reductions in nitrogen and phosphorus loading that are at least equivalent to the remaining reduction needed ~~onsite~~ to comply with the loading rate targets set out in Sub-Item (3)(a)(i) of this Rule. A developer may make offset payments to the NC Ecosystem Enhancement Program contingent upon acceptance of payments by that Program. A developer may use an offset option provided by the local government in which the development activity occurs. A developer may propose other offset measures to the local government, including providing his or her own offsite offset or utilizing a private seller. All offset measures identified in this Sub-Item shall meet the requirements of 15A NCAC 02B .0273 (2) through ~~(4);(4)~~ and 15A NCAC 02B .0240.

- (b) A plan to ensure maintenance of best management practices (BMPs) implemented as a result of the provisions in Sub-Item (3)(a) of this Rule for the life of the development;
- (c) A plan to ensure enforcement and compliance with the provisions in Sub-Item (3)(a) of this Rule for the life of the new development; and

(d) The following requirements in water supply 15A NCAC 02B .0104 shall apply to new development throughout the Jordan watershed:

- (i) Requirements in Paragraph (f) for local governments to assume ultimate responsibility for operation and maintenance of high-density stormwater controls, to enforce compliance, to collect fees, and other measures;
- (ii) Variance procedures in Paragraph (r);
- (iii) Assumption of local programs by the Commission in Paragraph (x); and
- (iv) Delegation of Commission authorities to the Director in Paragraph (aa).

(4) RULE IMPLEMENTATION. This Rule shall be implemented as follows:

- ~~(a) Within 18 months after the effective date of this Rule, the Division shall submit a model local stormwater program, including a model local ordinance, in conjunction with similar requirements in 15A NCAC 02B .0266, that embodies the criteria described in Item (3) of this Rule to the Commission for approval. The model program shall include a tool that will allow developers to account for nutrient loading from development lands and loading changes due to BMP implementation to meet the requirements of Item (3) of this Rule. The accounting tool shall utilize nutrient efficiencies and associated design criteria established for individual BMPs in the July 2007 version of the Stormwater Best Management Practices Manual published by the Division, or other at least technically equivalent standards acceptable to the Division. The Division shall work in cooperation with subject local governments and other watershed interests in developing this model program;~~
- ~~(b) Within six months after the Commission's approval of the model local stormwater program and model ordinance, subject local governments shall submit stormwater management programs, in conjunction with similar requirements in 15A NCAC 02B~~

~~.0266, to the Division for preliminary approval. These local programs shall meet or exceed the requirements in Item (3) of this Rule;~~

~~(e) Within 15 months after the Commission's approval of the model local stormwater program, the Division shall provide recommendations to the Commission on local stormwater programs. The Commission shall either approve the programs or require changes based on the standards set out in Item (3) of this Rule. Should the Commission require changes, the applicable local government shall have two months to submit revisions, and the Division shall provide follow up recommendations to the Commission within two months after receiving revisions;~~

~~(d)(a) Within three months after the Commission's approval of a local program, or upon the Division's first renewal of a local government's NPDES stormwater permit, whichever occurs later, By August 10, 2014, the affected local government governments shall complete adoption of and implement its—their local stormwater management program as approved by the Commission in May or September 2012 or subsequent revision to the program approved by the Commission or its delegated authority. Programs met the requirements of Item (3) of this Rule and were guided by the model local ordinance approved by the Commission in March 2011; and~~

~~(e)(b) Upon implementation, subject local governments shall submit annual reports to the Division summarizing their activities in implementing each of the requirements in Item (3) of this Rule, including changes to nutrient loading due to implementation of Sub-Item (3)(a) of this Rule.~~

(5) **RELATIONSHIP TO OTHER REQUIREMENTS.** Local governments shall have the following options with regard to satisfying the requirements of other rules in conjunction with this Rule:

(a) A local government may in its program submittal under Sub-Item (4)(b) of this Rule request that the Division accept the local government's implementation of

another stormwater program or programs, such as NPDES municipal stormwater requirements, as satisfying one or more of the requirements set forth in Item (3) of this Rule. The Division will provide determination on acceptability of any such alternatives prior to requesting Commission approval of local programs as required in Sub-Item (4)(c) of this Rule. The local government shall include in its program submittal technical information demonstrating the adequacy of the alternative requirements.

Authority G.S. 143-214.1; 143-214.5; 143-214.7; 143-214.12; 143-214.21; 143-215.3(a)(1); 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8B; 143B-282(c); 143B-282(d); S.L. 2005-190; S.L. 2006-259; S.L. 2009-216; S.L. 2009-484; S.L. 2012-200; 2012-201.

15A NCAC 02B .0266 JORDAN WATER SUPPLY NUTRIENT STRATEGY: STORMWATER MANAGEMENT FOR EXISTING DEVELOPMENT

This Rule is the stormwater strategy to control nutrient loading from existing development. The Division shall determine whether nutrient load reduction measures for existing development are necessary in each subwatershed of Jordan Reservoir. The Division shall require implementation of reasonable nutrient load reduction measures for existing development in each subwatershed of the Jordan Reservoir, as provided in this Rule and in accordance with a staged, adaptive management program.

(1) **PURPOSE.** The purposes of this Rule are as follows:

(a) To improve the management of stormwater runoff from existing development in the Jordan Watershed to contribute toward nitrogen and phosphorus loading goals identified in 15A NCAC 02B .0262; and

(b) To contribute to the restoration of water quality in the Jordan Reservoir as specified in Rule 15A NCAC 02B .0262.

(2) **APPLICABILITY.** This Rule shall apply to municipalities and counties located in whole or in part in the Jordan Watershed as identified in Rule 15A NCAC 02B .0262(7).

(3) **STAGE 1 PROGRAM REQUIREMENTS.** Municipalities and counties located in whole or in part in the Jordan watershed shall continue to implement a Stage 1 adaptive management program to control nutrient loading from existing development in the Jordan watershed as approved by the Commission in May 2010 or subsequent

revision their program approved by the Commission or its delegated authority. The Stage 1 adaptive management program met the requirements set out in 40 CFR 122.34 as applied by the Division in the NPDES General Permit for municipal separate storm sewer systems in effect on July 1, 2009. Local governments shall report annually to the Division on implementation progress on the following Stage 1 program elements:

- (a) Public education to inform the public of the impacts of nutrient loading and measures that can be implemented to reduce nutrient loading from stormwater runoff from existing development.
 - (b) Mapping that includes major components of the municipal separate storm sewer system, including the location of major outfalls, as defined in 40 CFR 122.26(b)(5) (July 1, 2008) and the names and location of all waters of the United States that receive discharges from those outfalls, land use types, and location of sanitary sewers.
 - (c) Identification and remove illegal discharges.
 - (d) Identification of opportunities for retrofits and other projects to reduce nutrient loading from existing developed lands.
 - (e) Maintenance of best management practices implemented by the local government.
- (4) **NUTRIENT MONITORING.** The Division shall maintain an ongoing program to monitor water quality in each arm of Jordan Reservoir. The Division shall also accept water quality sampling data from a monitoring program implemented by a local government or nonprofit organization if the data meets quality assurance standards established by the Division. On March 1, 2014, the Division shall report the results of monitoring in each arm of Jordan Reservoir to the Environmental Review Commission. The Division shall submit an updated monitoring report under this Item every three years thereafter until such time as the lake is no longer impaired by nutrient pollution.
- (5) **STAGE 2 ADAPTIVE MANAGEMENT.** The Division shall review monitoring described in Item (4) of this Rule to decide whether to implement a Stage 2 adaptive management program to control nutrient loading from existing development to achieve nutrient-related water quality standards in Jordan Lake. The Division shall use the

following conditions to identify local governments that need to develop and implement a Stage 2 program:

- (a) If the March 1, 2014 monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir required under Item (4) of this Rule shows that nutrient-related water quality standards are not being achieved, a municipality or county located in whole or in part in the subwatershed of that arm of Jordan Reservoir shall develop and implement a Stage 2 program within the subwatershed, as provided in this Rule.
- (b) If the March 1, 2017 monitoring report or any subsequent monitoring report for the Haw River Arm or the Lower New Hope Creek Arm of Jordan Reservoir required under Item (4) of this Rule shows that nutrient-related water quality standards are not being achieved, a municipality or county located in whole or in part in the subwatershed of that arm of Jordan Reservoir shall develop and implement a Stage 2 program within the subwatershed, as provided in this Rule.
- (c) The Division shall defer development and implementation of Stage 2 programs required in a subwatershed by this Item if it determines that additional reductions in nutrient loading from existing development in that subwatershed will not be necessary to achieve nutrient-related water quality standards. In making this determination, the Division shall consider the anticipated effect of measures implemented or scheduled to be implemented to reduce nutrient loading from sources in the subwatershed other than existing development. If any subsequent monitoring report for an arm of Jordan Reservoir required under Item (4) of this Rule shows that nutrient-related water quality standards have not been achieved, the Division shall notify the municipalities and counties located in whole or in part in the subwatershed of that arm of Jordan Reservoir and the municipalities and counties shall develop and implement a Stage 2 adaptive management program as provided in this Rule.

(6) NOTIFICATION OF STAGE 2 REQUIREMENTS. Based on findings under Item (5) of this Rule, the Division shall notify the local governments in each subwatershed that either:

- (a) Implementation of a Stage 2 program will be necessary to achieve water quality standards in an arm of the reservoir and direct the municipalities and counties in the subwatershed to develop a load reduction program in compliance with this Rule; or
- (b) Implementation of a Stage 2 program is not necessary at that time but will be reevaluated in three years based on the most recent water quality monitoring information.

(7) STAGE 2 LOAD GOALS. The Division shall establish a load reduction goal for existing development for each municipality and county required to implement a Stage 2 program. The load reduction goal shall be designed to achieve, relative to the baseline period 1997 through 2001, an eight percent (8%) reduction in nitrogen loading and a five percent (5%) reduction in phosphorus loading reaching Jordan Reservoir from existing developed lands within the police power jurisdiction of the local government. The baseline load shall be estimated using the results of a watershed model recommended in a July 2012 report to the Secretary from the Nutrient Scientific Advisory Board established pursuant to Section 4(a) of S.L. 2009-216, or by using an equivalent or more accurate method acceptable to the Division and recommended by that Board. The baseline load for a municipality or county shall not include nutrient loading from lands under State or federal control or lands in agriculture or forestry. The load reduction goal shall be adjusted to account for nutrient loading increases from lands developed subsequent to the baseline period but prior to implementation of new development stormwater programs.

(8) A local government receiving notice of the requirement to develop and implement a Stage 2 program under Item (6) of this Rule shall not be required to submit a program if the local government demonstrates that it has already achieved the reductions in nutrient loadings required under Item (7) of this Rule.

(9) STAGE 2 PROGRAM DEVELOPMENT. Local governments shall utilize the model program to control nutrient loading from existing development, that was approved by the Commission as of December 2013, to develop their Stage 2 program to control nutrient loading from existing development as

described under Item (10) of this Rule. In developing this model program, the Division considered comments from municipalities and counties listed in 15A NCAC 02B .0262(7) and recommendations from the Nutrient Scientific Advisory Board. The model program identifies specific load reduction practices and programs and reduction credits associated with each practice or program and shall provide that a local government may obtain additional or alternative load-reduction credits based on site-specific monitoring data.

(10) STAGE 2 IMPLEMENTATION. The following process shall be applied for local governments subject to the requirement to develop and implement a Stage 2 adaptive management program.

- (a) Within six months after receiving notice to develop and implement a Stage 2 program as described in Item (6) of this Rule, each local government that has not received Division approval for having achieved the required reductions as specified in Item (8) of this Rule shall submit to the Commission a program that is designed to achieve the reductions in nutrient loadings established by the Division pursuant to Item (7) of this Rule. A local government program may include nutrient management strategies that are not included in the model program developed pursuant to Item (9) of this Rule in addition to or in place of any component of the model program. In addition, a local government may satisfy the requirements of this Item through reductions in nutrient loadings from other sources in the same subwatershed to the extent those reductions go beyond measures otherwise required by statute or rule. A local government may also work with other local governments within the same subwatershed to collectively meet the required reductions in nutrient loadings from existing development within their combined jurisdictions. Any credit for reductions achieved or obtained outside of the police power jurisdiction of a local government shall be adjusted based on transport factors established by the Division document Nitrogen and Phosphorus Delivery from Small Watersheds to Jordan Lake, dated June 30, 2002 or

an equivalent or more accurate method acceptable to the Division and recommended by the Nutrient Scientific Advisory Board established pursuant to Section 4(a) of S.L. 2009-216.

- (b) Within six months following submission of a local government's Stage 2 adaptive management program to control nutrient loading from existing development, the Division shall recommend that the Commission approve or disapprove the program. The Commission shall approve the program if it meets the requirements of this Item, unless the Commission finds that the local government can, through the implementation of reasonable and cost-effective measures not included in the proposed program, meet the reductions in nutrient loading established by the Division pursuant to Item (7) of this Rule by a date earlier than that proposed by the local government. If the Commission finds that there are additional or alternative reasonable and cost-effective measures, the Commission may require the local government to modify its proposed program to include such measures to achieve the required reductions by the earlier date. If the Commission requires such modifications, the local government shall submit a modified program within two months. The Division shall recommend that the Commission approve or disapprove the modified program within three months after receiving the local government's modified program. In determining whether additional or alternative load reduction measures are reasonable and cost effective, the Commission shall consider factors including, but not limited to, the increase in the per capita cost of a local government's stormwater management program that would be required to implement such measures and the cost per pound of nitrogen and phosphorus removed by such measures. The Commission shall not require additional or alternative measures that would require a local government to:

- (i) Install or require installation of a new stormwater

collection system in an area of existing development unless the area is being redeveloped.

- (ii) Acquire developed private property.

- (iii) Reduce or require the reduction of impervious surfaces within an area of existing development unless the area is being redeveloped.

- (c) Within three months after the Commission's approval of a Stage 2 adaptive management program to control nutrient loading from existing development, the local government shall complete adoption and begin implementation of its program.

- (11) ADDITIONAL MEASURES TO REDUCE NITROGEN LOADING IN THE UPPER NEW HOPE CREEK SUBWATERSHED. If the March 1, 2023, monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir shows that nutrient-related water quality standards are not being achieved, a municipality or county located in whole or in part in the Upper New Hope Creek Subwatershed shall modify its Stage 2 adaptive management program to control nutrient loading from existing development to achieve additional reductions in nitrogen loading from existing development. The modified Stage 2 program shall be designed to achieve a total reduction in nitrogen loading from existing development of thirty-five percent (35%) relative to the baseline period 1997 through 2001. The Division shall notify local governments of the requirement to submit a modified Stage 2 adaptive management program. Submission, review and approval, and implementation of a modified Stage 2 adaptive management program shall follow the process, timeline, and standards set out Item (10) of this Rule.

- (12) Each local government implementing a Stage 2 program shall submit an annual report to the Division summarizing its activities in implementing its program.

- (13) If at any time the Division finds, based on water quality monitoring, that an arm of the Jordan Reservoir has achieved compliance with water quality standards, the Division shall notify the local governments in the subwatershed. Subject to the approval of the Commission, a local government may modify its Stage 2 adaptive management program to control nutrient loading from existing

development to maintain only those measures necessary to prevent increases in nutrient loading from existing development.

- (14) The Division shall report annually to the Commission regarding the implementation of adaptive management programs to control nutrient loading from existing development in the Jordan watershed.

Authority G.S. 143-214.1; 143-214.5; 143-214.7; 143-214.12; 143-214.21; 143-215.3(a)(1); 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8B; 143B-282(c); 143B-282(d); S.L. 2005-190; S.L. 2006-259; S.L. 2009-216.

**15A NCAC 02B .0267 JORDAN WATER SUPPLY
NUTRIENT STRATEGY: PROTECTION OF EXISTING
RIPARIAN BUFFERS**

(See S.L. 2009-216 and S.L. 2009-484)

Protection of the nutrient removal and other water quality benefits provided by riparian buffers throughout the watershed is an important element of the overall Jordan water supply nutrient strategy. The following is the strategy for riparian buffer protection and maintenance in the Jordan watershed, as prefaced in 15A NCAC 02B .0262:

- (1) **PURPOSE.** The purposes of this Rule shall be to protect and preserve existing riparian buffers throughout the Jordan watershed as generally described in 15A NCAC 02B .0262, in order to maintain their nutrient removal and stream protection functions. Additionally this Rule will help protect the water supply uses of Jordan Reservoir and of designated water supplies throughout the Jordan watershed. Local governments shall establish programs to meet or exceed the minimum requirements of this Rule. The requirements of this Rule shall supersede all locally implemented buffer requirements stated in 15A NCAC 02B .0214 through .0216 as applied to WS-II, WS-III, and WS-IV waters in the Jordan watershed. Local governments subject to this Rule may choose to implement more stringent requirements, including requiring additional buffer width.
- (2) **DEFINITIONS.** For the purpose of this Rule, these terms shall be defined as follows:
 - (a) 'Access Trails' means pedestrian trails constructed of pervious or impervious surfaces and related structures to access a surface water, including boardwalks, steps, rails, and signage.
 - (b) 'Airport Facilities' means all properties, facilities, buildings, structures, and activities that satisfy or otherwise fall within the scope of one or more of the definitions or uses of the words or phrases 'air navigation facility', 'airport', or 'airport protection privileges' under G.S. 63-1; the

definition of 'aeronautical facilities' in G.S. 63-79(1); the phrase 'airport facilities' as used in G.S. 159-48(b)(1); the phrase 'aeronautical facilities' as defined in G.S. 159-81 and G.S. 159-97; and the phrase 'airport facilities and improvements' as used in Article V, Section 13, of the North Carolina Constitution, which shall include, without limitation, any and all of the following: airports, airport maintenance facilities, clear zones, drainage ditches, fields, hangars, landing lighting, airport and airport-related offices, parking facilities, related navigational and signal systems, runways, stormwater outfalls, terminals, terminal shops, and all appurtenant areas used or suitable for airport buildings or other airport facilities, and all appurtenant rights-of-way; restricted landing areas; any structures, mechanisms, lights, beacons, marks, communicating systems, or other instrumentalities or devices used or useful as an aid, or constituting an advantage or convenience to the safe taking off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport or restricted landing area; easements through, or interests in, air space over land or water, interests in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to ensure safe approaches to the landing areas of airports and restricted landing areas, and the safe and efficient operation thereof and any combination of any or all of such facilities. Notwithstanding the foregoing, the following shall not be included in the definition of 'airport facilities':

- (i) Satellite parking facilities;
- (ii) Retail and commercial development outside of the terminal area, such as rental car facilities; and
- (iii) Other secondary development, such as hotels, industrial facilities, free-standing offices and other similar buildings, so long as these facilities are not

- directly associated with the operation of the airport, and are not operated by a unit of government or special governmental entity such as an airport authority, in which case they are included in the definition of 'airport facilities'.
- (c) 'Forest management plan' means as defined in Chapter 160A-458.5(4).
 - (d) 'Forest plantation' means an area of planted trees that may be conifers (pines) or hardwoods. On a plantation, the intended crop trees are planted rather than naturally regenerated from seed on the site, coppice (sprouting), or seed that is blown or carried into the site.
 - (e) 'Greenway / Hiking Trails' means pedestrian trails constructed of pervious or impervious surfaces and related structures including but not limited to boardwalks, steps, rails, and signage, and that generally run parallel to the shoreline.
 - (f) 'High Value Tree' means a tree that meets or exceeds the following standards: for pine species, 14-inch DBH or greater or 18-inch or greater stump diameter; or for hardwoods and wetland species, 16-inch DBH or greater or 24-inch or greater stump diameter.
 - (g) 'Shoreline stabilization' is the in-place stabilization of an eroding shoreline. Stabilization techniques which include "soft" methods or natural materials (such as root wads, or rock vanes) may be considered as part of a restoration design. However, stabilization techniques that consist primarily of "hard" engineering, such as concrete lined channels, riprap, or gabions, while providing bank stabilization, shall not be considered stream restoration.
 - (h) 'Stream restoration' is defined as the process of converting an unstable, altered or degraded stream corridor, including adjacent riparian zone and flood-prone areas to its natural or referenced, stable conditions considering recent and future watershed conditions. This process also includes restoring the geomorphic dimension, pattern, and profile as well as biological and chemical integrity, including transport of water and sediment produced by the stream's watershed in order to achieve dynamic equilibrium. 'Referenced' or 'referenced reach' means a stable stream that is in dynamic equilibrium with its valley and contributing watershed. A reference reach can be used to develop natural channel design criteria for stream restoration projects.
 - (i) 'Stump diameter' means the diameter of a tree measured at six inches above the ground surface level.
 - (j) 'Temporary road' means a road constructed temporarily for equipment access to build or replace hydraulic conveyance structures such as bridges, culverts, pipes or water dependent structures, or to maintain public traffic during construction.
- (3) **APPLICABILITY.** This Rule applies to all landowners and other persons conducting activities in the Jordan watershed, including state and federal entities, and to all local governments in the Jordan watershed, as described in 15A NCAC 02B .0262. Local governments shall develop riparian buffer protection programs for approval by the Commission, incorporating the minimum standards set out throughout this Rule and shall apply the requirements of this Rule throughout their jurisdictions within the Jordan watershed except where The Division shall exercise jurisdiction. For the following types of buffer activities in the Jordan watershed, wherever local governments are referenced in this Rule, the Division shall implement applicable requirements to the exclusion of local governments:
- (a) Activities conducted under the authority of the State.
 - (b) Activities conducted under the authority of the United States.
 - (c) Activities conducted under the authority of multiple jurisdictions.
 - (d) Activities conducted under the authority of local units of government.
 - (e) Forest harvesting activities described in Item (14) of this Rule.
 - (f) Agricultural activities.
 - (g) Activities conducted in a location where there is no local government program implementing NPDES stormwater requirements, Water Supply Watershed requirements, or a voluntary local stormwater or buffer initiative at the time of the activity.

(4) **BUFFERS PROTECTED.** The following minimum criteria shall be used for identifying regulated buffers:

- (a) This Rule shall apply to activities conducted within, or outside of with impacts upon, 50-foot wide riparian buffers directly adjacent to surface waters in the Jordan watershed (intermittent streams, perennial streams, lakes, reservoirs and ponds), excluding wetlands.
- (b) Wetlands adjacent to surface waters or within 50 feet of surface waters shall be considered as part of the riparian buffer but are regulated pursuant to 15A NCAC 02H .0506.
- (c) A surface water shall be subject to this Rule if the feature is approximately shown on any of the following references, and shall not be subject if it does not appear on any of these references:
 - (i) The most recent version of the soil survey map prepared by the Natural Resources Conservation Service of the United States Department of Agriculture.
 - (ii) The most recent version of the 1:24,000 scale (7.5 minute) quadrangle topographic maps prepared by the United States Geologic Survey (USGS).
 - (iii) ~~The maps approved by the Commission Geographic Information Coordinating Council and by the Commission, as more accurate than those identified in Sub-Item (4)(c)(i) and (4)(c)(ii) of this Rule. Prior to approving such maps, the Commission shall provide a 30-day public notice and opportunity for comment. Maps approved under this Sub-item shall not apply to projects that are existing and ongoing within the meaning of this Rule as set out in Item (6).~~
- (d) Where the specific origination point of a stream regulated under this Item is in question, upon request of the Division or another party, the local government shall make an on-site determination. A local government representative who has successfully

completed the Division's *Surface Water Identification Training Certification* course, its successor, or other equivalent training curriculum approved by the Division, shall establish that point using the latest version of the Division publication, *Identification Methods for the Origins of Intermittent and Perennial Streams*, available at http://h2o.ncnr.state.nc.us/newetlands/documents/NC_Stream_ID_Manual.pdf

<http://portal.ncdenr.org/web/wq/swp/ws/401/waterresources/streamdeterminations> or from the Division of Water Quality, 401/Wetlands Unit, 1650 Mail Service Center, Raleigh, NC, 27699-1650. A local government may accept the results of a site assessment made by another party who meets these criteria. Any disputes over on-site determinations made according to this Sub-Item shall be referred to the Director in writing. The Director's determination is subject to review as provided in Articles 3 and 4 of G.S. 150B.

- (e) Riparian buffers protected by this Rule shall be measured pursuant to Item (7) of this Rule.
 - (f) Parties subject to this rule shall abide by all State rules and laws regarding waters of the state including but not limited to 15A NCAC 02H .0500, 15A NCAC 02H .1300, and Sections 401 and 404 of the Federal Water Pollution Control Act.
 - (g) A riparian buffer may be exempt from this Rule as described in Item (5) or (6) of this Rule.
 - (h) No new clearing, grading, or development shall take place nor shall any new building permits be issued in violation of this Rule.
- (5) **EXEMPTION BASED ON ON-SITE DETERMINATION.** When a landowner or other affected party including the Division believes that the maps have inaccurately depicted surface waters, he or she shall consult the appropriate local government. Upon request, a local government representative who has successfully completed the Division's *Surface Water Identification Training Certification* course, its successor, or other equivalent training curriculum approved by the Division, shall make an on-site determination. Local governments may also accept the results of site assessments made by other parties who

have successfully completed such training. Any disputes over on-site determinations shall be referred to the Director in writing. A determination of the Director as to the accuracy or application of the maps is subject to review as provided in Articles 3 and 4 of G.S. 150B. Surface waters that appear on the maps shall not be subject to this Rule if a site evaluation reveals any of the following cases:

- (a) Man-made ponds and lakes that are not part of a natural drainage way that is classified in accordance with 15A NCAC 02B .0100, including ponds and lakes created for animal watering, irrigation, or other agricultural uses. A pond or lake is part of a natural drainage way when it is fed by an intermittent or perennial stream or when it has a direct discharge point to an intermittent or perennial stream.
- (b) Ephemeral streams.
- (c) The absence on the ground of a corresponding intermittent or perennial stream, lake, reservoir, or pond.
- (d) Ditches or other man-made water conveyances, other than modified natural streams.

(6) **EXEMPTION WHEN EXISTING USES ARE PRESENT AND ONGOING.** This Rule shall not apply to uses that are existing and ongoing; however, this Rule shall apply at the time an existing, ongoing use is changed to another use. Change of use shall involve the initiation of any activity that does not meet either of the following criteria for existing, ongoing activity:

- (a) It was present within the riparian buffer as of the effective date of a local program enforcing this Rule and has continued to exist since that time. For any Division-administered activities listed in Item (3) of this Rule, a use shall be considered existing and ongoing if it was present within the riparian buffer as of the Rule's effective date of this Rule August 11, 2009 and has continued to exist since that time. Existing uses shall include agriculture, buildings, industrial facilities, commercial areas, transportation facilities, maintained lawns, utility lines and on-site sanitary sewage systems, any of which involve either specific, periodic management of vegetation or displacement of vegetation by structures or regular activity. Only the portion of the riparian buffer

occupied by the footprint of the existing use is exempt from this Rule. Change of ownership through purchase or inheritance is not a change of use. Activities necessary to maintain uses are allowed provided that the site remains similarly vegetated, no impervious surface is added within 50 feet of the surface water where it did not previously exist as of the effective date of a local program enforcing this Rule, or for Division-administered activities listed in Item (3) of this Rule as of the Rule's effective date of this Rule August 11, 2009, and existing diffuse flow is maintained. Grading and revegetating Zone Two is allowed provided that the health of the vegetation in Zone One is not compromised, the ground is stabilized and existing diffuse flow is maintained.

(b) Projects or proposed development that are determined by the local government to meet at least one of the following criteria:

- (i) Project requires a 401 Certification/404 Permit and these were issued prior to the effective date of the local program enforcing this Rule, and prior to the August 11, 2009 effective date of this Rule for Division-administered activities listed in Item (3) of this Rule;
- (ii) Projects that require a state permit, such as landfills, NPDES wastewater discharges, land application of residuals and road construction activities, have begun construction or are under contract to begin construction and had received all required state permits and certifications prior to the effective date of the local program implementing this Rule, and prior to the August 11, 2009 effective date of this Rule for Division-administered activities listed in Item (3) of this Rule;
- (iii) Projects that are being reviewed through the Clean Water Act Section

- 404/National Environmental Policy Act Merger 01 Process (published by the US Army Corps of Engineers and Federal Highway Administration, 2003) or its immediate successor and that have reached agreement with DENR on avoidance and minimization by the effective date of the local program enforcing this Rule, and prior to the August 11, 2009 effective date of this Rule for state and federal entities; or
- (iv) Projects that are not required to be reviewed by the Clean Water Act Section 404/National Environmental Policy Act Merger 01 Process (published by the US Army Corps of Engineers and Federal Highway Administration, 2003) or its immediate successor if a Finding of No Significant Impact has been issued for the project and the project has the written approval of the local government prior to the effective date of the local program enforcing this Rule, or the written approval of the Division prior to the August 11, 2009 effective date of this Rule for state and federal entities.
- (7) **ZONES OF THE RIPARIAN BUFFER.** The protected riparian buffer shall have two zones as follows:
- (a) Zone One shall consist of a vegetated area that is undisturbed except for uses provided for in Item (9) of this Rule. The location of Zone One shall be as follows:
- (i) For intermittent and perennial streams, Zone One shall begin at the top of the bank and extend landward a distance of 30 feet on all sides of the surface water, measured horizontally on a line perpendicular to a vertical line marking the top of the bank.
- (ii) For ponds, lakes and reservoirs located within a natural drainage way, Zone One shall begin at the normal water level and extend landward a distance of 30 feet, measured horizontally on a line perpendicular to a vertical line marking the normal water level.
- (b) Zone Two shall consist of a stable, vegetated area that is undisturbed except for uses provided for in Item (9) of this Rule. Grading and revegetating in Zone Two is allowed provided that the health of the vegetation in Zone One is not compromised. Zone Two shall begin at the outer edge of Zone One and extend landward 20 feet as measured horizontally on a line perpendicular to the surface water. The combined width of Zones One and Two shall be 50 feet on all sides of the surface water.
- (8) **DIFFUSE FLOW REQUIREMENT.** Diffuse flow of runoff shall be maintained in the riparian buffer by dispersing concentrated flow prior to its entry into the buffer and reestablishing vegetation as follows:
- (a) Concentrated runoff from new ditches or manmade conveyances shall be converted to diffuse flow at non-erosive velocities before the runoff enters Zone Two of the riparian buffer;
- (b) Periodic corrective action to restore diffuse flow shall be taken as necessary and shall be designed to impede the formation of erosion gullies; ~~and~~
- (c) As set out in Items (7) and (9) of this Rule, no new stormwater conveyances are allowed through the buffers except for those specified in Item (9) of this Rule addressing stormwater management ponds, drainage ditches, roadside ditches, and stormwater ~~conveyances~~ conveyances; and
- (d) Activities conducted outside of buffers identified in Item (4) that alter the hydrology in violation of the diffuse flow requirements set out in this Item shall be prohibited.

- (9) **TABLE OF USES.** The following chart sets out potential new uses within the buffer, or outside the buffer with impacts on the buffer, and categorizes them as exempt, allowable, or allowable with mitigation. All uses not categorized as exempt, allowable, or allowable with mitigation are considered prohibited and may not proceed within the riparian buffer, or outside the buffer if the use would impact diffuse flow through the buffer, unless a variance is granted pursuant to Item (12) of this Rule. The requirements for each category are given in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Access trails: Pedestrian access trails leading to the surface water, docks, fishing piers, boat ramps and other water dependent activities: <ul style="list-style-type: none"> • Pedestrian access trails that are restricted to the minimum width practicable and do not exceed 4 feet in width of buffer disturbance, and provided that installation and use does not result in removal of trees as defined in this Rule and no impervious surface is added to the riparian buffer • Pedestrian access trails that exceed 4 feet in width of buffer disturbance, the installation or use results in removal of trees as defined in this Rule or impervious surface is added to the riparian buffer 	X	X	
Airport facilities: <ul style="list-style-type: none"> • Airport facilities that impact equal to or less than 150 linear feet or one-third of an acre of riparian buffer • Airport facilities that impact greater than 150 linear feet or one-third of an acre of riparian buffer • Activities necessary to comply with FAA requirements (e.g. radar uses or landing strips)¹ 		X X	X
Archaeological activities	X		
Bridges		X	
Canoe Access provided that installation and use does not result in removal of trees as defined in this Rule and no impervious surface is added to the buffer.	X		

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Dam maintenance activities: <ul style="list-style-type: none"> • Dam maintenance activities that do not cause additional buffer disturbance beyond the footprint of the existing dam or those covered under the U.S. Army Corps of Engineers Nationwide Permit No. 3 • Dam maintenance activities that do cause additional buffer disturbance beyond the footprint of the existing dam or those not covered under the U.S. Army Corps of Engineers Nationwide Permit No.3 	X	X	

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
<p>Drainage ditches, roadside ditches and stormwater conveyances through riparian buffers:</p> <ul style="list-style-type: none"> • New stormwater flows to existing drainage ditches, roadside ditches, and stormwater conveyances provided flows do not alter or result in the need to alter the conveyance and are managed to minimize the sediment, nutrients and other pollution that convey to waterbodies. • Realignment of existing roadside drainage ditches retaining the design dimensions, provided that no additional travel lanes are added and the minimum required roadway typical section is used based on traffic and safety considerations. • New or altered drainage ditches, roadside ditches and stormwater outfalls provided that a stormwater management facility is installed to control nutrients and attenuate flow before the conveyance discharges through the riparian buffer • New drainage ditches, roadside ditches and stormwater conveyances applicable to linear projects that do not provide a stormwater management facility due to topography constraints provided that other practicable BMPs are employed. 	X	<p>X</p> <p>X</p>	X

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Drainage of a pond in a natural drainage way provided that a new riparian buffer that meets the requirements of Items (7) and (8) of this Rule is established adjacent to the new channel	X		
Driveway crossings of streams and other surface waters subject to this Rule: <ul style="list-style-type: none"> • Driveway crossings on single family residential lots that disturb equal to or less than 25 linear feet or 2,500 square feet of riparian buffer • Driveway crossings on single family residential lots that disturb greater than 25 linear feet or 2,500 square feet of riparian buffer • In a subdivision that cumulatively disturb equal to or less than 150 linear feet or one-third of an acre of riparian buffer • In a subdivision that cumulatively disturb greater than 150 linear feet or one-third of an acre of riparian buffer 	X	X X	X
Driveway impacts other than crossing of a stream or other surface waters subject to this Rule			X
Fences: <ul style="list-style-type: none"> • Fences provided that disturbance is minimized and installation does not result in removal of trees as defined in this Rule • Fences provided that disturbance is minimized and installation results in removal of trees as defined in this Rule 	X	X	
Forest harvesting - see Item (14) of this Rule			
Fertilizer application: one-time application to establish vegetation	X		

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Grading and revegetation in Zone Two provided that diffuse flow and the health of existing vegetation in Zone One is not compromised and disturbed areas are stabilized until they are revegetated.	X		
Greenway/hiking trails designed, constructed and maintained to maximize nutrient removal and erosion protection, minimize adverse effects on aquatic life and habitat, and protect water quality to the maximum extent practical.		X	
Historic preservation	X		
Maintenance access on modified natural streams: a grassed travel way on one side of the water body when less impacting alternatives are not practical. The width and specifications of the travel way shall be only that needed for equipment access and operation. The travel way shall be located to maximize stream shading.		X	

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Mining activities: <ul style="list-style-type: none"> • Mining activities that are covered by the Mining Act provided that new riparian buffers that meet the requirements of Items (7) and (8) of this Rule are established adjacent to the relocated channels • Mining activities that are not covered by the Mining Act OR where new riparian buffers that meet the requirements of Items (7) and (8) of this Rule are not established adjacent to the relocated channels • Wastewater or mining dewatering wells with approved NPDES permit 	X	X	X

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Playground equipment: <ul style="list-style-type: none"> • Playground equipment on single family lots provided that installation and use does not result in removal of vegetation • Playground equipment installed on lands other than single-family lots or that requires removal of vegetation 	X	X	
Ponds created by impounding streams and not used as stormwater BMPs: <ul style="list-style-type: none"> • New ponds provided that a riparian buffer that meets the requirements of Items (7) and (8) of this Rule is established adjacent to the pond • New ponds where a riparian buffer that meets the requirements of Items (7) and (8) of this Rule is NOT established adjacent to the pond 		X	X
Protection of existing structures, facilities and stream banks when this requires additional disturbance of the riparian buffer or the stream channel		X	
Railroad impacts other than crossings of streams and other surface waters subject to this Rule.			X

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Railroad crossings of streams and other surface waters subject to this Rule: <ul style="list-style-type: none"> Railroad crossings that impact equal to or less than 40 linear feet of riparian buffer Railroad crossings that impact greater than 40 linear feet but equal to or less than 150 linear feet or one-third of an acre of riparian buffer Railroad crossings that impact greater than 150 linear feet or one-third of an acre of riparian buffer 	X	X	X
Recreational and accessory structures in Zone Two: <ul style="list-style-type: none"> Sheds and gazebos in Zone Two, provided they are not prohibited under local water supply ordinance: <ul style="list-style-type: none"> Total footprint less than or equal to 150 square feet per lot. Total footprint greater than 150 square feet per lot. Wooden slatted decks and associated steps, provided the use meets the requirements of Items (7) and (8) of this Rule: <ul style="list-style-type: none"> Deck at least eight feet in height and no vegetation removed from Zone One. Deck less than eight feet in height or vegetation removed from Zone One. 		X <u>X</u> X <u>X</u>	 <u>X</u> X X
Removal of previous fill or debris provided that diffuse flow is maintained and vegetation is restored	X		
Road impacts other than crossings of streams and other surface waters subject to this Rule			X

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Road crossings of streams and other surface waters subject to this Rule: <ul style="list-style-type: none"> Road crossings that impact equal to or less than 40 linear feet of riparian buffer Road crossings that impact greater than 40 linear feet but equal to or less than 150 linear feet or one-third of an acre of riparian buffer Road crossings that impact greater than 150 linear feet or one-third of an acre of riparian buffer 	X	X	X
Road relocation: Relocation of existing private access roads associated with public road projects where necessary for public safety: <ul style="list-style-type: none"> Less than or equal to 2,500 square feet of buffer impact Greater than 2,500 square feet of buffer impact 		X	X

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Stormwater BMPs: <ul style="list-style-type: none"> Wet detention, bioretention, and constructed wetlands in Zone Two if diffuse flow of discharge is provided into Zone One Wet detention, bioretention, and constructed wetlands in Zone One 		X	X
Scientific studies and stream gauging	X		
Streambank or shoreline stabilization		X	

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Temporary roads, provided that the disturbed area is restored to pre-construction topographic and hydrologic conditions immediately after construction is complete and replanted immediately with comparable vegetation, except that tree planting may occur during the dormant season. A one-time application of fertilizer may be used to establish vegetation: At the end of five years the restored buffer shall comply with the restoration criteria in Item (8) of 15A NCAC 02B .0268: <ul style="list-style-type: none"> Less than or equal to 2,500 square feet of buffer disturbance Greater than 2,500 square feet of buffer disturbance Associated with culvert installation or bridge construction or replacement. 	X	X X	

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Temporary sediment and erosion control devices, provided that the disturbed area is restored to pre-construction topographic and hydrologic conditions immediately after construction is complete and replanted immediately with comparable vegetation, except that tree planting may occur during the dormant season. A one-time application of fertilizer may be used to establish vegetation. At the end of five years the restored buffer shall comply with the restoration criteria in Item (8) of Rule 15A NCAC 02B .0268:			
<ul style="list-style-type: none"> In Zone Two provided ground cover is established within timeframes required by the Sedimentation and Erosion Control Act, vegetation in Zone One is not compromised, and runoff is released as diffuse flow in accordance with Item (8) of this Rule. 	X		
<ul style="list-style-type: none"> In Zones one and two to control impacts associated with uses approved by the local government or that have received a variance, provided that sediment and erosion control for upland areas is addressed, to the maximum extent practical, outside the buffer. 		X	
<ul style="list-style-type: none"> In-stream temporary erosion and sediment control measures for work within a stream channel that is authorized under Sections 401 and 404 of the Federal Water Pollution Control Act. 	X		
<ul style="list-style-type: none"> In-stream temporary erosion and sediment control measures for work within a stream channel. 		X	

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Utility, electric, aerial, perpendicular crossings of streams and other surface waters subject to this Rule ^{2,3,5} : <ul style="list-style-type: none"> Disturb equal to or less than 150 linear feet of riparian buffer Disturb greater than 150 linear feet of riparian buffer 	X	X	
Utility, electric, aerial, other than perpendicular crossings ⁵ : <ul style="list-style-type: none"> Impacts in Zone Two Impacts in Zone One^{2,3} 		X	X
Utility, electric, underground, perpendicular crossings ^{3,4,5} : <ul style="list-style-type: none"> Disturb less than or equal to 40 linear feet of riparian buffer Disturb greater than 40 linear feet of riparian buffer 	X	X	

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Utility, electric, underground, other than perpendicular crossings ⁴ : <ul style="list-style-type: none"> Impacts in Zone Two Impacts in Zone One¹ 	X X		

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Utility, non-electric, perpendicular crossings of streams and other surface waters subject to this Rule ^{3,5} : <ul style="list-style-type: none"> Disturb equal to or less than 40 linear feet of riparian buffer with a maintenance corridor equal to or less than 10 feet in width Disturb equal to or less than 40 linear feet of riparian buffer with a maintenance corridor greater than 10 feet in width Disturb greater than 40 linear feet but equal to or less than 150 linear feet of riparian buffer with a maintenance corridor equal to or less than 10 feet in width Disturb greater than 40 linear feet but equal to or less than 150 linear feet of riparian buffer with a maintenance corridor greater than 10 feet in width Disturb greater than 150 linear feet of riparian buffer 	X	X X	X X
Utility, non-electric, other than perpendicular crossings ^{4,5} : <ul style="list-style-type: none"> Impacts in Zone Two Impacts in Zone One¹ 		X	X

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Vegetation management: <ul style="list-style-type: none"> • Emergency fire control measures provided that topography is restored • Mowing or harvesting of plant products in Zone Two • Planting vegetation to enhance the riparian buffer • Pruning forest vegetation provided that the health and function of the forest vegetation is not compromised • Removal of individual trees that are in danger of causing damage to dwellings, other structures or human life, or are imminently endangering stability of the streambank. • Removal of individual trees which are dead, diseased or damaged. • Removal of poison ivy • Removal of invasive exotic vegetation as defined in: <i>Smith, Cherri L. 1998. Exotic Plant Guidelines. Dept. of Environment and Natural Resources. Division of Parks and Recreation. Raleigh, NC. Guideline #30</i>	X X X X X X X X		
Vehicular access roads leading to water-dependent structures as defined in 15A NCAC 02B .0202, provided they do not cross the surface water and have minimum practicable width not exceeding ten feet.		X	
Water dependent structures as defined in 15A NCAC 02B .0202 where installation and use result in disturbance to riparian buffers.		X	

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

Use	Exempt*	Allowable*	Allowable with Mitigation*
Water supply reservoirs: <ul style="list-style-type: none"> • New reservoirs where a riparian buffer that meets the requirements of Items (7) and (8) of this Rule is established adjacent to the reservoir • New reservoirs where a riparian buffer that meets the requirements of Items (7) and (8) of this Rule is not established adjacent to the reservoir 		X	X
Water wells <ul style="list-style-type: none"> • Single family residential water wells • All other water wells 	X	X	
Wetland, stream and buffer restoration that results in impacts to the riparian buffers: <ul style="list-style-type: none"> • Wetland, stream and buffer restoration that requires Division approval for the use of a 401 Water Quality Certification • Wetland, stream and buffer restoration that does not require Division approval for the use of a 401 Water Quality Certification 	X	X	

PROPOSED RULES

Use	Exempt*	Allowable*	Allowable with Mitigation*
Wildlife passage structures		X	

* To qualify for the designation indicated in the column header, an activity must adhere to the limitations defined for it in a given listing as well as the requirements established in Item (10) of this Rule.

¹ Provided that:

- No heavy equipment is used in Zone One.
- Vegetation in undisturbed portions of the buffer is not compromised.
- Felled trees are removed by chain.
- No permanent felling of trees occurs in protected buffers or streams.
- Stumps are removed only by grinding.
- At the completion of the project the disturbed area is stabilized with native vegetation.
- Zones one and two meet the requirements of Sub-Items (7) and (8) of this Rule.

² Provided that, in Zone One, all of the following BMPs for overhead utility lines are used. If all of these BMPs are not used, then the overhead utility lines shall require a no practical alternative evaluation by the local government, as defined in Item (11) of this Rule.

- A minimum zone of 10 feet wide immediately adjacent to the water body shall be managed such that only vegetation that poses a hazard or has the potential to grow tall enough to interfere with the line is removed.
- Woody vegetation shall be cleared by hand. No land grubbing or grading is allowed.
- Vegetative root systems shall be left intact to maintain the integrity of the soil. Stumps shall remain where trees are cut.
- Riprap shall not be used unless it is necessary to stabilize a tower.
- No fertilizer shall be used other than a one-time application to re-establish vegetation.
- Construction activities shall minimize the removal of woody vegetation, the extent of the disturbed area, and the time in which areas remain in a disturbed state.
- Active measures shall be taken after construction and during routine maintenance to ensure diffuse flow of stormwater through the buffer.
- In wetlands, mats shall be utilized to minimize soil disturbance.

³ Provided that poles or aerial infrastructure shall not be installed within 10 feet of a water body unless the local government completes a no practical alternative evaluation as defined in Item (11) of this Rule.

⁴ Provided that, in Zone One, all of the following BMPs for underground utility lines are used. If all of these BMPs are not used, then the underground utility line shall require a no practical alternative evaluation by the local government, as defined in Item (11) of this Rule.

- Woody vegetation shall be cleared by hand. No land grubbing or grading is allowed.
- Vegetative root systems shall be left intact to maintain the integrity of the soil. Stumps shall remain, except in the trench where trees are cut.
- Underground cables shall be installed by vibratory plow or trenching.
- The trench shall be backfilled with the excavated soil material immediately following cable installation.
- No fertilizer shall be used other than a one-time application to re-establish vegetation.
- Construction activities shall minimize the removal of woody vegetation, the extent of the disturbed area, and the time in which areas remain in a disturbed state.
- Measures shall be taken upon completion of construction and during routine maintenance to ensure diffuse flow of stormwater through the buffer.
- In wetlands, mats shall be utilized to minimize soil disturbance.

⁵ Perpendicular crossings are those that intersect the surface water at an angle between 75 degrees and 105 degrees.

(10) REQUIREMENTS FOR CATEGORIES OF USES. Uses designated in Item (9) of this Rule as exempt, allowable, and allowable with mitigation within a riparian buffer shall have the following requirements:

(a) EXEMPT. Uses designated as exempt are permissible without local government authorization provided

that they adhere to the limitations of the activity as defined in Item (9). In addition, exempt uses shall be designed, constructed and maintained to minimize soil disturbance and to provide the maximum water quality protection practicable, including

- construction, monitoring, and maintenance activities.
 - (b) ALLOWABLE. Uses designated as allowable may proceed provided that there are no practical alternatives to the requested use pursuant to Item (11) of this Rule. This includes construction, monitoring, and maintenance activities. These uses require written authorization from the local government.
 - (c) ALLOWABLE WITH MITIGATION. Uses designated as allowable with mitigation may proceed provided that there are no practical alternatives to the requested use pursuant to Item (11) of this Rule and an appropriate mitigation strategy has been approved pursuant to Item (13) of this Rule. These uses require written authorization from the local government.
- (11) DETERMINATION OF "NO PRACTICAL ALTERNATIVES."
 - (a) Persons who wish to undertake uses designated as allowable or allowable with mitigation shall submit a request for a "no practical alternatives" determination to the local government. The applicant shall certify that the project meets all the following criteria for finding "no practical alternatives":
 - (i) The basic project purpose cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality;
 - (ii) The use cannot practically be reduced in size or density, reconfigured or redesigned to better minimize disturbance, preserve aquatic life and habitat, and protect water quality; and
 - (iii) Best management practices shall be used if necessary to minimize disturbance, preserve aquatic life and habitat, and protect water quality;
 - (b) The applicant shall also submit at least the following information in support of their assertion of "no practical alternatives":
 - (i) The name, address and phone number of the applicant;
 - (ii) The nature of the activity to be conducted by the applicant;
 - (iii) The location of the activity, including the jurisdiction;
 - (iv) A map of sufficient detail to accurately delineate the boundaries of the land to be utilized in carrying out the activity, the location and dimensions of any disturbance in riparian buffers associated with the activity, and the extent of riparian buffers on the land;
 - (v) An explanation of why this plan for the activity cannot be practically accomplished, reduced or reconfigured to better minimize disturbance to the riparian buffer, preserve aquatic life and habitat and protect water quality; and
 - (vi) Plans for any best management practices proposed to be used to control the impacts associated with the activity.
 - (c) Within 60 days of a submission that addresses Sub-Item (11)(b) of this Rule, the local government shall review the entire project and make a finding of fact as to whether the criteria in Sub-Item (11)(a) have been met. A finding of "no practical alternatives" shall result in issuance of an Authorization Certificate. Failure to act within 60 days shall be construed as a finding of "no practical alternatives" and an Authorization Certificate shall be issued to the applicant unless one of the following occurs:
 - (i) The applicant agrees, in writing, to a longer period;
 - (ii) The local government determines that the applicant has failed to furnish requested information necessary to the local government's decision;
 - (iii) The final decision is to be made pursuant to a public hearing; or

- (iv) The applicant refuses access to its records or premises for the purpose of gathering information necessary to the local government's decision.
 - (d) The local government may attach conditions to the Authorization Certificate that support the purpose, spirit and intent of the riparian buffer protection program.
 - (e) Any appeals of determinations regarding Authorization Certificates shall be referred to the Director. The Director's decision is subject to review as provided in G.S. 150B Articles 3 and 4.
- (12) **VARIANCES.** Persons who wish to undertake prohibited uses may pursue a variance. The local government may grant minor variances. For major variances, local governments shall prepare preliminary findings and submit them to the Commission for approval. The variance request procedure shall be as follows:
 - (a) For any variance request, the local government shall make a finding of fact as to whether there are practical difficulties or unnecessary hardships that prevent compliance with the riparian buffer protection requirements. A finding of practical difficulties or unnecessary hardships shall require that the following conditions are met:
 - (i) If the applicant complies with the provisions of this Rule, he/she can secure no reasonable return from, nor make reasonable use of, his/her property. Merely proving that the variance would permit a greater profit from the property shall not be considered adequate justification for a variance. Moreover, the local government shall consider whether the variance is the minimum possible deviation from the terms of this Rule that shall make reasonable use of the property possible;
 - (ii) The hardship results from application of this Rule to the property rather than from other factors such as deed restrictions or other hardship;
 - (b) For any variance request, the local government shall make a finding of fact as to whether the variance is in harmony with the general purpose and intent of the State's riparian buffer protection requirements and preserves its spirit; and
 - (c) For any variance request, the local government shall make a finding of fact as to whether, in granting the variance, the public safety and welfare have been assured, water quality has been protected, and substantial justice has been done.
 - (d) **MINOR VARIANCES.** A minor variance request pertains to activities that will impact only Zone Two of the riparian buffer. Minor variance requests shall be reviewed and approved based on the criteria in Sub-Items (12)(a) through (12)(c) of this Rule by the local government pursuant to G.S. 153A-Article 18, or G.S. 160A-Article 19. The local government may attach conditions to the variance approval that support the purpose, spirit and intent of the riparian buffer protection program. Request for appeals to decisions made by the local governments shall be made in writing to the Director. The Director's decision is subject to review as provided in G.S. 150B Articles 3 and 4.
 - (e) **MAJOR VARIANCES.** A major variance request pertains to activities that will impact any portion of Zone
- (iii) The hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, such that compliance with provisions of this rule would not allow reasonable use of the property;
 - (iv) The applicant did not cause the hardship by knowingly or unknowingly violating this Rule;
 - (v) The applicant did not purchase the property after August 11, 2009, the effective date of this Rule, and then request a variance; and
 - (vi) The hardship is rare or unique to the applicant's property.

- One or any portion of both Zones One and Two of the riparian buffer. If the local government has determined that a major variance request meets the requirements in Sub-Items (12)(a) through (12)(c) of this Rule, then it shall prepare a preliminary finding and submit it to the Commission for approval. Within 90 days after receipt by the local government, the Commission shall review preliminary findings on major variance requests and take one of the following actions: approve, approve with conditions and stipulations, or deny the request. Appeals from a Commission decision on a major variance request are made on judicial review to Superior Court.
- (13) **MITIGATION.** Persons who wish to undertake uses designated as allowable with mitigation shall meet the following requirements in order to proceed with their proposed use:
- (a) Obtain a determination of "no practical alternatives" to the proposed use pursuant to Item (11) of this Rule; and
 - (b) Obtain approval for a mitigation proposal pursuant to 15A NCAC 02B .0268.
- (14) **REQUIREMENTS SPECIFIC TO FOREST HARVESTING.** The following requirements shall apply for forest harvesting operations and practices:
- (a) All the following measures shall apply in the entire riparian buffer as applicable:
 - (i) Logging decks and sawmill sites shall not be placed in the riparian buffer;
 - (ii) Access roads and skid trails shall be prohibited except for temporary and permanent stream crossings established in accordance with 15A NCAC 01I .0203. Temporary stream crossings shall be permanently stabilized after any site disturbing activity is completed;
 - (iii) Timber felling shall be directed away from the stream or waterbody;
 - (iv) Skidding shall be directed away from the stream or water body and shall be done in a manner that minimizes soil disturbance and prevents the creation of channels or ruts;
 - (v) Individual trees may be treated to maintain or improve their health, form or vigor;
 - (vi) Harvesting of dead or infected trees as necessary to prevent or control the spread of tree pest and disease infestation shall be allowed. These practices must be approved by the Division of Forest Resources for a specific site pursuant to the rule. The Division of Forest Resources must notify the Division of all approvals;
 - (vii) Removal of individual trees that are in danger of causing damage to structures or human life shall be allowed;
 - (viii) Natural regeneration of forest vegetation and planting of trees, shrubs, or ground cover plants to enhance the riparian buffer shall be allowed provided that soil disturbance is minimized;
 - (ix) High-intensity prescribed burns shall not be allowed; and
 - (x) Application of fertilizer shall not be allowed except as necessary for permanent stabilization. Broadcast application of fertilizer to the adjacent forest stand shall be conducted so that the chemicals are not applied directly to or allowed to drift into the riparian buffer.
- (b) In Zone One, forest vegetation shall be protected and maintained. Selective harvest as provided for below is allowed on forest lands that have a deferment for use value under forestry in accordance with G.S. 105-277.2 through 277.6 or on forest lands that have a forest management plan. A plan drafted under either option shall meet the standards set out in this Item. Copies of either the approval of the deferment for use value under forestry or the forest management plan shall be produced upon request. For such forest lands,

selective harvest is allowed in accordance with the following:

- (i) Tracked or wheeled vehicles are permitted for the purpose of selective timber harvesting where there is no other practical alternative for removal of individual trees provided activities comply with forest practice guidelines for water quality as defined in 15A NCAC 01I .0101 through .0209, and provided no equipment shall operate within the first 10 feet immediately adjacent to the stream except at stream crossings designed, constructed and maintained in accordance with Rule 15A NCAC 01I .0203;
 - (ii) Soil disturbing site preparation activities are not allowed; and
 - (iii) Trees shall be removed with the minimum disturbance to the soil and residual vegetation.
- (c) In addition to the requirements of (b) in this Item, the following provisions for selective harvesting shall be met:
- (i) The first 10 feet of Zone One directly adjacent to the stream or waterbody shall be undisturbed except for the removal of individual high value trees as defined provided that no trees with exposed primary roots visible in the streambank be cut unless listed as an exempt activity under Vegetation Management in the Table of Uses, Sub-Item (9) of this Rule;
 - (ii) In the outer 20 feet of Zone One, a maximum of 50 percent of the trees greater than five inches DBH may be cut and removed. The reentry time for harvest shall be no more frequent than every 15 years, except on forest plantations where the reentry time shall be no more frequent than every five years. In either case, the trees remaining after

harvest shall be as evenly spaced as possible; and

- (iii) In Zone Two, harvesting and regeneration of the forest stand shall be allowed in accordance with 15A NCAC 01I .0100 through .0200 as enforced by the Division of Forest Resources.

(15) **RULE IMPLEMENTATION.** This Rule shall be implemented as follows:

- (a) For Division-administered activities listed in Item (3) of this Rule, the Division shall continue to implement the requirements of this Rule ~~Rule, which it has done since as of its effective date; date of August 11, 2009;~~
- ~~(b) Within two months after the effective date of this Rule, the Division shall submit a model local riparian buffer protection ordinance that embodies the standards set out in this Rule and 15A NCAC 02B .0268 to the Commission for approval;~~
- ~~(c) Within six months after the Commission's approval of a model local buffer ordinance, local governments shall submit local programs to the Division for review based on the standards set out in this Rule and 15A NCAC 02B .0268. A local program shall also detail implementation including but not limited to such factors as a method for making variance determinations, a plan for record keeping, and a plan for enforcement. Local governments shall use the latest version of the Division's publication, Identification Methods for the Origins of Intermittent and Perennial Streams, available at http://h2o.enr.state.nc.us/newetlands/documents/NC_Stream_ID_Manual.pdf or at the 401/Wetlands Unit of the North Carolina Division of Water Quality at: Mail Service Center 1650, Raleigh, NC, 27699 1650, to establish the existence of streams;~~
- ~~(d) Within one year after the Commission's approval of a model local buffer ordinance, the Division shall provide recommendations to the Commission on local buffer programs. The Commission shall either approve the programs or require changes based on the standards set out in this Rule and 15A~~

~~NCAC 02B .0268. Should the Commission require changes, the applicable local government shall have two months to submit revisions, and the Division shall provide follow-up recommendations to the Commission within two months after receiving revisions;~~

~~(e)(b)~~ Within two months after the Commission's approval of local buffer programs, local ~~Local~~ governments shall continue to implement buffer programs approved by the Commission in September 2010 and January 2011, or subsequent revisions to those programs approved by the Commission or its delegated authority, to ensure that existing land use activities and proposed development complies with local programs. These programs are required to meet the standards set out in this Rule, 15A NCAC 02B .0268, and are guided by the model buffer program approved by the Commission in September 2009. A local government shall issue an approval for new development only if the development application proposes to avoid impacts to riparian buffers defined in Item (4) of this Rule, or where the application proposes to impact such buffers, it demonstrates that the applicant has done the following, as applicable:

- (i) Determined that the activity is exempt from requirements of this Rule;
- (ii) Received an Authorization Certificate from the Division pursuant to Item (11) of this Rule for uses designated as Allowable or Allowable with Mitigation;
- (iii) For uses designated as Allowable with Mitigation, received approval of a mitigation plan pursuant to 15A NCAC 02B .0268; and
- (iv) Received a variance pursuant to Item (12) of this Rule;

~~(f)(c)~~ Upon implementation, local ~~Local~~ governments shall continue to submit annual reports to the Division summarizing their activities in implementing the requirements of this Rule;

~~(g)(d)~~ If a local government fails to adopt or adequately implement its program as called for in this Rule, the Division may take appropriate enforcement action as authorized by statute, and may choose to assume responsibility for implementing that program until such time as it determines that the local government is prepared to comply with its responsibilities; and ~~(h)(e)~~ LOCAL OVERSIGHT. The Division shall periodically inspect local programs to ensure that they are being implemented and enforced in keeping with the requirements of this Rule. Local governments shall maintain on-site records for a minimum of five years, and shall furnish a copy of these records to the Division within 30 days of receipt of a written request for them. Local programs' records shall include the following:

- (i) A copy of all variance requests;
- (ii) Findings of fact on all variance requests;
- (iii) Results of all variance proceedings;
- (iv) A record of complaints and action taken as a result of complaints;
- (v) Records for stream origin calls and stream ratings; and
- (vi) Copies of all requests for authorization, records approving authorization and Authorization Certificates.

(16) OTHER LAWS, REGULATIONS AND PERMITS. In all cases, compliance with this Rule does not preclude the requirement to comply with all other federal, state and local laws, regulations, and permits regarding streams, steep slopes, erodible soils, wetlands, floodplains, forest harvesting, surface mining, land disturbance activities, or any other landscape feature or water quality-related activity.

Authority 143-214.1; 143-214.5; 143-214.7; 143-215.3(a)(1); 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8B; 143B-282(c); 143B-282(d); S.L. 1999-329, s. 7.1.; S.L. 2005-190; S.L. 2006-259; S.L. 2009-216; S.L. 2009-484.

15A NCAC 02B .0270 JORDAN WATER SUPPLY NUTRIENT STRATEGY: WASTEWATER DISCHARGE REQUIREMENTS

~~(See S.L. 2009-216 and S.L. 2009-484)~~

The following is the NPDES wastewater discharge management strategy for the B. Everett Jordan Reservoir watershed, or Jordan watershed:

- (1) **PURPOSE.** The purpose of this Rule is to establish minimum nutrient control requirements for point source wastewater discharges in the Jordan watershed in order to restore and maintain water quality in the reservoir and its tributaries and protect their designated uses, including water supply.
- (2) **APPLICABILITY.** This Rule applies to all wastewater treatment facilities discharging in the Jordan watershed that receive nutrient-bearing wastewater and are subject to requirements for individual NPDES permits.
- (3) **DEFINITIONS.** For the purposes of this Rule, the following definitions apply:
 - (a) In regard to point source dischargers, treatment facilities, and wastewater flows and discharges,
 - (i) "Existing" means that which was subject to a NPDES permit as of December 31, 2001;
 - (ii) "Expanding" means that which has increased or will increase beyond its permitted flow as defined in this Rule; and

- (iii) "New" means that which was not subject to a NPDES permit as of December 31, 2001.
- (b) "Active" allocation means that portion of an allocation that has been applied toward and is expressed as a nutrient limit in an individual NPDES permit. Allocation that is held but not applied in this way is "reserve" allocation.
- (c) "Limit" means the mass quantity of nitrogen or phosphorus that a discharger or group of dischargers is authorized through a NPDES permit to release into surface waters of the Jordan watershed. Limits are enforceable and may be expressed as "delivered limit" or as the equivalent "discharge limit."
- (d) "MGD" means million gallons per day.
- (e) "Permitted flow" means the maximum monthly average flow authorized in a facility's NPDES permit as of December 31, 2001, with the following exceptions:

Facility Owner	Facility Name	NPDES Permit	Permitted Flow (MGD)
B. E. Jordan & Son, LLC	B. E. Jordan & Son WWTP	NC0042528	0.036
Durham County	Triangle WWTP	NC0026051	12.0
Fearrington Utilities, Inc.	Fearrington Village WWTP	NC0043559	0.5
Greensboro, City of	T.Z. Osborne WWTP	NC0047384	40.0
Mervyn R. King	Countryside Manor WWTP	NC0073571	0.03
OWASA	Mason Farm WWTP	NC0025241	14.5
Pittsboro, Town of	Pittsboro WWTP	NC0020354	2.25
Quarterstone Farm Assoc.	Quarterstone Farm WWTP	NC0066966	0.2
Aqua North Carolina, Inc.	Chatham WRF	NC0056413	0.35

- (f) "Reserve" allocation means allocation that is held by a permittee or other person but which has not been applied toward and is not expressed as a nutrient limit in an individual NPDES permit. Allocation that has been applied and expressed in this way is "active" allocation.

- (4) This Item provides for the initial division of nutrient wasteload allocations among point source dischargers under this strategy.
 - (a) The delivered wasteload allocations of nitrogen and phosphorus assigned to point source dischargers collectively in each of the Jordan subwatersheds, as set out in 15A NCAC 02B .0262(4), shall be divided as follows:

Subwatershed and Discharger Subcategories	Delivered Allocations (lb/yr)	
	Total Nitrogen	Total Phosphorus
Upper New Hope Arm Permitted flows \geq 0.1 MGD	332,466	22,498

Permitted flows < 0.1 MGD	3,613	608
Lower New Hope Arm		
Permitted flows ≥ 0.1 MGD	6,836	498
Permitted flows < 0.1 MGD	0	0
Haw River Arm		
Permitted flows ≥ 0.1 MGD	881,757	104,004
Permitted flows < 0.1 MGD	13,370	1,996

- (b) The nutrient allocations in Sub-Item (a) of this Item shall be apportioned among the existing dischargers in each subcategory in proportion to the dischargers' permitted flows and the resulting delivered nutrient allocations assigned to each individual discharger.
- (5) This Item describes allowable changes in nutrient allocations.
- (a) The aggregate and individual nutrient allocations available to point source dischargers in the Jordan watershed are subject to change:
- (i) Whenever the Commission, through rulemaking, revises the wasteload allocations in 15A NCAC 02B .0262 in order to ensure the protection of water quality in the reservoir and its tributaries or to conform with applicable state or federal requirements;
- (ii) Whenever one or more point source dischargers acquires any portion of the nonpoint load allocations under the provisions in this Rule, and 15A NCAC 02B .0273, Options for Offsetting Nutrient Loads;
- (iii) As the result of allocation transfers between point sources or between point and nonpoint sources, except that nutrient allocation can be transferred and applied only within its assigned subwatershed; or
- (iv) Any allocation is valid only in the subwatershed for which it is first established.
- (b) In the event that the Commission changes any nutrient wasteload allocation specified in 15A NCAC 02B .0262 or Item (4) of this Rule, the Commission shall also re-evaluate the apportionment among the dischargers and shall revise the individual allocations as necessary.
- (6) This Item identifies nutrient control requirements specific to existing discharges.
- (a) ~~Beginning with the first full calendar year following the effective date of this Rule, any~~ Any existing discharger with a permitted flow of 0.1 MGD or greater shall continue to limit its total phosphorus discharge to its active individual discharge allocation initially applied as of calendar year 2010 as defined or modified pursuant to this Rule.
- (b) ~~No later than six months after the effective date of this Rule, each~~ Each existing discharger with a permitted flow greater than or equal to 0.1 ~~MGD~~ MGD, ~~having~~ shall evaluate ~~evaluated~~ its treatment facilities and ~~operations~~ operations, and identify identified further opportunities to improve and optimize nitrogen reduction in the existing ~~facilities beyond those previously implemented pursuant to G.S. 143-215.1B(d); facilities, and submit~~ submitted a report to the Division in 2010 ~~documenting its findings, proposing optimization measures, and describing expected results. No later than six months following shall, upon~~ Division acceptance of the report, implement the measures or ~~as provided in the acceptance, and shall~~ continue to implement such measures until treatment system improvements undertaken to comply with this Rule's nitrogen limits are completed and operational. ~~the discharger shall implement the proposed measures. Beginning one year following Division acceptance of the report and continuing through the fifth calendar year in 2015 and continuing until one year after the improvements are operational,~~ after the effective date of this Rule, each such discharger shall submit a progress report to the Division by March 1 of each year documenting the status of the proposed measures and the nitrogen

- reductions achieved at the facility in the previous calendar year.
- (c) ~~Beginning with the fifth full calendar year after the effective date of this Rule, No later than the calendar year 2016, each existing discharger with a permitted flow greater than or equal to 0.1 MGD shall limit its total nitrogen discharge to its active individual discharge allocation as defined or modified pursuant to this Rule. Rule, except that if by December 31, 2016, the discharger has received an authorization pursuant to G.S. 143-215.1 for construction, installation, or alteration of its treatment works for purposes of complying with its total nitrogen limit, at which point the limit shall become effective no later than calendar year 2018.~~
- (d) ~~Not later than 45 days after the effective date of this Rule, the Director shall notify existing permittees of the individual nitrogen and phosphorus allocations assigned according to Item (4) of this Rule and shall further notify each permittee, pursuant to 15A NCAC 02H .0114, of the Division's intent to modify the permittee's NPDES permit to incorporate nitrogen and phosphorus limits pursuant to the requirements set out in this rule and in accordance with applicable rules and regulations.~~
- (7) This Item identifies nutrient control requirements specific to new discharges.
- (a) Any person proposing a new wastewater discharge to surface waters shall meet the following requirements prior to applying for an NPDES permit:
- (i) Evaluate all practical alternatives to said discharge, pursuant to 15A NCAC 02H .0105(c)(2);
- (ii) If the results of the evaluation support a new discharge, acquire sufficient nitrogen and phosphorus allocations for the discharge. The proponent may obtain allocation for the proposed discharge from existing dischargers pursuant to the applicable requirements of Item (9) of this Rule or employ measures to offset the increased nutrient loads
- resulting from the proposed discharge. The proponent may fund offset measures by making payment to the NC Ecosystem Enhancement ~~Program, Program or private sellers of reduction credit, contingent upon acceptance of payments by that Program~~ or may implement other offset measures contingent upon approval by the ~~Division, either of which shall meet Division as~~ meeting the requirements of Rule 15A NCAC 02B .0273.0273 and 15A NCAC 02B .0240. The offsets shall be of an amount equivalent to the allocations required for a period of 30 years. Payment for each 30-year portion of the nonpoint source load allocation shall be made prior to the ensuing permit issuance;
- (iii) Determine whether the proposed discharge of nutrients will cause local water quality impacts; and
- (iv) Provide documentation with its NPDES permit application demonstrating that the requirements of Sub-Items (i) through (iii) of this Sub-Item have been met.
- (b) The nutrient discharge allocations and offsets for a new facility shall not exceed the mass loads equivalent to a concentration of 3.0 mg/L nitrogen or 0.18 mg/L phosphorus at the permitted flow in the discharger's NPDES permit.
- (c) Upon the effective date of its NPDES permit, a new discharger shall be subject to nitrogen and phosphorus limits not to exceed its active individual discharge allocations.
- (8) This Item identifies nutrient control requirements specific to expanding discharges.
- (a) Any person proposing to expand an existing wastewater discharge to surface waters beyond its permitted flow as defined in this Rule shall meet the following requirements prior to applying for an NPDES permit:
- (i) Evaluate all practical alternatives to said

- discharge, pursuant to 15A NCAC 02H .0105(c)(2);
 - (ii) If the results of the evaluation support an expanded discharge, acquire sufficient nitrogen and phosphorus allocations for the discharge. The proponent may obtain allocation for the proposed discharge from existing dischargers pursuant to the applicable requirements of Item (9) of this Rule or employ measures to offset the increased nutrient loads resulting from the proposed discharge. The proponent may fund offset measures by making payment to the NC Ecosystem Enhancement Program contingent upon acceptance of payments by that Program or implement other offset measures contingent upon approval by the Division, either of which shall meet the requirements of rule 15A NCAC 02B .0273. The offsets shall be of an amount equivalent to the allocations required for a period of 30 years. Payment for each 30-year portion of the nonpoint source load allocation shall be made prior to the ensuing permit issuance;
 - (iii) Determine whether the proposed discharge of nutrients will cause local water quality impact; and
 - (iv) Provide documentation with its NPDES permit application demonstrating that the requirements of Sub-Items (i) through (iii) of this Sub-Item have been met.
- (b) The nutrient discharge limits for an expanding facility shall not exceed the greater of its nutrient allocations or the mass value equivalent to a concentration of 3.0 mg/L nitrogen or 0.18 mg/L phosphorus at the permitted flow in the discharger's NPDES permit; except that this provision shall not result in an allocation or limit that is less than
 - originally assigned to the discharger under this Rule.
 - (c) Upon expansion or upon notification by the Director that it is necessary to protect water quality, any discharger with a permitted flow of less than 0.1 MGD, as defined under this Rule, shall become subject to total nitrogen and total phosphorus permit limits not to exceed its active individual discharge allocations.
- (9) This Item describes additional requirements regarding nutrient discharge limits for wastewater facilities:
 - (a) Annual mass nutrient limits shall be established as calendar-year limits.
 - (b) Any point source discharger holding nutrient allocations under this Rule may by mutual agreement transfer all or part of its allocations to any new, existing, or expanding dischargers in the same Jordan subwatershed or to other person(s), subject to the provisions of the Jordan nutrient strategy.
 - (c) For NPDES compliance purposes, the enforceable nutrient limits for an individual facility or for a compliance association described in Item (10) shall be the effective limits in the governing permit, regardless of the allocation held by the discharger or association.
 - (d) The Director may establish more stringent nitrogen or phosphorus discharge limits for any discharger upon finding that such limits are necessary to prevent the discharge from causing adverse water quality impacts on surface waters other than an arm of Jordan Reservoir as defined in Rule .0262(4) of this strategy. The Director shall establish such limits through modification of the discharger's NPDES permit in accordance with applicable rules and regulations. When the Director does so, the discharger retains its nutrient allocations, and the non-active portion of the discharger's allocation becomes reserve allocation. The allocation remains in reserve until the director determines that less stringent limits are allowable or until the allocation is applied to another discharge not subject to such water quality-based limits.
 - (e) In order for any transfer of allocation to become effective as a discharge

- limit in an individual NPDES permit, the discharger must request and obtain modification of the permit. Such request shall:
- (i) Describe the purpose and nature of the modification;
 - (ii) Describe the nature of the transfer agreement, the amount of allocation transferred, and the dischargers or persons involved;
 - (iii) Provide copies of the transaction agreements with original signatures consistent with NPDES signatory requirements; and
 - (iv) Demonstrate to the Director's satisfaction that the increased nutrient discharge will not violate water quality standards in localized areas.
- (f) Changes in a discharger's nutrient limits shall become effective upon modification of its individual permit but no sooner than January 1 of the year following modification. If the modified permit is issued after January 1, the Director may make the limit effective on that January 1 provided that the discharger made acceptable application in a timely manner.
- (g) Regional Facilities. In the event that an existing discharger or group of dischargers accepts wastewater from another NPDES-permitted treatment facility in the same Jordan subwatershed and that acceptance results in the elimination of the discharge from the other treatment facility, the eliminated facility's delivered nutrient allocations shall be transferred and added to the accepting discharger's delivered allocations.
- (10) This Item describes the option for dischargers to join a group compliance association to collectively meet nutrient control requirements.
- (a) Any or all facilities within the same Jordan subwatershed may form a group compliance association to meet delivered nutrient allocations collectively. More than one group compliance association may be established in any subwatershed. No facility may belong to more than one association at a time.
 - (b) Any such association must apply for and shall be subject to an NPDES permit that establishes the effective nutrient limits for the association and for its members.
 - (c) No later than 180 days prior to the proposed date of a new association's operation or expiration of an existing association's NPDES permit, the association and its members shall submit an application for a NPDES permit for the discharge of nutrients to surface waters of the Jordan watershed. The association's NPDES permit shall be issued to the association and its members. It shall specify the delivered nutrient limits for the association and for each of its co-permittee members. Association members shall be deemed in compliance with the permit limits for nitrogen and phosphorus contained in their individually issued NPDES permits so long as they remain members in an association.
 - (d) An association's delivered nitrogen and phosphorus limits shall be the sum of its members' individual active delivered allocations for each nutrient plus any other active allocation obtained by the association or its members.
 - (e) The individual delivered allocations for each member in the association permit shall initially be equivalent to the discharge limits in effect in the member's NPDES permit. Thereafter, changes in individual allocations or limits must be incorporated into the members' individual permits before they are included in the association permit.
 - (f) An association and its members may reapportion the individual delivered allocations of its members on an annual basis. Changes in individual allocations or limits must be incorporated into the members' individual permits before they are included in the association permit.
 - (g) Changes in nutrient limits shall become effective no sooner than January 1 of the year following permit modification. If the modified permit is issued after January 1, the Director may make the limit effective on that January 1 provided that the discharger made acceptable application in a timely manner.

- (h) Beginning with the first full calendar year that the nitrogen or phosphorus limits are effective, an association that does not meet its permit limit for nitrogen or phosphorus for a calendar year shall, no later than May 1 of the year following the exceedance, make an offset payment to the NC Ecosystem Enhancement Program or to private sellers of nutrient offset credit, contingent upon acceptance of payments by that Program or by implementing other load offsetting measures contingent upon approval by the Division, ~~either of which shall meet as meeting~~ the requirements of rule 15A NCAC 02B .0273-.0273 and 15A NCAC 02B .0240.
- (i) Association members shall be deemed in compliance with their individual delivered limits in the association NPDES permit for any calendar year in which the association is in compliance with its delivered limit. If the association fails to meet its delivered limit, the association and the members that have failed to meet their individual delivered nutrient limits in the association NPDES permit will be out of compliance with the association NPDES permit.

Authority G.S. 143-214.1; 143-214.5; 143-215; 143-215.1; 143-215.3(a)(1); 143-215B; 143B-282(c); 143B-282(d); S.L. 1995, c. 572; S.L. 2005-190; S.L. 2006-259; S.L. 2009-216; S.L. 2011-394; S.L. 2012-187.

**15A NCAC 02B .0271 JORDAN WATER SUPPLY
NUTRIENT STRATEGY: STORMWATER
REQUIREMENTS FOR STATE AND FEDERAL
ENTITIES**

(See S.L. 2009-216 and S.L. 2009-484)

The following is the stormwater strategy for the activities of state and federal entities within the Jordan watershed, as prefaced in Rule 02B .0262.

- (1) PURPOSE. The purposes of this Rule are as follows.
- (a) To accomplish the following on lands under state and federal control: ~~achieve and maintain, on new non-road development lands, the nonpoint source nitrogen and phosphorus percentage reduction goals established for Jordan Reservoir in 15A NCAC 02B .0262 relative to the baseline period defined in that Rule, to provide the highest practicable level of treatment on new road development, and to achieve and~~

~~maintain the percentage goals on existing developed lands by reducing loading from state-maintained roadways and facilities, and from lands controlled by other state and federal entities in the Jordan watershed;~~

- (i) Achieve and maintain, on new non-road development lands, the nonpoint source nitrogen and phosphorus percentage reduction goals established for Jordan Reservoir in 15A NCAC 02B .0262 relative to the baseline period defined in that Rule;
- (ii) Provide the highest practicable level of treatment on new road development; and
- (iii) On existing state-maintained roadways and facilities, and existing developed lands controlled by other state and federal entities in the Jordan watershed, achieve and maintain the nonpoint source nitrogen and phosphorus percentage reduction goals established for Jordan Reservoir in 15A NCAC 02B .0262 relative to the baseline period defined in that Rule.

- (b) To ensure that the integrity and nutrient processing functions of receiving waters and associated riparian buffers are not compromised by erosive flows from state-maintained roadways and facilities and from lands controlled by other state and federal entities in the Jordan watershed; and
- (c) To protect the water supply uses of Jordan Reservoir and of designated water supplies throughout the Jordan watershed.

- (2) APPLICABILITY. This Rule shall apply to all existing and new development, both as defined in 15A NCAC 02B .0263, that lies within or partially within the Jordan watershed under the control of the NC Department of Transportation (NCDOT), including roadways and facilities, and to all lands controlled by other state and federal entities in the Jordan watershed.
- (3) EXISTING DEVELOPMENT ADAPTIVE IMPLEMENTATION. The Division of Water

Quality shall review monitoring required in Item (4) of 15A NCAC 02B .0266 to decide whether to implement a program to control nutrient loading from existing development to achieve nutrient-related water quality standards in Jordan Lake. The Division shall use the following conditions to identify state and federal entities that need to develop and implement a program to control nutrient loadings:

- (a) If the March 2014 monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir required under Item (4) of 15A NCAC 02B .0266 shows that nutrient-related water quality standards are not being achieved, state and federal entities in the subwatershed of that arm of Jordan Reservoir shall develop and implement a program to control nutrient loading from existing development within the subwatershed, as provided in this Rule;
- (b) If the March 2017 monitoring report or any subsequent monitoring report for the Haw River Arm or the Lower New Hope Creek Arm of Jordan Reservoir required under Item (4) of 15A NCAC 02B .0266 shows that nutrient-related water quality standards are not being achieved, state and federal entities in the subwatershed of that arm of Jordan Reservoir shall develop and implement a program to control nutrient loading from existing development within the subwatershed, as provided in this Rule;
- (c) The Division shall defer development and implementation of a program to control nutrient loading from existing development required in a subwatershed by this Sub-Item if it determines that additional reductions in nutrient loading from existing development in that subwatershed will not be necessary to achieve nutrient-related water quality standards. In making this determination, the Division shall consider the anticipated effect of measures implemented or scheduled to be implemented to reduce nutrient loading from sources in the subwatershed other than existing development. If any subsequent

monitoring report for an arm of Jordan Reservoir required under Item (4) of 15A NCAC 02B .0266 shows that nutrient-related water quality standards have not been achieved, the Division shall notify each state and federal entity in the subwatershed of that arm of Jordan Reservoir, and each entity shall develop and implement a program to control nutrient loading from existing development as provided in this Rule; and

- (d) ADDITIONAL MEASURES TO REDUCE NITROGEN LOADING IN THE UPPER NEW HOPE CREEK SUBWATERSHED. If the March 1, 2023, monitoring report or any subsequent monitoring report for the Upper New Hope Creek Arm of Jordan Reservoir shows that nutrient-related water quality standards are not being achieved, state and federal entities located in whole or in part in the Upper New Hope Creek Subwatershed shall modify their programs to control nutrient loading from existing roadway and nonroadway development to achieve additional reductions in nitrogen loadings. The modified program shall be designed to achieve a total reduction in nitrogen loading from existing development of thirty-five percent (35%) relative to the baseline period 1997 through 2001 in that arm of Jordan Reservoir. Subject state and federal entities shall develop and implement a program to control nutrient loading from existing development within the subwatershed, as provided in this Rule.

- (4) EXISTING DEVELOPMENT NOTIFICATION REQUIREMENTS. Based on findings under Item (3) of this Rule, the Division shall notify the state and federal entities in each subwatershed that either:

- (a) Implementation of a program to control nutrient loading from existing development, or additional measures under an existing program, will be necessary to achieve water quality standards in an arm of the reservoir and direct the state and federal entities in the subwatershed to develop or modify a load reduction program in compliance with this Rule; or

- (b) Implementation of a program to control nutrient loading from existing development is not necessary at that time but will be reevaluated in three years based on the most recent water quality monitoring information.
- (3)(5) NON-NCDOT REQUIREMENTS. With the exception of the NCDOT, all state and federal entities that control lands within the Jordan watershed shall meet the following requirements:
- (a) For any new development proposed within their jurisdictions that would disturb one-half acre or more, non-NCDOT state and federal entities shall continue to develop stormwater management plans for submission to and approval by the Division. These stormwater plans shall not be approved by the Division unless the following criteria are met:
- (i) The nitrogen and phosphorus loads contributed by the proposed new development activity in a given subwatershed shall not exceed the unit-area mass loading rates applicable to that subwatershed as follows for nitrogen and phosphorus, respectively, expressed in units of pounds per acre per year: 2.2 and 0.82 in the Upper New Hope; 4.4 and 0.78 in the Lower New Hope; and 3.8 and 1.43 in the Haw. The developer shall determine the need for engineered stormwater controls to meet these loading rate targets by using the loading calculation method called for in ~~this Section~~ Item (10) of this Rule or other equivalent method acceptable to the Division;
- (ii) Proposed new development subject to NPDES, water supply, and other state-mandated stormwater regulations shall comply with those regulations in addition to the other requirements of this Sub-Item. Proposed new development in any water supply watershed in the Jordan watershed designated WS-II, WS-III, or WS-IV shall comply with the density-based restrictions, obligations, and requirements for engineered stormwater controls, clustering options, and 10/70 provisions described in Sub-Items (3)(b)(i) and (3)(b)(ii) of the applicable Rule among 15A NCAC .02B .0214 through .0216;
- (iii) Stormwater systems shall be designed to control and treat the runoff generated from all surfaces by one inch of rainfall. The treatment volume shall be drawn down pursuant to guidance specific to each practice as provided in the most recent version of the *Stormwater Best Management Practices Manual* published by the Division, or other technically at least equivalent guidance acceptable to the Division. To ensure that the integrity and nutrient processing functions of receiving waters and associated riparian buffers are not compromised by erosive flows, stormwater flows from the development shall not contribute to degradation of waters of the State. At a minimum, the development shall not result in a net increase in peak flow leaving the site from pre-development conditions for the one-year, 24-hour storm event;
- (iv) Proposed new development that would replace or expand structures or improvements that existed as of December 2001, the end of the baseline period, and which would not result in a net increase in built-upon area shall not be required to meet the nutrient loading targets or high-density requirements except to the extent that it shall provide stormwater control at least equal to the previous development. Proposed new

- development that would replace or expand existing structures or improvements and would result in a net increase in built-upon area shall have the option either to achieve at least the percentage load reduction goals stated in 15A NCAC 02B .0262 as applied to nitrogen and phosphorus loading from the previous development for the entire project site, or to meet the loading rate targets described in Sub-Item ~~(3)~~(5)(a)(i) of this Rule;
- (v) Proposed new development shall comply with the riparian buffer protection requirements of 15A NCAC 02B .0267 and .0268;
- (vi) The entity shall have the option of offsetting part of the nitrogen and phosphorus loads by implementing or funding offsite management measures as follows: Before using offsite offset options, a development shall meet any requirements for engineered stormwater controls described in Sub-Item ~~(3)~~(5)(a)(iii) of this Rule, and shall attain a maximum nitrogen loading rate on-site of four pounds per acre per year for single-family, detached and duplex residential development and eight pounds per acre per year for other development, including multi-family residential, commercial and industrial and shall meet any requirements for engineered stormwater controls described in Sub-Item ~~(3)~~(5)(a)(iii) of this Rule. An entity may make offset payments to the NC Ecosystem Enhancement Program or to private sellers of reduction credit contingent upon acceptance of payments by that Program as meeting the applicable requirements of 15A NCAC 02B .0240. An entity may propose other offset measures to the Division, including providing its own offsite offset or utilizing a private seller. All offset measures identified in this Sub-Item shall meet the requirements of 15A NCAC 02B .0273(2)-(4); and
- (vii) The non-NCDOT state or federal entity shall include measures to ensure maintenance of best management practices (BMPs) implemented as a result of the provisions in Sub-Item ~~(3)~~(5)(a) of this Rule for the life of the development.
- (b) For existing development, non-NCDOT state and federal entities receiving notice from the Division of the requirement to develop and implement or modify a program to control nutrient loading from existing development, as specified under Item (4) of this Rule, shall develop and implement load reduction programs for achieving and maintaining nutrient load reductions from existing development—do so based on the standards set out in this Sub-Item. Such entities shall submit these programs for approval by the Division in accordance with the process identified in Item (7) of this Rule. A load reduction program shall include the following elements and meet the associated criteria:
- (i) The long-term objective of this program shall be for the entity to achieve the percentage nutrient load reduction goals in Item (5) of 15A NCAC 02B .0262 relative to annual mass loads, in pounds per year, representative of the baseline period defined in that Rule and reaching Jordan Reservoir from existing developed lands within each subwatershed under its control. Loads shall be calculated by applying the Tar Pamlico Nutrient Export Calculation Worksheet, Piedmont Version, dated

~~October 2004, — method~~ called for in Item (10) of this Rule or an equivalent or more accurate method acceptable to the Division, to acreages of different types of existing developed lands as defined in this Sub-Item and in Item (2) of this Rule. To provide entities spatial latitude to obtain reductions in different locations, loads thus calculated shall be converted to delivered loads to Jordan Reservoir using transport factors established in the Division document, *Nitrogen and Phosphorus Delivery from Small Watersheds to Jordan Lake*, dated June 30, 2002. Subject entities shall include estimates of, and plans for offsetting, nutrient load increases from lands developed subsequent to the baseline period but prior to implementation of new development programs. For these post-baseline developed lands, the new loading rate shall be compared to the applicable loading rate target in Sub-Item ~~(3)~~(5)(a)(i) of this Rule for the subwatershed and acres involved, and the difference shall constitute the load reduction need. Should percentage reduction goals be adjusted pursuant to Item (8) of 15A NCAC 02B .0262, then the annual load goals established in this Sub-Item shall be adjusted accordingly. Entities may seek to fund implementation of load-reducing activities through grant sources such as the North Carolina Clean Water Act Section 319 Grant Program, or other funding programs for nonpoint sources;

- (ii) The load reduction program shall include a plan and supporting technical analysis for achieving half of each load reduction goal within

10 years ~~after the effective date~~ of the applicable notification date established under Item (4) of this Rule, and a plan and timeframes for achieving the remaining half subject to modification based on technical analysis at 10 years after ~~effective date~~ the notification date established under Item (4) of this Rule. A load reduction program may propose an alternative compliance timeframe provided it includes a technical analysis that demonstrates the need for that timeframe. A program technical analysis shall examine the feasibility of achieving stated goals and shall consider factors such as magnitude of reduction need relative to area within a subwatershed, the potential for utilizing the range of load-reducing activities listed in Sub-Item ~~(3)~~(5)(b)(iv) of this Rule, and relative costs and efficiencies of each activity to the extent information is available. The load reduction program shall propose implementation rates and timeframes for each activity, and shall provide for proportionate annual progress toward meeting the reduction goals as practicable, that is capable of being put into practice, done, or accomplished;

- (iii) The load reduction program shall identify specific load-reducing practices implemented to date subsequent to the baseline period and for which it is seeking credit. It shall estimate load reductions for these practices using methods provided for in Item ~~(8)~~(10) of this Rule, and their anticipated duration;
- (iv) The load reduction program shall identify the types of activities the entity intends

to implement and types of existing development affected, relative proportions or a prioritization of practices, and the relative magnitude of reductions it expects to achieve from each. An entity may credit any nitrogen or phosphorus load reductions in excess of those required by other rules in this Chapter. The program shall identify the duration of anticipated load reductions, and may seek activities that provide sustained, long-term reductions. The load reduction program shall meet the requirements of 15A NCAC 02B .0273. Potential load-reducing activities may include stormwater activities such as street sweeping, improvement of existing ponds and stormwater structures, removal of existing built-upon area, retrofitting of existing development with engineered best management practices (BMPs), treatment of runoff in redevelopment projects, over-treatment of runoff in new development projects, source control activities such as pet waste reduction and fertilization reduction, alternative stormwater practices such as rain barrels, cisterns, downspout disconnections, and stormwater capture and reuse, restoration of ecological communities such as streams and riparian buffers, and wastewater activities such as creation of surplus allocation through advanced treatment at wastewater facilities, expansion of surplus allocation through regionalization, collection system improvements, and removal of illegal discharges;

- (v) The load reduction program shall identify anticipated funding mechanisms or sources and discuss steps taken or planned to secure such funding;
- (vi) An entity shall have the option of working with municipalities or counties within its subwatershed to jointly meet the load targets from all existing development within their combined jurisdictions. An entity may utilize private or third party sellers. All reductions shall meet the requirements of 15A NCAC 02B .0273;
- (vii) The entity shall include measures to provide for operation and maintenance of retrofitted stormwater controls to ensure that they meet the load targets required in Sub-Item ~~(3)~~(5)(b) of this Rule for the life of the development; and
- (viii) An entity may choose to conduct monitoring of stream flows and runoff from catchments to quantify disproportionately high loading rates relative to those used in the accounting methods stipulated under Item ~~(8)~~(10) of this Rule, and to subsequently target load-reducing activities to demonstrated high-loading source areas within such catchments for proportionately greater load reduction credit. An entity may propose such actions in its initial load reduction program submittal or at any time subsequent, and shall obtain Division approval of the monitoring design. It shall also obtain Division approval of any resulting load reduction benefits based on the standards set out in this Rule. ~~As detailed in Item (5), an~~ An entity that chooses such monitoring ~~initially may delay submittal of its load reduction program~~

~~by one year for the purpose of incorporating monitoring findings into its program design provided it submits to the Division within six months of the effective date of this Rule a satisfactory monitoring proposal involving at least one year of up front monitoring, executes shall execute the monitoring, and provides provide the results to the Division as part of its load reduction program submittal.~~

(4)(6) NCDOT REQUIREMENTS. The NCDOT shall meet the following requirements on lands within the Jordan Watershed: develop a single Stormwater Management Program that will be applicable to the entire Jordan watershed and submit this program for approval by the Division according to the following standards:

(a) ~~Identify NCDOT stormwater outfalls from Interstate, US, and NC primary routes;~~

(b) ~~Identify and eliminate illegal discharges into the NCDOT's stormwater conveyance system;~~

(c)(a) Establish a Implementation of its program for post-construction stormwater runoff control for new development approved by the Commission in November 2012, including new and widening NCDOT roads and facilities. The program shall establish-established a process by which the Division shall review reviews and approve approves stormwater designs for new NCDOT development projects. The program shall delineate-delineates the scope of vested projects that would be considered as existing development, and shall define-defines lower thresholds of significance for activities considered new development. In addition, the following criteria shall apply:

(i) For new and widening roads, compliance with the riparian buffer protection requirements of Rules 15A NCAC 02B .0267 and .0268 which are expected to achieve a 30 percent nitrogen reduction efficiency in runoff treatment through either diffuse flow into

(ii)

~~buffers or other practices) practices, shall be deemed as compliance-compliant with the purposes of this Rule;~~ New non-road development shall achieve and maintain the nitrogen and phosphorus percentage load reduction goals established for each subwatershed in 15A NCAC 02B .0262 relative to either area-weighted average loading rates of all developable lands as of the baseline period defined in 15A NCAC 02B .0262, or to project-specific pre-development loading rates. Values for area-weighted average loading rate targets for nitrogen and phosphorus, respectively, in each subwatershed shall be the following, expressed in units of pounds per acre per year: 2.2 and 0.82 in the Upper New Hope; 4.4 and 0.78 in the Lower New Hope; and 3.8 and 1.43 in the Haw. The NCDOT shall determine the need for engineered stormwater controls to meet these loading rate targets by using the loading calculation method called for in Item ~~(8)(10) of this Rule~~ or other equivalent method acceptable to the Division. Where stormwater treatment systems are needed to meet these targets, they shall be designed to control and treat the runoff generated from all surfaces by one inch of rainfall. Such systems shall be assumed to achieve the nutrient removal efficiencies identified in the most recent version of the *Stormwater Best Management Practices Manual* published by the Division provided that they meet associated drawdown and other design specifications included in the same document. The NCDOT may propose to the Division nutrient removal rates for practices currently

included in the BMP Toolbox required under its NPDES stormwater permit, or may propose revisions to those practices or additional practices with associated nutrient removal rates. The NCDOT may use any such practices approved by the Division to meet loading rate targets identified in this Sub-Item. New non-road development shall also control runoff flows to meet the purpose of this Rule regarding protection of the nutrient functions and integrity of receiving ~~waters.~~ waters:

- (iii) For new non-road development, the NCDOT shall have the option of partially offsetting its nitrogen and phosphorus loads by implementing or funding offsite management measures. These offsite offsetting measures shall achieve at least equivalent reductions in nitrogen and phosphorus load to the remaining reduction needed onsite to comply with Sub-Item ~~(4)(e)(6)(a)(ii)~~ of this Rule. Before using offsite offset options, a development shall attain a maximum nitrogen loading rate of 8 pounds per acre per year. The NCDOT may make offset payments to the NC Ecosystem Enhancement Program contingent upon acceptance of payments by that Program. The NCDOT may propose other offset measures to the Division. All offset measures identified in this Sub-Item shall meet the requirements of ~~15A NCAC 02B .0273;~~ 15A NCAC 02B .0273; and
- (iv) New development shall continue compliance, required as of August 11, 2009, with the riparian buffer protection requirements of 15A NCAC

02B .0267 and .0268 through a Division approval process.

- ~~(d) Establish a program to identify and implement load-reducing opportunities on existing development within the watershed. The long-term objective of this effort shall be for the NCDOT to achieve the nutrient load goals in 15A NCAC 02B .0262 as applied to existing development under its control, including roads and facilities.~~
- ~~(i) For existing non-roadway development, the program shall include estimates of, and plans for offsetting, nutrient load increases from lands developed subsequent to the baseline period but prior to implementation of its new development program. It shall include a technical analysis that includes a proposed implementation rate and schedule. This schedule shall provide for proportionate annual progress toward reduction goals as practicable throughout the proposed compliance period. The program shall identify the types of activities NCDOT intends to implement and types of existing non-roadway development affected, relative proportions or a prioritization of practices, and the relative magnitude of reductions it expects to achieve from each.~~
- ~~(ii) For existing roadway development, NCDOT may meet minimum implementation rate and schedule requirements by implementing retrofits or other load-reducing measures in the watershed to achieve load reductions at the rate of 500 pounds of nitrogen reduction per 5-year period and at least 50 pounds per year. To the maximum extent practicable, retrofits shall be designed to treat the runoff generated from all~~

~~surfaces by 1 inch of rainfall, and shall conform to the standards and criteria established in the most recent version of the Division approved NCDOT BMP Toolbox required under NCDOT's NPDES stormwater permit. To establish removal rates for nutrients in the Toolbox, design criteria for individual practices therein shall be modified as needed consistent with such criteria in the most recent version of the *Stormwater Best Management Practices Manual* published by the Division, or other technically at least equivalent guidance acceptable to the Division, and the Division shall approve such modifications as part of the accounting process defined in Item (8) of this Rule. Other aspects of nutrient mass load calculations shall be based on the accounting process defined in Item (8) of this Rule.~~

(b) ~~NCDOT EXISTING DEVELOPMENT LOAD REDUCTION GOALS.~~ For NCDOT existing roadway and non-roadway development, a load reduction goal shall be designed to achieve, relative to the baseline period 1997 through 2001, an eight percent (8%) reduction in nitrogen loading and a five percent (5%) reduction in phosphorus loading reaching Jordan Reservoir in the Upper New Hope and Haw subwatersheds. The load reduction goal for the Lower New Hope arm shall be designed to maintain no increases in nitrogen and phosphorus loads from existing roadway and nonroadway development relative to the baseline period 1997 through 2001. Load reduction goals for each subwatershed shall be calculated as follows:

(i) For existing NCDOT roadways and industrial facilities, baseline loads shall be established using

stormwater runoff nutrient load characterization data collected through the National Pollutant Discharge Elimination System (NPDES) Research Program under NCS0000250 Permit Part II Section G;

(ii) For other NCDOT nonroadway development, baseline loads shall be established by applying the Tar-Pamlico Nutrient Export Calculation Worksheet, Piedmont Version, dated October 2004, to acreages of nonroadway development under the control of NCDOT during the baseline period. The baseline load for other nonroadway development may also be calculated using an equivalent or more accurate method acceptable to the Division and recommended by the Scientific Advisory Board established under Session Law 2009-216; and

(iii) The existing development load reduction goal shall be adjusted to account for nutrient loading increases from existing roadway and nonroadway development subsequent to the baseline period but prior to implementation of new development stormwater programs pursuant to Sub-Item (6)(a) of this Rule.

(c) If notified by the Division of the requirement to develop and implement, or modify a program to control nutrient loading from existing development as specified under Item (4) of this Rule, the NCDOT shall do so based on the standards set out in this Sub-item. The NCDOT shall submit such programs to the Division for approval according to the processes identified in Item (8) of this Rule. Such program shall achieve the nutrient load reduction goals in Sub-Item (6)(b) of this Rule and address both roadway and nonroadway development. Such program shall include the following elements:

- (i) Identification of the NCDOT stormwater outfalls from Interstate, US, and NC primary routes;
 - (ii) Identification and elimination of illegal discharges into the NCDOT's stormwater conveyance system; and
 - (iii) Initiation of a "Nutrient Management Education Program" for NCDOT staff and contractors engaged in the application of fertilizers on highway rights of way. The purpose of this program shall be to contribute to the load reduction goals established in 15A NCAC 02B .0262 through proper application of nutrients, both inorganic fertilizer and organic nutrients, to highway rights of way in the Jordan watershed in keeping with the most current state-recognized technical guidance on proper nutrient management.
- (d) If notified by the Division of the requirement to develop and implement, or modify a program to control nutrient loading from existing development as specified under Item (4) of this Rule, the NCDOT shall achieve the nutrient load reduction goals under Sub-Item (6)(b) of this Rule by development of a load reduction program that addresses both roadway and nonroadway development in each subwatershed of the Jordan Reservoir. Such program may include, but not be limited to, the following load-reducing measures:
- (i) street sweeping;
 - (ii) source control activities such as pet waste reduction and fertilizer management at NCDOT facilities;
 - (iii) improvement of existing stormwater structures;
 - (iv) alternative stormwater practices such as use of rain barrels and cisterns;
 - (v) stormwater capture and reuse; and
 - (vi) purchase of nutrient reduction credits.
- (e) The NCDOT may meet minimum implementation rate and schedule requirements of its program by implementing a combination of three stormwater retrofits per year for existing roadway development in the Jordan Lake watershed and other load-reducing measures identified in its program developed pursuant to this Rule and approved by the Commission.
- ~~(e) Initiate a "Nutrient Management Education Program" for NCDOT staff and contractors engaged in the application of fertilizers on highway rights of way. The purpose of this program shall be to contribute to the load reduction goals established in 15A NCAC 02B .0262 through proper application of nutrients, both inorganic fertilizer and organic nutrients, to highway rights of way in the Jordan watershed in keeping with the most current state-recognized technical guidance on proper nutrient management; and~~
- ~~(f) Address compliance with the riparian buffer protection requirements of 15A NCAC 02B .0267 and .0268 through a Division approval process.~~
- (5)(7) **NON-NCDOT RULE IMPLEMENTATION.** For all state and federal entities that control lands within the Jordan watershed with the exception of the NCDOT, this Rule shall be implemented as follows:
- ~~(a) Within six months after the effective date of this Rule, any entity that intends to use water quality monitoring to guide the initial design of its load reduction program shall provide a monitoring design to the Division. The Division shall notify any such entity of the adequacy of its design within three months of submittal. When an entity's monitoring design is deemed adequate, it may delay submittal of its load reduction program by up to one year from the timeframe given in Sub Item (5)(e) of this Rule, whereupon the same time interval would be added to the approval and implementation timeframes given in Sub Items (5)(d) through (5)(f) of this Rule;~~
- ~~(b)(a) Upon Commission approval of the accounting methods required by Item (8) of this Rule, subject entities shall comply with As of July 2012, the date~~

- of Commission approval for the nutrient accounting methods, entities shall comply with the requirements of Sub-Item ~~(3)~~(5)(a) of this Rule for any new development proposed within their jurisdictions;
- (e)(b) ~~Within 24 months after the Commission's approval of the accounting methods, Within six months after receiving notice to develop and implement, or modify a program to control nutrient loading from existing development as specified in Sub Item (4)(a) of this Rule, subject entities shall submit load reduction programs to the Division for preliminary approval according to the standards set out in Sub-Item ~~(3)~~(5)(b) of this Rule;~~
- (d)(c) ~~Within 34 months after the Commission's approval of the accounting methods, Within six months following submission of the subject entity's program to control nutrient loading from existing development, the Division shall request the Commission's approval of entities' load reduction programs. The Commission shall either approve the programs or require changes. Should the Commission require changes, the Division shall seek Commission approval at the earliest feasible date subsequent to the original request;~~
- (e)(d) ~~Within 36 months after the Commission's approval of the accounting methods, or within two months following Commission approval of a load reduction program, whichever is later, entities shall begin to implement load reduction programs; and~~
- (f)(e) ~~Upon implementation of the requirements of Item ~~(3)~~(5) of this Rule, subject entities shall provide annual reports to the Division documenting their progress in implementing those requirements; and~~
- (f) If the 2023 monitoring report or subsequent monitoring reports for the Upper New Hope Arm of Jordan Reservoir shows that nutrient-related water quality standards are not being achieved, the Division shall notify the subject entities of the need for additional measures to reduce nitrogen loading in the subwatershed.
- The subject entities shall then submit a modified program to achieve the nutrient reductions specified in Sub-Item (3)(d) of this Rule. Submission, review and approval, and implementation of a modified program shall follow the process, timeline, and standards set out in Sub-Items (7)(b) through (7)(d) of this Rule.
- (6)(8) NCDOT RULE IMPLEMENTATION. For the NCDOT, this Rule shall be implemented as follows:
- (a) ~~Within 30 months of the effective date of this Rule, the NCDOT shall submit the Stormwater Management Program for the Jordan watershed to the Division for approval. This Program shall meet or exceed the requirements in Item (4) of this Rule;~~
- (b) ~~Within 40 months of the effective date of this Rule, the Division shall request the Commission's approval of the NCDOT Stormwater Management Program;~~
- (e) ~~Within 42 months of the effective date of this Rule, the NCDOT shall implement the approved Stormwater Management Program; and~~
- (a) NCDOT shall continue to implement the Stormwater Management Program for New Development approved by the Commission in November 2012, and implemented as of January 2013 or subsequent revisions to their program approved by the Commission or its delegated authority. This program shall continue to meet or exceed the requirements in Sub-Items (6)(a) of this Rule;
- (b) Existing development requirements shall be implemented as follows:
- (i) Within six months after receiving notice to develop and implement, or modify a program to control nutrient loading from existing development as specified in Item (4)(a) of this Rule, the NCDOT shall submit the Existing Development Program for the Jordan watershed to the Division for approval. This Program shall meet or exceed the requirements in Sub-Items (6)(c) through (6)(e) of this Rule;

- (ii) Within six months following submission of the NCDOT's program to control nutrient loading from existing development, the Division shall request the Commission's approval of the NCDOT Existing Development Program. If the Commission disapproves the program, the NCDOT shall submit a modified program within two months. The Division shall recommend that the Commission approve or disapprove the modified program within three months after receiving the NCDOT's modified program;

(iii) Within two months after the Commission's approval of a program to control nutrient loading from existing development, the NCDOT shall implement their approved program; and

(iv) If the 2023 monitoring report or subsequent monitoring reports for the Upper New Hope Arm of Jordan Reservoir shows that nutrient-related water quality standards are not being achieved, the Division shall notify the NCDOT of the need for additional measures to reduce nitrogen loading in the subwatershed. The NCDOT shall then submit a modified program to achieve the nutrient reductions specified in Sub-Item (3)(d) of this Rule. Submission, review and approval, and implementation of a modified program shall follow the process and timeline set out in Sub-Items (8)(b)(i) through (8)(b)(iii) of this Rule.

required under NCDOT's NPDES stormwater permit.
- ~~(4)(c)~~ Upon implementation, the NCDOT shall submit annual reports to the Division summarizing its activities in implementing each of the requirements in ~~Item (4)~~ Sub-Items (6)(c) through (6)(e) of this Rule. This annual reporting may be incorporated into annual reporting

~~(7)(9)~~ **RELATIONSHIP TO OTHER REQUIREMENTS.** A party may in its program submittal under Item ~~(5)(7)~~ or ~~(6)(8)~~ of this Rule request that the Division accept its implementation of another stormwater program or programs, such as NPDES stormwater requirements, as satisfying one or more of the requirements set forth in Item ~~(3)(5)~~ or ~~(4)(6)~~ of this Rule. The Division shall provide determination on acceptability of any such alternatives prior to requesting Commission approval of programs as required in Items ~~(5)(7)~~ and ~~(6)(8)~~ of this Rule. The party shall include in its program submittal technical information demonstrating the adequacy of the alternative requirements.
- ~~(8)(10)~~ **ACCOUNTING METHODS.** ~~Within 18 months after the effective date of this Rule, the Division shall submit a nutrient accounting framework to the Commission for approval. This framework shall include tools for quantifying load reduction assignments on existing development for parties subject to this Rule, load reduction credits from various activities on existing developed lands, and a tool that will allow subject parties to account for loading from new and existing development and loading changes due to BMP implementation. The Division shall work in cooperation with subject parties and other watershed interests in developing this framework. Non-NCDOT entities shall continue to utilize the Jordan/Falls Lake Stormwater Load Accounting Tool approved by the Commission in July 2012 for all applicable load reduction estimation activities or equivalent, more source-specific or more accurate methods acceptable to the Division. Except as for the establishment of baseline loads as specified under Item (6)(b) of this Rule, NCDOT shall utilize the NCDOT-Jordan/Falls Lake Stormwater Load Accounting Tool approved by the Commission in July 2012 for all applicable load estimation activities or equivalent, more source-specific, or more accurate methods acceptable to the Division. The Division shall periodically revisit these accounting methods to determine the need for revisions to both the methods and to existing development load reduction assignments made using the methods set out in this Rule. It shall do so no less frequently than every 10 years. Its review shall include values subject to change over time independent of changes resulting from implementation of this Rule, such as untreated export rates that may change with changes in atmospheric~~

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deposition. It shall also review values subject to refinement, such as BMP nutrient removal efficiencies.

Authority G.S. 143-214.1; 143-214.5; 143-214.5(i); 143-214.7; 143-214.12; 143-214.21; 143-215.3(a)(1); 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8B; 143B-282(c); 143B-282(d); S.L. 2005-190; S.L. 2006-259; S.L. 2009-216, S.L. 2009-484.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Transportation intends to amend the rules cited as 19A NCAC 02D .0531-.0532.

Agency obtained G.S. 150B-19.1 certification:

- ☒ **OSBM certified on:** 02/01/2013
☐ **RRC certified on:**
☐ **Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdot.gov/about/regulations/rules/>

Proposed Effective Date: July 1, 2013

Public Hearing:

Date: March 11, 2013 Wake County

Time: 7:00 p.m.

Location: Wake Commons Building, Room 100C, 4011 Cary Drive, Raleigh, NC

Date: March 19, 2013 Pamlico County

Time: 7:00 p.m.

Location: Delamar Auditorium, Pamlico Community College, 5049 Highway 306 South Grantsboro, NC

Reason for Proposed Action: *The General Assembly enacted SL 2012-145, which directed the Department and Board of Transportation to establish tolls for all ferry routes except for the Ocracoke/Hatteras Ferry and the Knotts Island Ferry and to begin collection of tolls on July 1, 2013.*

Procedure by which a person can object to the agency on a proposed rule: *Objection – any person who objects to the adoption of a permanent rule may submit written comments to the agency by:*

Hard Copy: NC Department of Transportation – Attn: Rule Making Coordinator, 1501 Mail Service Center, Raleigh, NC 27699-1501.

Electronic Copy: <http://www.ncdot.gov/regulations/rules/> and click on the following link – to submit comments on proposed rules or for questions on NC Department of Transportation rule-making please contact us.

Comments may be submitted to: *Helen Landi – Rulemaking Coordinator, 1501 Mail Service Center, Raleigh, NC 27699-1501, email hlandi@ncdot.gov*

Comment period ends: April 16, 2013

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 (check all that apply).

- ☒ **State funds affected**
☐ **Environmental permitting of DOT affected**
☒ **Analysis submitted to Board of Transportation**
☒ **Local funds affected**
☒ **Date submitted to OSBM:** December 20, 2012
☒ **Substantial economic impact (≥\$500,000)**
☒ **Approved by OSBM**
☐ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 02 - DIVISION OF HIGHWAYS

SUBCHAPTER 02D - HIGHWAY OPERATIONS

SECTION .0500 - FERRY OPERATIONS

19A NCAC 02D .0531 FREE OPERATIONS

The Currituck Sound to Knotts Island and ~~(Knotts Island), Ocracoke to Hatteras Inlet, Pamlico River, and Cherry Branch-Minnesott Beach~~ operations are toll free.

Authority G.S. 136-82; 143B-10(j).

19A NCAC 02D .0532 TOLL OPERATIONS

~~(a) The Cedar Island-Ocracoke, Currituck Corolla, Swan Quarter-Ocracoke and Southport Ft. Fisher-Swan Quarter-Ocracoke, Southport-Fort Fisher, Pamlico River, and Cherry Branch-Minnesott Beach~~ ferry operations are toll operations. There is no charge for children 12 and under. People age 65 and older receive a 10 percent discount.

(b) Only emergency vehicles in emergency status are toll exempt.

(c) One-way fares Fares and rates applicable to each operation are as listed in this Rule: follows:

PROPOSED RULES

(1) Cedar Island-Ocracoke and Swan Quarter-Ocracoke		
(a) (A)	pedestrian	\$ 1.00 <u>5.00</u>
(b) (B)	bicycle and rider	\$ 3.00 <u>10.00</u>
(c) (C)	motorcycle and rider	\$ 10.00 <u>15.00</u>
(d) (D)	single vehicle or combination 20 feet or less in length (minimum fare for licensed vehicle)	\$ 15.00 <u>27.00</u>
(e) (E)	vehicle or combination over 20 feet up to and including 40 feet	\$ 30.00 <u>50.00</u>
(f) (F)	vehicle or combination over 40 feet to 65 feet (maximum length)	\$ 45.00 <u>65.00</u>
(g)	vehicle or combination over 65 feet	Special Permit @ \$1.00 Per Foot
(G)	each passenger in any size vehicle	\$5.00
(2) Currituck Corolla (pedestrian only) <u>\$2.00</u>		
(no toll charge for Currituck County school children and staff)		
(3)(2) Southport-Ft. Fisher-Southport-Fort Fisher		
(a) (A)	pedestrian	\$ 1.00 <u>2.00</u>
(b) (B)	bicycle and rider	\$ 2.00 <u>3.00</u>
(c) (C)	motorcycle and rider	\$ 3.00 <u>5.00</u>
(d) (D)	single vehicle or combination 20 feet or less in length (minimum fare for licensed vehicle)	\$ 5.00 <u>10.00</u>
(e) (E)	vehicle or combination over 20 feet up to and including 40 feet	\$ 10.00 <u>20.00</u>
(f) (F)	vehicle or combination over 40 feet to 65 feet	\$ 15.00 <u>30.00</u>
(g)	vehicle or combination over 65 feet	Special Permit @ \$1.00 Per Foot
(G)	each passenger in any size vehicle	\$2.00
(3) Pamlico River		
(A)	pedestrian	\$ 2.00
(B)	bicycle and rider	\$ 3.00
(C)	motorcycle and rider	\$ 5.00
(D)	single vehicle or combination 20 feet or less in length (minimum fare for licensed vehicle)	\$ 10.00
(E)	vehicle or combination over 20 feet up to and including 40 feet	\$ 20.00
(F)	vehicle or combination over 40 feet to 65 feet	\$ 30.00
(G)	each passenger in any size vehicle	\$ 2.00
(4) Cherry Branch-Minnesott Beach		
(A)	pedestrian	\$ 1.00
(B)	bicycle and rider	\$ 2.00
(C)	motorcycle and rider	\$ 3.00
(D)	single vehicle or combination 20 feet or less in length (minimum fare for licensed vehicle)	\$ 4.00
(E)	vehicle or combination over 20 feet up to and including 40 feet	\$ 8.00
(F)	vehicle or combination over 40 feet to 65 feet	\$12.00
(G)	each passenger in any size vehicle	\$ 1.00

~~(d)(4)~~ Commuter Passes are valid for one year ~~year from date of purchases~~. Passes are available to anyone. Passes are valid for pass owner only as follows:

Type	System Wide Pass	Site Specific Pass
Vehicles up to 20 feet	\$150.00	\$100.00
Vehicles over 20 feet to 40 feet	\$200.00	\$125.00
Vehicles over 40 feet to 65 feet	\$250.00	\$150.00
(1) System-Wide Passes		
(A) Pedestrian / Passenger		\$ 100.00
(B) Bicycles, Motorcycles, and vehicles less than 20 feet		\$ 500.00
(C) Vehicles 20 feet and over up to 40 feet		\$ 600.00
(D) Vehicles over 40 feet		\$ 700.00
(2) Site Specific Pass for the Cedar Island-Ocracoke Ferry or the Swan Quarter-Ocracoke Ferry		
(A) Pedestrian / Passenger		\$ 75.00
(B) Bicycles, Motorcycles, and vehicles less than 20 feet		\$ 300.00
(C) Vehicles 20 feet and over up to 40 feet		\$ 400.00
(D) Vehicles over 40 feet		\$ 500.00
(3) Site Specific Pass for the Southport - Fort Fisher Ferry or the Pamlico River Ferry		
(A) Pedestrian / Passenger		\$ 50.00

(B)	Bicycles, Motorcycles, and vehicles less than 20 feet	\$ 200.00
(C)	Vehicles 20 feet and over up to 40 feet	\$ 250.00
(D)	Vehicles over 40 feet	\$ 300.00
(4)	Site Specific Pass for the Cherry Branch Fisher Ferry	
(A)	Pedestrian / Passenger	\$ 25.00
(B)	Bicycles, Motorcycles, and vehicles less than 20 feet	\$ 150.00
(C)	Vehicles 20 feet and over up to 40 feet	\$ 200.00
(D)	Vehicles over 40 feet	\$ 250.00

Authority G.S. 136-82; 143B-10(j).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 52 - BOARD OF PODIATRY EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Podiatry Examiners intends to amend the rules cited as 21 NCAC 52 .0208 and .0211.

Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:
☐ RRC certified on:
☒ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://ncbpe.org/content/executive-board>

Proposed Effective Date: June 1, 2013

Public Hearing:

Date: April 2, 2013

Time: 10:00 a.m.

Location: Conference Room, 1500 Sunday Drive, Suite 102, Raleigh, NC 27607

Reason for Proposed Action:

21 NCAC 52 .0208 – To accommodate changes to G.S. 93B-15 to allow for more flexibility in the licensing of military podiatrists and podiatrist spouses of military personnel in North Carolina.

21 NCAC 52 .0211 – To allow for Continuing Medical Education credits to be evaluated and approved by the Board for those CMEs earned in foreign countries by North Carolina licensed podiatrists who are residing outside the United States.

Procedure by which a person can object to the agency on a proposed rule: Any person wishing to object to a proposed rule shall address their request to NC Board of Podiatry Examiners, 1500 Sunday Dr., Suite 102, Raleigh, NC 27607. The caption of the objection shall bear the notation; "RULEMAKING OBJECTION RE:" and then the subject area. The written objection should include the following information:

(1) an indication of the subject area to which the objection is directed. For example: "This objection concerns the rulemaking hearing to amend Rule .0000";

- (2) either a draft of the proposed rule or a summary of its contents;
 (3) reason for the objection;
 (4) the effect on existing rules;
 (5) any data supporting the objection;
 (6) effect of the proposed rule on existing practices in the area involved, including cost factors;
 (7) names of those most likely to be affected by the rule with addresses if reasonably known; and
 (8) name(s) and address(es) of objector(s).

Comments may be submitted to: Penney De Pas, NC Board of Podiatry Examiners, 1500 Sunday Drive, Suite 102, Raleigh, NC 27607-5151; fax (919) 787-4916; email info@ncbpe.org

Comment period ends: April 16, 2013

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 (check all that apply).

- ☐ State funds affected
☐ Environmental permitting of DOT affected
☐ Analysis submitted to Board of Transportation
☐ Local funds affected
☐ Date submitted to OSBM:
☐ Substantial economic impact (≥\$500,000)
☐ Approved by OSBM
☒ No fiscal note required by G.S. 150B-21.4

SECTION .0200 - EXAMINATION AND LICENSING

21 NCAC 52 .0208 CONTINUING EDUCATION

(a) An additional requirement for issuance of the annual renewal certificate shall be certification to the board of proof of having complied with the continuing education provisions of the General Statutes. The board shall notify all podiatrists that 25 hours are required annually.

(b) General CME policy – Minimum of 25 hours / year as follows:

- (1) Completion of 25 hours of Continuing Medical Education (CME) is required per year (July 1- June 30) for renewal of licensure. CME credits ~~cannot~~ shall not be carried over from the previous licensure year.
- (2) It shall be the responsibility of the individual podiatrist to ascertain in advance that the courses which he or she attends have received proper approval of the certifying ~~organizations.~~ organizations, and comply with the Standards, Requirements, and Guidelines for Approval of Sponsors of Continuing Education in Podiatric Medicine of the Council on Podiatric Medical Education (<http://www.cpme.org/education/content.cfm?ItemNumber=2440&navItemNumber=2249>).
The Board shall respond in writing or by email with approval or denial to individuals requesting approval of CME courses and credit hours. Decisions by the Board are the final agency decision and may be appealed as set out in G.S. 150B-23.
- (3) Certificates of completion of courses other than that sponsored by the NC Foot and Ankle Society (NCF&AS) must be submitted to the Board along with the podiatrist's annual license renewal documents. Completion certificates must contain the following information:
 - (A) Podiatrist's name;
 - (B) Course name, location, and date;
 - (C) Number of hours CME completed;
 - (D) Signature of seminar chairperson; and
 - (E) Name of certifying or sponsoring agency.

Handwritten certificates are not acceptable. It is the podiatrist's responsibility to contact the seminar organizer to secure a printed certificate before submitting to the Board for approval along with a renewal.

- (4) In the case of a licensed podiatrist participating in the second or third year of a medical residency, a letter signed by the podiatric residency director indicating podiatrist's name and the dates the podiatrist has been in residency ~~will~~ shall substitute for the 25-credit hour requirement and a CME certificate.
- (5) A podiatrist may submit his CME certificate(s) to the Board in facsimile, electronic, or hard

copy format at any time during the renewal year.

- (6) The Board shall retain CME documentation along with the individual podiatrist's license renewal information.

(c) Category 1: Minimum requirement 20 hours per year, as follows:

- (1) Continuing medical education (CME) credit shall be allowed for attendance at educational seminars offered by the North Carolina Foot and Ankle Society (NCF&AS). The number of qualifying hours of continuing education shall be determined and approved by the Board in advance based on the standards in 90-202.11. NCF&AS shall provide the Board directly with a listing of individuals attending its CME events and credits earned.
- (2) Continuing medical education credit shall be recognized for attendance at educational seminars offered by other national, state and podiatric education providers, as certified by the Council on Podiatric Medical Education (CPME) of the American Podiatric Medical Association (APMA). The number of qualifying hours of continuing education shall be determined and approved by the Council on Podiatric Medical Education.
- (3) Lecturers may receive one hour of credit for each hour of CPME- or APMA- approved lectures given, but such credit shall be limited to one hour for each discrete topic. A brief summary of the content of each lecture must be submitted for approval.
- (4) Category 1 is limited to educational seminars either offered by NCF&AS or by sponsors pre-approved by CPME:
<http://www.cpme.org> (CPME 700: "Approved Sponsors of Continuing Education in Podiatry").
(N.B.: APMA- or CPME- approved online or journal courses are considered Category 2.)
- (5) Since CPME evaluates only CME conducted in the United States, North Carolina-licensed podiatrists practicing outside the United States or participating in a foreign fellowship or other short-term residency abroad, may apply to the Board to have their continuing medical education credits from their country of practice considered and evaluated by the Board on an individual basis.

(d) Category 2: A maximum of only 5 of the total 25 CME hours per year will be allowed as follows:

- (1) Continuing medical education (CME) credit shall be allowed for educational programs approved for Category 1 credit by the American Medical Association (AMA) and the American Osteopathic Association (AOA) or their affiliated organizations.

- (2) Continuing medical education (CME) credit shall be allowed for courses approved by North Carolina Area Health Education Center (AHEC).
- (3) Online or medical journal courses approved by CPME are permitted.
- (4) For courses not pre-approved by AHEC, AOA, or AMA, all requests for CME approval must contain a timeline and course description.

(e) Waiver for Certified Illness, Medical Condition, Natural Disaster, or Undue Hardship

Since continuing education is one of the methods whereby a podiatrist keeps his medical knowledge and skills up-to-date, in the case of an unexpected, certified illness or medical condition of the licensee or immediate family member (as certified by a letter from a licensed physician) or undue hardship (e.g., active military service or natural disaster) which precludes a licensed podiatrist from completing his continuing education requirement within the 18-month timeframe from July 1 of the year of last license or renewal issuance through December 31 of the following year, the Board may waive the continuing education requirement for license renewal by issuing the podiatrist a conditional license predicated on the licensee acquiring all of the required continuing education credits in a mutually-agreeable timeframe, but no later than 24 months after December 31 of the year following the year of license or renewal issuance. The Board reserves the right to require additional information to support the licensee's claim. The Board will notify the licensee of its decision in writing.

Authority G.S. 90-202.4(g); 90-202.11.

21 NCAC 52 .0211 MILITARY LICENSE

(a) Restricted Temporary License: The Board ~~shall~~ may grant restricted temporary license privileges to podiatrists practicing in a clinical residency solely on federal military installations within North Carolina. Application for restricted temporary license shall require the same education-education, minus the one-year clinical residency as required by G.S. 90.202.5(a), as for a permanent license, and an applicant need only have passed Parts I and II of the National Boards, but there shall be no examination nor application fee assessed. Temporary Restricted temporary licenses shall be granted for a maximum of one-year, renewable annually so long as the podiatrist continues to practice within the clinical residency on the federal military installation.

(b) Unrestricted Temporary License: Prior to the annual licensing examination, the Board may grant unrestricted temporary license privileges to podiatrists practicing solely on federal military installations within North Carolina who:

- (1) Have completed their one-year clinical residency as required by G.S. 90.202.5,
- (2) Hold a podiatry license in good standing from another jurisdiction,
- (3) Have practiced for two of the preceding five years (may include clinical residency), and
- (4) Have applied to sit for the North Carolina licensure exam within the coming 12 months.

(c) Permanent Unrestricted License-Military Podiatrist: The Board shall issue a permanent license to a military-trained

applicant to allow the applicant to lawfully practice podiatry in North Carolina if, upon application to the Board, the applicant satisfies the following conditions:

- (1) Has been awarded a military occupational specialty in podiatry and has done all of the following at a level that is substantially equivalent to or exceeds the requirements for licensure in North Carolina: completed a military program of podiatry training and completed testing and equivalent training and experience.
- (2) Has engaged in the practice of podiatry for at least two of the five years (may include clinical residency) preceding the date of the application under this Paragraph.
- (3) Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice podiatry in this State at the time the act was committed.
- (4) Pays the application, examination, and licensing fees required by the board.

(d) Permanent Unrestricted License-Podiatrist Spouse of Military Personnel: The board shall issue to a military spouse a license to practice podiatry in this State if, upon application to the board, the military spouse satisfies the following conditions:

- (1) Holds a current license, certification, or registration from another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration are substantially equivalent to or exceed the requirements for licensure in this State.
- (2) Can demonstrate competency in the occupation through passing the North Carolina examination.
- (3) Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice that occupation in this State at the time the act was committed.
- (4) Is in good standing and has not been disciplined by the agency that had jurisdiction to issue the license, certification, or permit.
- (5) Pays the application, examination, and licensing fees required by the board.

(e) All relevant podiatric medical experience of a military service member in the discharge of official duties or, for a military spouse, all relevant podiatric medical experience, including full-time and part-time experience, regardless of whether in a paid or volunteer capacity, shall be credited in the calculation of years of practice in an occupation as required under Paragraph (a) or (b) of this Rule.

(f) A nonresident licensed under this Rule shall be entitled to the same rights and subject to the same obligations as required of a resident licensed by the board in this State.

Authority G.S. 90-202.5(b); 90-202.6; 93B-15.1.

This Section contains information for the meeting of the Rules Review Commission on January 17, 2013 and February 6, 2013 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 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Addison Bell
Margaret Currin
Pete Osborne
Bob Rippy
Faylene Whitaker

Appointed by House

Ralph A. Walker
Anna Baird Choi
Jeanette Doran
Garth K. Dunklin
Stephanie Simpson

COMMISSION COUNSEL

Joe Deluca (919)431-3081
Bobby Bryan (919)431-3079

RULES REVIEW COMMISSION MEETING DATES

February 21, 2013 March 21, 2013
April 18, 2013 May 16, 2013

RULES REVIEW COMMISSION

January 17, 2013

MINUTES

The Rules Review Commission met on Thursday, January 17, 2013, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Addison Bell, Margaret Currin, Jeanette Doran, Bob Rippy, Stephanie Simpson, Ralph Walker and Faylene Whitaker. Commissioner Garth Dunklin joined via Skype.

Staff members present were: Joe DeLuca and Bobby Bryan, Commission Counsel; Dana Vojtko; Julie Edwards and Molly Masich.

The meeting was called to order at 10:07 a.m. with Chairman Walker 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).

APPROVAL OF MINUTES

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the December 20, 2012 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

10A NCAC 09 .3004, .3008 – Child Care Commission. There has been no response from the agency and no action was taken.

10A NCAC 13D .2105, .2210, .2301 – Medical Care Commission. The Commission approved re-written rules .2210 and .2301. There was no response from the agency for rule .2105 and no action was taken.

19A NCAC 01C .0201 – Department of Transportation – There has been no response from the agency and no action was taken.

19A NCAC 02D .0414 – Department of Transportation – There has been no response from the agency and no action was taken.

21 NCAC 64 .0903 – Board of Examiners for Speech and Language Pathologists and Audiologists. There was no response from the agency and no action was taken.

LOG OF FILINGS

Chairman Walker presided over the review of the log of permanent rules.

Office of the Commissioner of Banks

All rules and repeals were approved unanimously.

Commission for Public Health

Chris Hoke from the agency addressed the Commission.

All rules were approved unanimously with the following exception:

21 NCAC 43D .0708 - The Commission objected to this Rule based on ambiguity. In Item (36), page 5 it is unclear what is meant by “vendor location” in lines 13, 14 and 17 and “store” in line 18.

This rule refers to a “change in location” as triggering termination of the WIC Vendor Agreement. But it also adds the proviso that the change in location must be more than three miles from the vendor’s previous location. This seems to indicate that if the vendor changes locations and the change is less than three miles, the vendor’s agreement is not terminated.

It now becomes important to note that the rule appears to be referring to the “vendor[’s]” location rather than the “store[’s]” location although this is not explicit. In the definitions rule 43D .0202 “store” means “the physical building located at a permanent and fixed site” (emphasis added).

That leaves open the possibility that this rule could (and should?) be interpreted to mean that if a vendor, whose store is subject to a disqualification period, changes locations and the change is less than three miles, that the vendor’s agreement remains in place, the original store is still subject to the disqualification, while the new location is not subject to any disqualification.

If that illogical outcome is the intent, then that should be made abundantly clear. If that is not the intent, then the rule is unclear.

Criminal Justice Education and Training Standards Commission

All rules were approved unanimously except for 12 NCAC 09E .0105 which was withdrawn by the agency.

Coastal Resources Commission

15A NCAC 07H .0304 was approved unanimously.

Department of Secretary of State

18 NCAC 12 .0904 was approved unanimously.

Prior to the discussion of this rule, Commissioner Doran recused herself and did not participate in any discussion or vote concerning this rule because she is a registered lobbyist.

Prior to the discussion of this rule, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning this rule because her husband is a registered lobbyist.

Board of Examiners for Engineers and Surveyors

All rules were approved unanimously.

RRC CERTIFICATION**Private Protective Services Board**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 07D .0104, .0115, .0203, .0301, .0302, .0401, .0501, .0601, .0807, .0901 and .0909.

2013 STATE MEDICAL FACILITIES PLAN

The Commission found that the Department of Health and Human Services and the State Health Coordinating Council had complied with G.S. 131E-176(25) in the adoption of the 2013 Plan.

OTHER BUSINESS

The Commission unanimously approved supporting the two bills, AN ACT TO MAKE CERTAIN RULES SUBJECT TO LEGISLATIVE REVIEW UPON REQUEST OF THE RULES REVIEW COMMISSION and AN ACT TO ALLOW THE RULES REVIEW COMMISSION TO RETURN A RULE TO AN AGENCY IF A FISCAL NOTE DOES NOT SUFFICIENTLY ADDRESS ADDITIONAL COSTS, prepared by staff at the direction of the Commission.

The Commission unanimously agreed to initiate rulemaking to amend its Rule 05 .0110 on filing objection letters to prohibit the Commission from counting objection letters dated before the date of the last change to the rule other than a change made in response to a request for a technical change.

The Proposed amendment is as follows:

26 NCAC 05 .0110 FILING OBJECTION LETTERS

(a) The RRC shall not consider any ~~objection~~ letter objecting to a rule as set out in G.S. 150B-21.3(b2) which is dated prior to the time the agency adopts the rule.

(b) For purposes of this Rule, a rule that is changed other than as a response to a request for a technical change is considered to be a newly adopted rule. The Commission shall not consider objection letters dated prior to the time of the change.

*History Note: Authority G.S. 143B-30.1;
Eff. August 1, 2008.
Amended eff. May 1, 2013.*

The Commission elected officers. The Commission's Bylaws require that elections be held at the January meeting.

Judge Walker was re-elected Chairman.

Margaret Currin was re-elected 1st Vice-Chairman.

Garth Dunklin was elected 2nd Vice-Chairman.

The meeting adjourned at 11:25 p.m.

The next scheduled meeting of the Commission is Thursday, February 21st at 10:00 a.m.

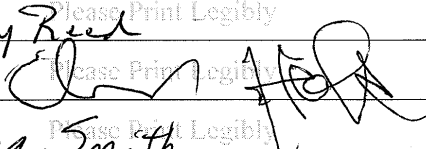
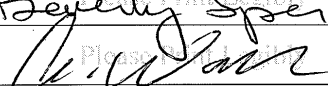
There is a digital recording of the entire meeting available from the Office of Administrative Hearings / Rules Division.

Respectfully Submitted,

Julie Edwards
Editorial Assistant

Rules Review Commission
Meeting
Please Print Legibly

JANUARY 17, 2013

Name	Agency
Richard Spivey	CS Stds - DOJ
Trevor Allen	CS Stds - DOJ
Nadine Pfeiffer	DHSR
Lonnie Christopher	OCOB
Jay Reed	DPH
	DPH
Donna Smith	NCDA
Megan Lamphere	DHSR
Beverly Speroff	DHSR
	SS
Arnette Cowan	NC DPH
Bob Martin	NC DPH
Alice Lexina	—
David McGowan	NCAR
Janette Varley	NC DOJ
Tysha Grays	NC DPH
Kim Lovenduski	NC DAHS
Josephine Ciatone	NC DPH
Jennifer Everett	NC DENR
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**LIST OF APPROVED PERMANENT RULES
January 17, 2013 Meeting**

BANKS, OFFICE OF THE COMMISSIONER OF

<u>Change of Location of Main Office or Branch</u>	04	NCAC 03C .0301
<u>Application</u>	04	NCAC 03C .0401
<u>Filing with Secretary of State</u>	04	NCAC 03C .0406

MEDICAL CARE COMMISSION

<u>Reporting and Investigating Abuse, Neglect or Misappropri...</u>	10A	NCAC 13D .2210
<u>Patient Assessment and Plan of Care</u>	10A	NCAC 13D .2301

PUBLIC HEALTH, COMMISSION FOR

<u>Definitions</u>	10A	NCAC 43D .0202
<u>Vendor Peer Groups</u>	10A	NCAC 43D .0706
<u>Vendor Applicants</u>	10A	NCAC 43D .0707
<u>Local WIC Agency</u>	10A	NCAC 43D .0709
<u>Vendor Violations</u>	10A	NCAC 43D .0710
<u>Accreditation Requirements</u>	10A	NCAC 48B .0103

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Specialized Firearms Instructor Training</u>	12	NCAC 09B .0226
<u>Specialized Driver Instructor Training</u>	12	NCAC 09B .0227
<u>Specialized Subject Control Arrest Techniques Instructor ...</u>	12	NCAC 09B .0232
<u>Specialized Physical Fitness Instructor Training</u>	12	NCAC 09B .0233
<u>Instructors Annual In-Service Training</u>	12	NCAC 09E .0104
<u>Topical Areas</u>	12	NCAC 09F .0102

COASTAL RESOURCES COMMISSION

<u>AECS Within Ocean Hazard Areas</u>	15A	NCAC 07H .0304
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SECRETARY OF STATE, DEPARTMENT OF

<u>Lobbyist Compensation Shall Be Separately Reported</u>	18	NCAC 12 .0904
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ENGINEERS AND SURVEYORS, BOARD OF EXAMINERS FOR

<u>General</u>	21	NCAC 56 .1001
<u>Application Procedure</u>	21	NCAC 56 .1002
<u>Seal</u>	21	NCAC 56 .1003
<u>Certification with Temporary Permit</u>	21	NCAC 56 .1104

**RULES REVIEW COMMISSION
SPECIAL MEETING
February 6, 2013
MINUTES**

The Rules Review Commission held a special meeting on Wednesday, February 6, 2013, in the Conference Room of the Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Ralph Walker and Jeanette Doran. Commissioner Currin was present by conference call.

Staff members present were: Bobby Bryan and Amanda Reeder, Commission Counsel, and Julie Edwards.

The meeting was called to order at 10:05 a.m. with Chairman Walker 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).

TEMPORARY RULE

10A NCAC 14K .0101 – Department of Health and Human Services. The rule was approved unanimously contingent on receiving a technical change. The technical change has been subsequently received.

Lisa Corbett with the Attorney General's Office addressed the Commission.

Jessica Keith with the agency addressed the Commission.

The meeting adjourned at 10:14 a.m.

Respectfully Submitted,

Julie Edwards
Editorial Assistant

RULES REVIEW COMMISSION

Rules Review Commission
Meeting
Please Print Legibly

Special Temporary Rule
Meeting
2-6-13

Name	Agency
Barbara Pym	DHHS
Cheryl Quimet	DHHS-DH3R
Tribby Kinsy	DH3R
Megan Lamphere	DHHS-DH3R
Jessica Keith	DHHS
Lisa McCortell	NC DOJ
Mary Ann Josse	Carillon Assisted Living
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LIST OF APPROVED TEMPORARY RULES
February 6, 2013 Meeting

HEALTH AND HUMAN SERVICES, DEPARTMENT OF

Preadmission Screening

10A NCAC 14K .0101

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby

Randall May
A. B. Elkins II
Joe Webster

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>			
James Ivery Smith, Ivy Lee Armstrong v. ABC Commission	11 ABC 08266	04/12/12	
Trawick Enterprises LLC v. ABC Commission	11 ABC 08901	05/11/12	27:01 NCR 39
Dawson Street Mini Mart Lovell Glover v. ABC Commission	11 ABC 12597	05/23/12	
ABC Commission v. Christian Broome Hunt T/A Ricky's Sports Bar and Grill	11 ABC 13161	05/03/12	
Alabarati Brothers, LLC T/A Day N Nite Food Mart, v. ABC Commission	11 ABC 13545	05/01/12	
Playground LLC, T/A Playground v. ABC Commission	11 ABC 14031	05/16/12	27:01 NCR 64
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	11 ABC 14036	07/05/12	
ABC Commission v. D's Drive Thru Inc. T/A D's Drive Thru	12 ABC 00060	05/29/12	
ABC Commission v. Choudhary, LLC T/A Speedway	12 ABC 00721	05/01/12	
ABC Commission v. Dos Perros Restaurant LLC T/A Dos Perros Restaurant	12 ABC 05312	09/25/12	
ABC Commission v. Bobby Warren Joyner T/A Hillsdale Club	12 ABC 06153	11/06/12	
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	12 ABC 07260	12/11/12	
ABC Commission v. Fat Cats Grill and Oyster Bar Inc, T/A Fat Cats Grill and Oyster Bar	12 ABC 08988	12/19/12	
<u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u>			
Brian J. Johnson v. Department of Public Safety Victim Services	12 CPS 01664	12/21/12	
George H. Jagers, III v. Crime Victims Compensation Commission	12 CPS 01693	11/01/12	
Teresa Herbin v. Department of Public Safety Victim Services	12 CPS 03680	08/10/12	
Jacqueline M Davis victim-Antonio T Davis v. Dept. of Public Safety	12 CPS 05919	11/06/12	
Demario J. Livingston v. Dept. of Public Safety Victim Services	12 CPS 06245	10/19/12	
Shirley Ann Robinson v. N.C. Crime Victims Compensation Commission	12 CPS 07601	12/07/12	
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
Bright Haven Residential and Community Care d/b/a New Directions Group Home v. Division of Medical Assistance, DHHS	10 DHR 00232	04/27/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home, v. DHHS/Division of Health Service Regulation, Adult Care Licensure Section	10 DHR 01666	05/18/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home v. DHHS, Division of Health Service Regulation, Adult Care Licensure and Certification Section	10 DHR 05801	05/18/12	
Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section	10 DHR 05861	05/18/12	
Mary Ann Barnes v. DHHS, Division of Health Service Regulation, Health Care Personnel	11 DHR 6488	07/16/12	

CONTESTED CASE DECISIONS

Registry				
Comprehensive PT Center v. DHHS, Division of Medical Assistance	11 DHR 9197	08/14/12	27:12 NCR 1204	
Cherry's Group Home, Alphonso Cherry v. DHSR Michelle Elliot	11 DHR 09590	07/12/12		
Leslie Taylor v. DHHS, Division of Health Regulation	11 DHR 10404	10/19/12		
Powell's Medical Facility and Eddie N. Powell, M.D., v. DHHS, Division of Medical Assistance	11 DHR 01451	03/05/12	27:01 NCR 75	
Julie Sadowski v. DHHS, Division of Health Service Regulation	11 DHR 01955	04/03/12		
Carlos Kendrick Hamilton v. DHHS, Division of Social Services	11 DHR 11161	10/16/12	27:16 NCR 1679	
Teresa Diane Marsh v. DHHS, Division of Health Service Regulation	11 DHR 11456	04/27/12		
Betty Parks v. Division of Child Development, DHHS	11 DHR 11738	06/20/12		
Lorrie Ann Varner v. DHHS, Regulation Health Care Personnel Registry Section	11 DHR 11867	08/02/12		
Brenda Brewer v. DHHS, Division of Child Development	11 DHR 12064	08/03/12	27:12 NCR 1210	
Timothy John Murray v. DHHS, Division of Health Service Regulation	11 DHR 12594	06/15/12		
Holly Springs Hospital II, LLC v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Harnett Health System, Inc. and WakeMed	11 DHR 12727	04/12/12	27:04 NCR 486	
Rex Hospital, Inc., v. DHHS, Division of Health Service Regulation, CON Section and WakeMed, Holly Springs Hospital II, LLC, and Harnett Health System, Inc.	11 DHR 12794	04/12/12	27:04 NCR 486	
Harnett Health System, Inc., v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Holly Springs Hospital II, LLC, and WakeMed	11 DHR 12795	04/12/12	27:04 NCR 486	
WakeMed v. DHHS, Division of Health Service Regulation, CON Section and Holly Springs Hospital II, LLC, Rex Hospital, Inc., and Harnett Health System, Inc	11 DHR 12796	04/12/12	27:04 NCR 486	
Sandra Ellis v. DHHS	11 DHR 12959	07/11/12		
Vendell Haughton v. DHHS, Division of Medical Assistance	11 DHR 13616	07/05/12		
Tarsand Denise Morrison v. DHHS, Division of Health Service Regulation	11 DHR 13906	07/11/12		
Care Well of Charlotte Inc, Joy Steele v. DHHS	11 DHR 13909	08/02/12		
Carrie's Loving Hands Inc. #MHL #040-047 Felicia McGee v. DHHS, DHSR, Mental Health Licensure and Certification	11 DHR 14172	01/22/13		
Carrie's Loving Hands Inc. #MHL #010-047 Felicia McGee v. DHHS, DHSR, Mental Health Licensure and Certification	11 DHR 14173	01/22/03		
Michael Timothy Smith, Jr. v. DHHS, Division of Health Service Regulation	11 DHR 14184	08/01/12		
John S. Won v. DHHS	11 DHR 14232	09/05/12	27:15 NCR 1547	
Cynthia Tuck Champion v. DHHS, Division of Health Service Regulation	11 DHR 14283	06/15/12		
Leslie Taylor, and Octavia Carlton v. Mecklenburg County Department of Social Services Youth and Family Services Division	11 DHR 14335	10/12/12		
Lauren Stewart v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 14570	06/08/12		
Alice M. Oakley v. Division of Child Development, DHHS	11 DHR 14571	05/15/12	27:04 NCR 508	
McWilliams Center for Counseling Inc., v. DHHS, Division of Mental Health, Developmental Disabilities, Substance Abuse Services, and agency of the State of NC	11 DHR 15098	11/13/12		
Althea L. Flythe v. Durham County Health Department	12 DHR 00242	05/17/12		
Jerri Long v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00361	07/06/12		
Renal Advantage, Inc., v. DHHS, Division of Health Service Regulation, CON Section and DVA Healthcare Renal Care, Inc	12 DHR 00518	08/28/12	27:15 NCR 1553	
Angela Moye v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00642	08/23/12	27:12 NCR 1218	
Jessica Lynn Ward v. DHHS	12 DHR 00643	05/17/12		
Trinity Child Care II & I v. DHHS, Division of Public Health, Child and Adult Care Food Program	12 DHR 00861	04/20/12	27:04 NCR 518	
Dr. Karen J. Williams, LPC v. DHHS, Division of Medical Assistance	12 DHR 00926	09/18/12		
Faith Home Care of NC, Bonita Wright v. DHHS, DMA	12 DHR 00928	07/25/12		
Olar Underwood v. Division of Child Development and Early Education	12 DHR 00990	10/22/12		
Angela C Jackson v. DHHS	12 DHR 01097	06/19/12		
Paula N Umstead v. DHHS	12 DHR 01098	05/11/12		
Daniel W. Harris, Jr., v. DHHS, Division of Health Service Regulation	12 DHR 01138	10/19/12		
ACI Support Specialists Inc. Case #2009-4249 v. DHHS	12 DHR 01141	06/06/12		
AriLand Healthcare Service, LLC, NCMHL #018-092, Shawn Kuhl Director of Operations v. DHHS, Emery E. Milliken, General Counsel	12 DHR 01165	05/25/12		
Kenneth Holman v. DHHS	12 DHR 01244	06/05/12		
Hillcrest Resthome Inc. (\$2000 penalty) v. DHHS	12 DHR 01289	05/30/12		
Hillcrest Resthome Inc. (\$4000 penalty) v. DHHS	12 DHR 01290	05/30/12		
Vivian Barrear v. DHHS, Division of Medical Assistance DHHS	12 DHR 01296	06/06/12		
Patricia Satterwhite v. DHHS	12 DHR 01338	07/23/12		

CONTESTED CASE DECISIONS

Timothy L Durham v. DHHS, Division of Health Services Regulation	12 DHR 01396	09/04/12	
Clydette Dickens v. Nash Co DSS	12 DHR 01625	05/15/12	
Robert Lee Raines v. DHHS	12 DHR 01736	05/30/12	
Ms. Antoinette L. Williams v. DHHS	12 DHR 01739	06/15/12	
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Filed

STATE OF NORTH CAROLINA
COUNTY OF WAKE

2012 OCT 16 AM 11:08

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DHR 11161

Office of
Administrative Hearings

<p>CARLOS KENDRICK HAMILTON, Petitioner,</p> <p align="center">v.</p> <p>NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF SOCIAL SERVICES, Respondent.</p>	<p align="center">DECISION</p>
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On July 17, 2012, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. On August 31, 2012, Respondent filed a proposed Decision, and on September 4, 2012, Petitioner filed a proposed Decision.

APPEARANCES

Petitioner was represented by William F. Moss, Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, PO Box 2611, Raleigh, NC 27602.

Respondent was represented by Jane R. Thompson, Assistant Attorney General, NC Department of Justice, 792 Arbor Road, Winston-Salem, NC 27104.

ISSUE

Whether Respondent properly revoked Petitioner's family foster home license based on a substantiation of neglect against Petitioner and for lack of compliance with foster home licensing rules?

EXHIBITS ADMITTED INTO EVIDENCE

Given the confidential nature of the exhibits involving minor children, the undersigned Granted a pretrial Motion to Seal all Exhibits in this case.

For Petitioner: 1 - 4

For Respondent: 1 - 12

WITNESSES

For Petitioner: Robert Gibson, and Petitioner

For Respondent: Heather West, Marlana Walker, Crystal Campbell Walker,
Nicole Jensen

FINDINGS OF FACT

Procedural Background

1. On July 12, 2011, Respondent issued a Notice of Administrative Action to revoke Petitioner's license to operate a family foster home based on (1) Wake County Department of Social Services' substantiation of neglect for improper care, and (2) for failure to comply with administrative rules 10A NCAC 70E .1104(c)(9), 10A NCAC 70E .0902(a)(2),(6), & (10).
2. On September 9, 2011, Petitioner appealed Respondent's July 12, 2011 decision by filing a contested case petition with the Office of Administrative Hearings. In that petition, Petitioner alleged the following:

Respondent has decided to revoke my license to provide foster care based upon reasons that are unsubstantiated and incorrect. A) DHHS committed error by relying upon an agency's unreliable "substantiation" of neglect. The first foster child who alleges that I put him outside of the house as a punishment made other, extremely serious allegations of abuse. The Wake County Police Department (WCPD) and CPS investigated these other claims and found them to be entirely untrue. So, this same child's story about my disciplinary methods lacks credibility. The allegation of the second foster child who says that I put him outside of the house as a punishment is unbelievable too. WCPD responded to my home at the time of the alleged act and found no evidence of abuse or neglect. This agency should have relied upon WCPD's assessment. Neglect should not have been "substantiated" on the basis of either child's story. B) DHHA and/or the agency committed error by concluding that i) I accepted placement of an unauthorized foster child, ii) I failed to notify the supervising agency that an adult male was residing in my home, iii) I had pornography in places accessible to children; and iv) I have "objectionable pictures" in my bedroom. As to conclusions i) and ii), neither the child nor the adult male spends enough time in my bedroom, both places that are off-limits and inaccessible to children. Nonetheless, I have thrown out all such materials to make my home a better foster home. Finally, as conclusion iv), the "objectionable" pictures are African-American art. These pictures hung in my bedroom during the agency's initial inspection and all subsequent visits. However, if these pictures present a problem, I am willing to remove them.

Adjudicated Facts

3. In January 2009, Respondent issued a license to Petitioner to operate as a therapeutic foster parent with Youth Quest as his supervising agency. In June 2009, Petitioner transferred his license to Touchstone Residential Services for supervision. His two-year license was renewed in January 2011, and will expire in January 2013.
4. Therapeutic foster care is a Level II placement. Children placed in a therapeutic foster home must be authorized by Medicaid as meeting the medical necessity requirements for a Level II placement. Only two foster children may be in a therapeutic home at one time, unless a waiver is granted for a sibling group of three. Therapeutic foster parents receive additional

training as they are expected to be able to handle children who have higher needs than regular foster children. Therapeutic foster parents also receive more than the standard foster care monthly board rate.

5. Children can be placed in therapeutic foster homes by either county departments of social services with placement responsibility for those children, or by parents who work directly with local mental health providers and a supervising agency.

6. Therapeutic foster children receive monthly face-to-face contacts with the supervising agency, in addition to the contact with any placing agency. The foster parent receives 60 minutes of supervision each week per child to discuss how the child's needs are being met, especially his mental health needs. 60% of this contact can be face-to-face contact, while 40% can be by phone.

7. At various times, Petitioner had eight children placed with him while he was supervised by Touchstone Residential Services ("Touchstone"). Five children's placements were short-term placements of 30 days or less. Several of these children were in the custody of their parents. For those specific placements, Touchstone received the Medicaid payment for the child with no contribution from the parents.

8. The only exception to this payment arrangement was with minor child TG. Eleven-year-old TG was placed by his parents with Petitioner around July 2010. TG's parents paid Petitioner a monthly room and board payment.

9. Beginning June 1, 2009, PB, a 9-year-old male, was placed with Petitioner by Chatham County Department of Social Services ("DSS").

10. Beginning September 29, 2010, Marlana Walker began working as a Qualified Professional ("QP") for Touchstone. In November 2010, Walker began supervising PB's placement with Petitioner.

11. On December 23, 2010, PB (then 11 years old) left Petitioner's home for a Christmas visit with his mother. PB did not return to Petitioner's home after a decision was made to extend PB's visit at home. On December 31, 2010, PB's mother filed a report with Wake County Human Services (part of Wake County Division of Social Services) ("Wake County DSS") alleging neglect due to improper discipline and sexual abuse by Petitioner. Chatham County DSS initially interviewed PB.

12. On December 31, 2010, social worker Crystal Campbell was the CPS investigator for Wake County DSS assigned the PB investigation. PB alleged that Petitioner had hit him, and that Petitioner had sexually abused him. When interviewed by Ms. Campbell, PB also alleged that Petitioner had put him outside for punishment in the cold without proper clothing. At the contested case hearing, Ms. Campbell explained that her notes from her interview of PB indicated that PB remembered Petitioner putting him outside one night when the clock read 9:23 pm, that it was dark and cold, and he was only wearing shorts. (Resp. Exh. 9, pp. 8, 14-15)

a. Crystal Campbell also interviewed PB's therapist, Dr. Carey. Dr. Carey advised Campbell that placing PB outside with just shorts on was an inappropriate discipline for PB. Since PB had a history of lying and manipulation and came from

a sexually abusive background, Carey could not be sure about PB's sexual abuse allegations. Campbell noted in her report that Dr. Carey stated:

[T]his was one of those questionable cases because of PB's history of lying and manipulation. Dr. Carey noted that she dealt with P's manipulation for a long period, and noted that he had stolen her cell phone at one point. Dr. Carey noted it was one of those cases that you could go either way on.

(Resp. Exh. 9, p. 8)

b. Petitioner told Ms. Campbell that PB had been brainwashed by his mother, and that he came from a very "sexualized" home, so these allegations were not surprising. Petitioner denied any neglect or abuse. (Resp. Exh. 9, p. 8)

c. Ms. Campbell also interviewed TG and his parents. TG did not say that anyone had harmed him. TG's parents advised that they had never seen anyone work so well with TG, and that TG had made a complete turnaround. Mr. G noted that TG has never said anything, and they have never seen any safety concerns. (Resp. Exh. 9, p. 8)

13. Neither Touchstone nor Respondent's Regulatory and Licensing Services was notified of PB's mom filing a report with Wake County Human Services. As such, Ms. Walker was unaware of PB's mother filing a report with Wake County DSS when Walker recommended re-licensure of Petitioner's home effective January 2011.

14. In January 2011, Nicole Jensen, Respondent's foster home licensing consultant, re-licensed Petitioner's home without knowing of the open CPS investigation regarding PB.

15. On Friday, March 4, 2011, 16-year-old WH was placed with Petitioner for a weekend respite period. Touchstone had agreed to work with WH's mother when WH was unable to remain at home, because of his behaviors. Any extension of WH's respite period required the agreement of Touchstone and WH's supervising agency. WH was scheduled to return to his mother on Monday, March 7, 2011.

16. On Monday, March 7, 2011, Touchstone's Marlana Walker learned that WH's mother had asked Petitioner to extend WH's placement with Petitioner for another week, because the placement was going so well. Petitioner agreed to that extension. During the weekend, neither WH's mother nor Petitioner contacted Touchstone or WH's supervising agency about the request to extend WH's stay with Petitioner. Petitioner told Ms. Walker he knew he should have contacted Touchstone, and had no reason for not doing so. After talking with Petitioner about the extension of WH's stay on Monday, Ms. Walker contacted WH's case manager, and they agreed to extend WH's stay with Petitioner for another week.

17. On Friday, March 11, 2011, WH became agitated while he and TG were eating lunch in Petitioner's home. WH wanted more ketchup, so Petitioner put more ketchup on WH's plate. TG was explaining the rules of the house to WH. WH became upset, because he thought that TG was telling him what to do. WH's behavior escalated, WH threatened TG, and wanted to speak with his mother. Petitioner told TG to go to another room. Petitioner called WH's mother, and requested she pick up WH from Petitioner's home. WH's mother refused to come and pick up WH. Petitioner called the Raleigh Police.

18. On Saturday, March 12, 2011, WH's behavior escalated again, because he continued thinking that TG was telling him what to do. WH cursed and screamed. WH was not wearing a shirt as he had just taken a shower. Petitioner told WH to put on a shirt, but WH did not. When Petitioner told WH to go outside, WH refused. Petitioner used an "arm assist" or therapeutic hold to escort WH outside, and keep WH away from TG. Petitioner continued to process WH's feelings, but was unsuccessful with de-escalating WH.

a. Petitioner returned inside the home, and told WH he could come back inside when he calmed down. WH said he wanted to pack his stuff and leave. Petitioner watched WH from the living room window, and called WH's mother. He advised WH's mom that WH had been upset for a significant amount of time, and that he had been unsuccessful in calming down WH. When Petitioner requested WH's mother pick up her son, WH's mother refused.

b. Petitioner returned outside and the Raleigh Police were in front of his home. Both WH and Petitioner talked with Raleigh Police Officer Egan. Officer Egan wrote in his report that:

Hamilton stated the child will not follow directions and tell lies frequently. This child apparently also attempts to fight with the other younger children in the house. . . . [W]H indicated that he had been assaulted by Hamilton. I found no evidence of an assault. Hamilton stated that he needed a report just to document the child's behavior. . . No injuries were reported.

(Pet. Exh. 1)

19. During the March 11-13, 2011 weekend, Petitioner did not contact Touchstone, or WH's supervising agency or mental health provider when WH's behavior problems continued, and after two police visits occurred.

20. On Monday, March 14, 2011, at approximately 9:00 am, WH's mother picked up WH from Petitioner's home. WH's mother noticed bruises on WH's arm after picking WH up from Petitioner's home, and filed a report with Wake County Human Services against Petitioner for improper discipline. (Resp. Exh. 8) WH's mother also advised Marlana Walker that she had filed the report against Petitioner.

21. That same day, Ms. Walker called Petitioner. Petitioner informed Ms. Walker of WH's escalated behavior during the weekend. Petitioner told Walker how he had called WH's mother to come and pick up WH, but the mother refused, and that WH's mother did not pick up WH until that morning. (Resp. Exh. 1)

a. Ms. Walker also learned that WH's mother had given Petitioner a note telling Petitioner to stop giving WH one of his medications. Such note was against licensing rules without agency and medical approval. Petitioner confirmed that he gave WH his medication. Later, Petitioner indicated that he thought WH's behaviors had worsened, because he was not taking the medication in question.

b. Ms. Walker completed a Critical Incident Report. In the narrative part of that report, Walker described her March 11, 2011 conversation with Petitioner about what had happened during the weekend between WH and Petitioner. Such

narrative was based on her recorded conversation with Petitioner on March 11, 2011. (Resp. Exh. 1)

22. Because minor TG was still living with Petitioner, Ms. Walker visited TG at his middle school on March 14, 2011. TG had no complaints about Petitioner. However, TG mentioned that another adult named Marcus was frequently in the home, spent the night in Petitioner's bedroom, and provided some childcare when Petitioner ran errands.

23. Ms. Walker had never heard of nor seen Marcus. Petitioner advised Walker that Marcus was a friend who visited occasionally, but did not spend the night. He was aware of the licensing rule that any change in the composition of the household must be reported. In Petitioner's transfer application in June 2009, Petitioner had listed Marcus Jones as a reference, listed Petitioner's home address as Jones' address, and indicated he had known Jones for ten years. However, since references are not required for re-licensure, Marlana Walker was unaware of this information about Mr. Jones from 2009, when she recommended Petitioner for relicensure in January 2011.

24. In March 2011, Touchstone removed TG from Petitioner's home until the Wake County Child Protective Services (CPS)/DSS completed the investigation into WH's complaint. Initially, TG was placed with another Touchstone foster home. When that placement did not go well, TG returned to his parents' home within the same day. TG is a triplet. TG's parents adopted TG and his siblings as infants. TG has far more behavioral problems than his two siblings, who remained in the home. TG's parents were very pleased with TG's care and progress in the Petitioner's home, and wanted him returned as soon as possible.

25. Ms. Walker continued to supervise TG's case, even though TG was no longer in a Touchstone home, by visiting Petitioner's home and attending meetings for TG as she had in the past.

26. On March 14, 2011, Wake County DSS was continuing to investigate PB's complaint when it received WH's mother's complaint against Petitioner. Wake County DSS combined PB and WH's complaints for investigative purposes, and began investigating WH's complaint.

27. In WH's complaint against Petitioner, WH alleged that Petitioner locked WH out of the house for most of Saturday (March 12, 2011) "with only shorts no shoes, no socks & no shirt." (Resp. Exh. 8, p. 2) WH alleged that Petitioner grabbed his arm, "pulling him around and shoved him into a car & left marks & bruises on" him. (Resp. Exh. 8, p. 2) When Campbell interviewed WH, she observed scratches on WH's upper arm.

28. On March 14, 2011, Campbell interviewed Petitioner regarding WH's allegations.

a. Petitioner stated that WH's stay had initially gone well and his mother wanted him to remain permanently. His behavior deteriorated as the extra week went on. Petitioner advised Campbell that WH's mother took WH off one of his medications. Petitioner later learned that, that medication controlled WH's moods, and that WH "completely changed from a sweet obedient child to some who just defied everything he said" when he mother stopped giving him that medication. (Resp. Exh. 9, p. 14)

b. Petitioner was adamant that all allegations were false, that PB "was only doing what his mother was telling him to do," and WH was trying to get back at Petitioner. WH had become defiant and threatened to make sure Petitioner lost his job. (Resp. Exh. 9, p. 14)

c. Petitioner stated he called Touchstone to ask that WH be removed. He advised that the scratches occurred when he was forcing WH out the door, because WH's yelling was upsetting TG.

29. Petitioner informed Campbell that Marcus was a casual friend, but did not give Campbell any contact information for Marcus. At the conclusion of Campbell's interview of Petitioner, Petitioner agreed to sign a safety plan agreeing not to care for any children in his home until the investigation was complete. (Resp. Exh. 10)

30. On March 17, 2011, Ms. Campbell sent the Notice of CPS Involvement (Resp. Exh. 8) to Respondent for both investigative cases. On March 17, 2011, Respondent's Nicole Jenson received the Notice of CPS Involvement/Investigation for both PB and WH. On March 18, 2011, Jenson also received Touchstone's Critical Incident Report regarding WH. (Resp. Exh. 1)

31. At the contested case hearing, Crystal Campbell admitted that she did not properly notify Touchstone and Respondent of PB's investigation until March 17, 2011, when she began investigating WH's complaint against Petitioner.

32. In May 2011, Heather West, Respondent's licensing consultant, informed Touchstone that they could no longer provide any case management services for TG. TG would continue to receive services from his mental health services provider, but he could not return to a Touchstone home without a new Medicaid authorization for services, and a new supervision agreement from Touchstone.

33. On June 16, 2011, after receiving notice of the DSS investigation of both boys' allegations, the Raleigh Police Department executed a search warrant at Petitioner's home. TG and another child were present in the home at that time. Raleigh Police searched Petitioner's home and found "several pornographic tapes in (places where children could get to them if they wanted)" and paintings on the wall in Petitioner's bedroom of "men and women in sexual positions." Detective [Jennings] noted that "the paintings would be concerning if young children were looking at them." (Resp. Exh. 9, p. 14) In her investigative report, Campbell noted that:

A search warrant was executed by the police department, but nothing was found that would confirm the stories of the boys. . . . Det. Jennings notes that there is no evidence to back up the stories of the boys. . . . There is no evidence at this time to confirm the stories of the children.

(Resp. Exh. 9, p. 14)

34. At hearing, Ms. Walker testified that her supervisor, Kaye Crosland, was no longer with Touchstone and unavailable to testify due to medical disability. Crosland told Walker that Crystal Campbell called Crosland on June 17, 2011, and reported that Petitioner's case would be unsubstantiated with no finding of abuse or neglect. Based on that communication, Ms. Walker sent Petitioner an email regarding resumption of her case management role with TG.

35. According to Walker, Ms. Crosland also heard from Petitioner on June 17, 2011. Petitioner advised Crosland that he had also heard from Ms. Campbell, and had already returned TG to his home. Ms. Crosland told Petitioner that TG could not return until he was recertified by Medicaid, and Touchstone had agreed to the placement, which would not happen until it was formally notified of the investigative case decision. Ms. Walker later learned that a case decision of child neglect had in fact been substantiated.

36. At hearing, Ms. Campbell adamantly denied calling Petitioner or Touchstone on June 17, 2011, and telling them the investigation was complete. On June 17, 2011, Ms. Campbell was celebrating a friend's birthday in Miami, and no case decision was made until she "staffed" or discussed the case with her supervisor on June 23, 2011. Ms. Campbell acknowledged that she heard from Petitioner and TG's father on several occasions during the investigation, as they wanted to know why the investigation was taking so long, and when it would be completed. These calls became so frequent that her supervisor called both men, and told them to cease contacting her.

37. On June 22, 2011, Kaye Crosland of Touchstone advised Nicole Jensen that TG's parents had placed TG back in Petitioner's home based on Campbell's June 17, 2011 call to Petitioner. Ms. Crosland advised Jensen that she had told Petitioner that TG could not return until they were formally notified of a case decision, Medicaid authorization was renewed for TG, and Touchstone agreed to supervise the placement. Later that day, Ms. Crosland sent Ms. Jensen a draft letter to Petitioner that Touchstone would no longer be working with him as a foster parent, because he had accepted and kept TG in his home without agency approval. (Resp. Exh. 11)

38. On June 22, 2011, Ms. Jensen also heard from another licensed agency that Petitioner had inquired about transferring his license to that agency, stating he was no longer a foster parent for Touchstone. Transfers are not permitted during an active child protective services investigation or after adverse licensure action has been taken. Two possible transfer requests for Petitioner were discussed with Ms. Jensen after the revocation notice had been sent.

39. On June 23, 2011, Wake County DSS completed its investigation into PB and WH's complaints, substantiated the neglect allegations against Petitioner based on the factors of "environment injurious" and "improper care" and discipline under N.C. Gen. Stat. § 7B-101(15). Wake County DSS sent a Case Decision Notification of its decision to Respondent. (Resp. Exh. 9, pp. 4, 10) Acting supervisor, Virginia King, wrote the Wake County DSS decision.

a. At hearing, Ms. Campbell explained that both PB and WH did not know each other, but both made similar allegations that they were disciplined by being placed outside in cold temperatures with inadequate clothing. Petitioner admitted putting WH outside for punishment, even though he denied it was cold at the time.

b. In addition, Petitioner violated the March 14, 2011 safety plan by having children in his home before the conclusion of the DSS investigation, and the police found pornographic material present in Petitioner's home where children could access it. She advised Virginia King that Petitioner passed a lie detector test.

40. Handwritten notes on pages 14-15 of the Wake County report were:

There is conflictual information regarding improper discipline of WH. Mr. Hamilton reported that the scratches on his [WH] arm came from him using the therapeutic hold when WH was out of control.

(Resp. Exh. 9, p. 15)

41. On June 28, 2011, Nicole Jenson's office received Wake County DSS' Notice substantiating neglect allegations against Petitioner. On June 30, 2011, Jenson received Touchstone's formal request for revocation of Petitioner's license.

42. At the time of contested case hearing, the actual case files of both investigations could not be located by Wake County DSS, so the information sent to Respondent is the only written information available. Since Ms. Campbell was employed by Johnston County DSS, she did not have access to Wake County's files.

43. By Notice of Administrative Action dated July 12, 2011, Respondent revoked Petitioner's therapeutic foster home license. Mr. Marcus Jones signed for receipt of such Notice at Petitioner's home on July 18, 2011. The revocation decision was made by Respondent's foster home licensure staff, their supervisor, Touchstone's licensing consultant, and the Attorney General's office.

44. In that decision, Respondent found that Wake County DSS had a substantial basis for its neglect determination, in that there was credible evidence from two foster children, who had never been placed together, that they were made to stay outside for punishment in cold weather without adequate clothing. Respondent also found that neglect was properly based on the presence of pornographic material within access of children. Given PB's sexually abusive background, Respondent found the presence of pornography, consistent with PB's statements, was indicative of very poor judgment by Petitioner and supportive of a neglect finding of injurious environment. Revocation of a foster home license may be based on a finding that a foster parent has abused or neglected a child. 10A NCAC 70E .0708(a) & 70E .1104(c) (9).

45. Respondent also determined that revocation was appropriate in this case, because Petitioner violated several rules critical to the foster care system's ability to protect children and meet their needs. The primary violation was Petitioner's failure to have a supervising agency after TG's parents placed TG back in Petitioner's home in June 2011. 10A NCAC 70E .0902(a)(2). The requirement of a supervising agency is explained as part of the foster parent application process. Petitioner signed several agency-foster parent agreements, which included this requirement (Resp. Exh. 5), and he was specifically told by Touchstone not to return TG to his home without agency supervision. TG has remained in Petitioner's home without any agency supervision since June 2011.

46. Respondent also found that Petitioner violated 10A NCAC 70E .0902(a)(6) when he failed to inform Touchstone of the presence of Marcus Jones in his home. All three children interviewed, stated that Mr. Jones was in the home for overnight visits and provided some childcare in Petitioner's absence. Yet, Petitioner never mentioned Mr. Jones' presence in Petitioner's home to Touchstone before the Wake DSS investigation. In July 2011, Mr. Jones signed for receipt of Respondent's Notice of Administrative Action on Petitioner's behalf after

Petitioner refused to sign for such receipt. Any adult member of the household must undergo a fingerprint criminal record check, a physical, and be evaluated by the supervising agency. Petitioner could not provide any contact information for Mr. Jones when asked by Wake County DSS, yet he listed Mr. Jones as a reference on Petitioner's transfer application in 2009, and listed his own home address as Jones' address on that same application.

47. Finally, Respondent found that Petitioner violated 10A NCAC 70E. 1104(a)(10) by having pornography in his home, which was accessible to foster children. That administrative rule requires foster parents to provide a safe and healthy environment for foster children. Petitioner's violation of this rule supported its decision to revoke Petitioner's foster home license.

48. At hearing, TG's father testified about TG's placement and behavioral history and his progress in Petitioner's home.

a. Since being placed with Petitioner, TG's behavior and grades have dramatically improved. TG has received awards at school and earned grades to place him on the Honor Roll. (Pet. Exh. 3) Mr. Gibson does not believe the allegations of PB or WH. He opined that TG has never been harmed in Petitioner's home. TG's father wants what is best for TG, and believes it is best for him to remain with Petitioner, even after the neglect substantiation by Wake DSS, and without a supervising agency.

b. Mr. Gibson identified an affidavit from Dr. Seth Tabb, TG's therapist. (Pet. Exh. 4) Dr. Tabb diagnosed TG with Pervasive Developmental Disorder, Not Otherwise Specified; Post Traumatic Stress Disorder; Depressive Disorder, Not Otherwise Specified. Dr. Tabb explained that TG had made significant improvement in his behavior and academic standing since being placed with Petitioner. She opined that TG's continued improvement and strong academic performance could be significantly damaged if TG is forced to leave Petitioner's care. (Pet. Exh. 4)

49. At the contested case hearing, Petitioner explained that he had worked with children and adults with special needs for 16 years. Petitioner has been a licensed foster parent since 2009. Currently, he is working with, and helping one adult in the community.

50. PB lived in Petitioner's home for almost two years, and called Petitioner "Uncle Carlos" or "Dad." They had a great relationship. He felt PB's allegations of sexual abuse arose out of PB's past background. Petitioner denied that PB was placed outside for punishment, and emphasized that he never locked PB outside the home. PB exaggerated and lied. The only time PB was outside was when he played with his neighborhood friend J. Whenever PB was outside, PB and he had walkie-talkies so they could communicate.

51. Petitioner acknowledged that WH was only placed with him for a short respite period in March 2011. Although WH's mother stated she wanted him taken off one of his medications, Petitioner continued to administer WH's medication. Petitioner could not be sure that WH actually swallowed his medication. Now, Petitioner believes WH's behavior deteriorated because he was not taking that medication.

a. Petitioner explained that he was outside with WH, except when Petitioner went into the house to get his phone charger. WH became loud and was

upsetting TG. Petitioner gently led WH down the stairs, and outside to talk. WH was attacking and talking trash to TG. It was not cold outside. Petitioner showed Ms. Walker and Ms. Campbell the hold he used to guide WH.

b. He admitted the police found adult pornography in his bedroom and attic. However, pornography is no longer in his home. The artwork that had been deemed too suggestive was "black art." It also has been removed from his home.

52. Petitioner admitted that TG and another child, D, were present on the evening of June 16, 2011 when the police searched his home. Petitioner explained that Ms. Campbell had told him he could see TG with supervision, before the conclusion of the investigation. TG's father was also present. At hearing, TG's father corroborated that he had brought TG to see Petitioner for a 1-hour visit that night, as a reward for TG's good behavior. Dad indicated that he went to get ice cream, and then returned to pick up TG.

53. Petitioner acknowledged that he knew Marcus Jones. In 2009, Mr. Jones worked in Raleigh, and asked to use Petitioner's address, even though Jones was not living there. Petitioner could not explain why the children would state that Mr. Jones spent some nights at his home or provided care for them on occasion.

a. Petitioner was at home when the Notice of Administrative Action from Respondent arrived, and was upset. When he refused to sign for receipt of the Notice, Mr. Jones signed for the Notice of Administrative Action.

b. At hearing, Petitioner did not sufficiently explain why he did not provide Ms. Campbell with any information so Campbell could contact Mr. Jones to discuss Jones' role and level of participation in Petitioner's home.

54. Petitioner claimed that on June 16, 2011, Ms. Campbell told him "if everything goes right with the lie detector, this case will be over." Petitioner passed a polygraph test administered by Raleigh Police regarding the child abuse and neglect allegations.

55. Petitioner called Campbell on June 17, 2011, and told her he had passed the polygraph test. Petitioner claimed that Campbell said, "Thank God, it's over. You can go get TG. I will call Touchstone." That same day, Petitioner received an email from Marlana Walker with Touchstone indicating that she would resume her work with TG and Petitioner. (Pet. Exh. 1)

56. On rebuttal, Ms. Campbell reiterated that she never told Petitioner he could return TG to his home before she completed her investigation. She admitted that Petitioner called and told her that he had passed the polygraph test, but denied telling Petitioner that the investigation was over, that TG could return, and she would call Touchstone. Any placement of children in Petitioner's home before the case decision, even on a temporary basis, would have been a violation of the safety plan. She told Petitioner he could speak with TG to help "de-escalate" him if needed when TG's behaviors were difficult. She also told Petitioner that he could not see TG even with supervision. She did not know who may have called Petitioner and Kaye Crosland of Touchstone regarding the investigation on June 17, 2011, but she did not.

57. After Wake County DSS substantiated the neglect allegations against Petitioner, Touchstone notified Petitioner that they would no longer be working with him, and TG should not

be in his home. Petitioner acknowledged that he tried to transfer to another agency, but could not due to the pending adverse licensure action.

58. Since June 17, 2011, TG has resided in Petitioner's home, where Petitioner has been helping TG without a supervising agency. Petitioner wants to continue to care for TG.

59. Neither PB nor WH testified at the contested case hearing. Respondent failed to produce any documentation at hearing explaining the diagnosis of PB or WH. Neither did Respondent produce the care plans of PB or WH.

60. Neither the Wake County DSS report nor any witness by Respondent indicated that PB provided any specificity regarding the dates, number of times, or Petitioner's location, when Petitioner allegedly placed PB outside in the cold as punishment or discipline. PB's therapist advised that PB's allegations were questionable, that PB had problems with lying and manipulation, and that PB stole the therapist's cell phone.

61. The Wake County DSS report also acknowledged, "there was conflictual information regarding improper discipline of" WH, and that Petitioner reported that the scratches on WH's arms could have come from Petitioner using a therapeutic hold when WH was out of control.

a. The Wake County Case DSS decision notes that WH experienced a negative outcome as he had to be placed in UNC's psychological hospital, is currently on medications, and is under the care of a psychiatrist. However, it is unclear whether WH's hospital stay, and continued medical care was due to his being placed outside Petitioner's home in the cold without adequate clothing. (Resp. Exh. 9, p. 3)

b. There was no evidence presented at hearing indicating that PB suffered any physical, mental or emotional impairment or there was a substantial risk of such impairment due to the alleged neglect by Petitioner. In the case decision summary (Resp. Exh. 9, pp. 7, 13), Wake County DSS noted no current safety issues, no risk of future harm to the children, and no need of protection for the children. Both PB and WH were placed with their mothers.

62. On March 12, 2011, Raleigh Police Officer Egan visited Petitioner's home. In his March 12, 2011 report, Egan noted, "I found no evidence of an assault. . . . No injuries were reported. EMS did not respond. CCBI did not respond." (Pet. Exh. 2) At hearing, there was no evidence that any criminal charges were filed against Petitioner based on the March 12, 2011 incident. No law enforcement officer testified at the contested case hearing. Ms. Campbell admitted at hearing that she had never seen Petitioner's Exhibit No. 2.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. The purpose of Chapter 131D of the North Carolina General Statutes is to assign authority to protect the health, safety and well-being of children separated from or being cared for away from their families. (N.C. Gen. Stat. § 131D-10.1)

3. N.C. Gen. Stat. § 131D-10.3(a) states that no person shall operate, establish or provide foster care for children or receive or place children in family foster homes without first applying for a license and submitting the required information on required applications forms to Respondent.

4. 10A NCAC 70E .0601(a) provides that Respondent is the licensing authority for family foster homes and therapeutic foster homes. (Authorized by G.S. §§ 131D-10.1, 131D-10.3, 131D-10.5, 143B-153)

5. 10A NCAC 70E .0602 defines the following terms:

(2) 'Family Foster Home' has the meaning as defined in G.S. 131D-10.2(8).

(3) 'Family Foster Care' means a planned, goal-directed service in which the temporary protection and care of children take place in a family foster home. Family foster care is a child welfare service for children and their parents who must live apart from each other for a period of time due to abuse, neglect, dependency, or other circumstances necessitating out-of-home care. . . .

(7) 'Therapeutic Foster Care' means a foster home where the foster parent has received additional training in providing care to children with behavioral mental health or substance abuse problems.

(Authority: G.S. §§ 131D-10.1, 131D-10.3, 131D-10.5, 143B-153)

6. N.C. Gen. Stat. § 131D-10.2(8) defines "family foster home" as:

[T]he private residence of one or more individuals who permanently reside as members of the household and who provide continuing full-time foster care for a child or children who are placed there by a child placing agency or who provide continuing full-time foster care for two or more children who are unrelated to the adult members of the household by blood, marriage, guardianship or adoption.

7. 10A NCAC 70E .0708 **REVOCATION AND DENIAL** states:

(a) The licensing authority **may** revoke or deny licenses when an agency authorized by law to investigate allegations of abuse or neglect finds the foster parent has abused or neglected a child.

(b) The licensing authority may revoke or deny a license when the foster home is not in compliance with licensing standards in this Subchapter.

(c) The licensing authority shall base the revocation or denial on the following:

- (1) a child's circumstances;
- (2) a child's permanency plan;

- (3) the nature of the non-compliance; and
- (4) the circumstances of the placement.

(Emphasis added) Under this rule, Respondent's decision to revoke a foster home license based on a substantiation of neglect or violation of licensing rules is within Respondent's discretion.

8. 10A NCAC 70E .1104 **CRITERIA FOR THE FAMILY** provides:

(a) Foster parents shall be persons whose behaviors, circumstances, and health are conducive to the safety and well-being of children. Foster parents shall be selected on the basis of demonstrating strengths in the skill areas of Subparagraphs (1) through (12) of this Paragraph which permit them to undertake and perform the responsibilities of meeting the needs of children, in providing continuity of care, and in working with the supervising agency. Foster parents shall demonstrate skills in:

(10) providing a safe and healthy environment for children placed in the home which keeps them free from harm; . . .

(c) Health. The foster family shall be in good physical and mental health as evidenced by:

(9) no indication that a member of the foster family has been found to have abused or neglected a child or has been a respondent in a juvenile court proceeding that resulted in the removal of a child or has had child protective services involvement that resulted in the removal of a child.

9. Respondent's reliance on the blanket "substantiation" of a local investigation as sufficient to revoke a license is dangerous and, nothing else showing, may deprive the licensee of valuable property without due process. "Substantiations" must be tested for reliability. Reliance on hearsay, or hearsay upon hearsay is likewise dangerous in forming such a decision with such drastic consequences as revocation of a license.

10. N.C. Gen. Stat. § 7B-101(15) defines "neglected juvenile" as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker, . . . or who lives in an environment injurious to the juvenile's welfare. . .

11. To prove neglect in a termination of parental rights case, our Courts have held that:

[T]here must be clear, cogent, and convincing evidence (1) the juvenile is neglected within the meaning of N.C.G.S. 7A-101(15), and (2) "the juvenile has sustained 'some physical, mental or emotional impairment ... or [there is] a substantial risk of such impairment'" as a consequence of the neglect.

In re Reyes, 136 N.C.App. 812, 815, 526 S.E.2d 499, 501 (2000)(quoting *In re Safriet*, 112 N.C.App. 747,752, 436 S.E.2d 898, 901-01(1993))

12. At the contested case hearing, Petitioner had an opportunity to confront the allegations against him, but failed to carry his burden of showing by a preponderance of the evidence that the Respondent has acted erroneously, failed to use proper procedure, or acted arbitrarily or capriciously in revoking his foster home license.

13. A preponderance of the evidence showed that Respondent had a reasonable basis for its decision to revoke Petitioner's family foster home license, and there exists sufficient evidence to support its revocation decision. The Court finds that Respondent appropriately relied on the child neglect case decision of Wake County DSS as a basis for its revocation action. The Court does not find credible Petitioner's contention that Ms. Campbell notified him on June 17, 2011 that no child neglect had been found, and he was free to return TG to his home. Wake County DSS had a substantial basis for its finding of child neglect on June 23, 2011.

14. 10A NCAC 70E .0902 AGENCY FOSTER PARENTS' AGREEMENT provides that:

(a) Foster parents shall sign an agreement under which the foster parents shall:

(2) accept children into the home only through the supervising agency and not through other individuals, agencies, or institutions;

(6) report to the supervising agency any changes in the composition of the household, change of address, or change in the employment status of any adult member of the household;

15. Petitioner violated 10A NCAC 70E .0902(a) when he accepted TG's parents' private placement of TG with Petitioner without a supervising agency responsible for TG's care. Because Petitioner insisted on returning TG to his home without the permission of Touchstone in June 2011, Touchstone decided to no longer work with Petitioner. Since TG has remained in Petitioner's home without any agency supervision for over a year, no supervising agency has ensured that Petitioner's home continues to meet foster home licensing requirements, and no agency is making weekly and monthly visits to ensure TG is safe, and TG's significant needs are being met.

16. While TG's parents are pleased with TG's care in Petitioner's home, and Petitioner appears committed to caring for TG, this licensing requirement, central to the safety and well-being of foster children, has been willfully ignored. This violation supports the revocation of Petitioner's family foster home license.

17. Petitioner violated 10A NCAC 70E .0902(6) when he was not candid or cooperative with Respondent regarding Mr. Jones' role in his home. Petitioner's failure to do so prevented Ms. Campbell from contacting Mr. Jones, and prevented Touchstone from making the necessary evaluation of Mr. Jones' presence in his home. This rule violation supports Respondent's decision to revoke Petitioner's foster home license.

18. Petitioner violated 10A NCAC 70E .1104 by having adult pornography in his home, which was accessible to children. Given PB's background, and TG's diagnosis, having

such material in Petitioner's home is a licensing rule violation that supports revocation of the foster home license.

DECISION

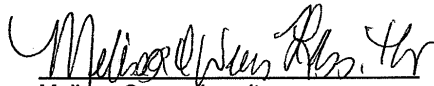
Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to revoke Petitioner's foster home license should be **UPHELD**.

NOTICE AND ORDER

The Department of Health and Human 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 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. It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, in accordance with N.C.G.S. 150B-36(b3).

This the 16th day of October, 2012.


Melissa Owens Lassiter
Administrative Law Judge

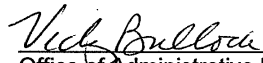
CERTIFICATE OF SERVICE

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:

William F. Moss,
Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan
PO Box 2611
Raleigh, NC 27602
ATTORNEY FOR PETITIONER

Jane R. Thompson
Assistant Attorney General
NC Department of Justice
792 Arbor Road
Winston-Salem, NC 27104
ATTORNEY FOR RESPONDENT

This the 16th day of October, 2012.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714

Filed

STATE OF NORTH CAROLINA

2012 SEP 11 AM 10:00

COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 02162

TEAM DANIEL, LLC, Office of
Administrative Hearings

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, DIVISION
OF MEDICAL ASSISTANCE,

Respondent.

FINAL DECISION

This contested case came on for hearing before the Honorable Donald W. Overby,
Administrative Law Judge presiding, on August 13, 2012, in Fayetteville, North Carolina.

APPEARANCES

For Petitioner: Jose A. Coker
William Aycock
The Charleston Group
Post Office Box 1762
Fayetteville, NC 28302

For Respondent: Tracy Hayes, Esq.
Special Deputy Attorney General
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602

ISSUE

Whether DMA substantially prejudiced Petitioner's rights, exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as require by law or rule when it decided to temporarily suspend Medicaid payments to Petitioner.

WITNESSES

Jean Sibbers, DMA Certified Investigator,
Patrick Piggott, Chief of the DMA Program Integrity Behavioral Health Section,
Denise Mercado, Owner of Team Daniel, LLC.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to 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.

1. Medicaid is a cooperative federal-state program that provides medical assistance to eligible categorically needy individuals. Respondent, North Carolina Department of Health and Human Services (DHHS), is the single state Medicaid agency as set forth in N.C.G.S. § 108A-54 and 42 C.F.R. § 431.210(e), and is responsible for administering the North Carolina Medicaid program in accordance with the Social Security Act and its implementing regulations, including but not limited to investigating allegations of fraud and abuse against providers enrolled in the NC Medicaid program.

2. Petitioner, Team Daniel, LLC, is an enrolled provider of Medicaid-reimbursable mental health and developmental disabilities services. Team Daniel is a mental health provider in Cumberland County, North Carolina. It is owned by husband and wife Denise and John

Mercado who named their business for their son who died at the age of 24 after being disabled as a baby by haemophilus influenza meningitis. Team Daniel has provided mental health services to children and adult patients since 2007. Prior to July 2012, Team Daniel employed approximately 200 professionals and staff and served approximately 75 patients.

3. In February 2011, the Centers for Medicare and Medicaid Services (CMS), the federal agency responsible for overseeing all fifty State Medicaid programs, issued new and revised federal fraud and abuse regulations to comply with the mandates of the Patient Protection and Affordable Care Act of 2010 (Public Law 111-148), which became effective March 25, 2011.

4. One of those regulations, 42 C.F.R. § 455.23, made significant revisions to the process for State Medicaid agencies to impose payment suspensions against enrolled Medicaid providers.

5. The Respondent Department conducted an ongoing investigation of Team Daniel beginning approximately January 2012 after receiving multiple allegations of fraud against it.

6. Patrick Piggott Chief of the DMA Program Integrity Behavioral Health Section assigned one of the Department's investigators, Jean Sibbers, to investigate the particular allegations regarding Team Daniel's operation of an unlicensed residential facility. Although there were reportedly numerous allegations, Ms. Sibbers was only assigned to investigate those allegations and Mr. Piggott investigated all remaining allegations himself.

7. Based on Ms. Sibbers investigation and pursuant to 42 C.F.R. 455.23, the Department notified Team Daniel on March 29, 2012 of the payment suspension action for Provider Number 3418423 based on allegations of fraud, in part at least based on the allegation of an unlicensed residential facility providing care.

8. By letter dated May 2, 2012, the Department rescinded its March 29th payment suspension action based on its prior authorizations to Team Daniel to provide the services.

9. By separate letter on the same date, the Department notified Team Daniel that it was again suspending payments under Team Daniel's Provider Numbers 3418423 and 7200414 due to further allegations of fraud. Team Daniel has never used or billed under number 7200414, although it was a valid number assigned to Team Daniel.

10. Pursuant to 42 C.F.R. § 455.23, DMA issued a payment suspension against Petitioner on May 2, 2012 based on "credible allegations" of fraud received from a variety of sources.

11. Petitioner filed a motion for preliminary injunction, which was denied by the presiding Administrative Law Judge on July 26, 2012.

I. PRELIMINARY INJUNCTION

12. Petitioner filed a Motion for Temporary Restraining Order and Preliminary Injunction simultaneously with the filing of the contested case petition on April 5, 2012.

13. On April 5, 2012, this Court granted Petitioner's Motion for Temporary Restraining Order. The terms of the restraining order were continued in effect until such time as the Preliminary Injunction hearing could be held.

14. On June 5, 2012, the parties presented oral arguments on the issue of preliminary injunction before this Court. The matter was taken under advisement and by order dated June 6, 2012, the terms of the temporary restraining order were continued in effect until such time as a ruling was made on the preliminary injunction.

15. By telephonic communication with counsel for both parties, this Court denied Petitioner's Motion for Preliminary Injunction on July 26, 2012.

16. This matter was being expedited for hearing and the contested case evidentiary hearing was set for and heard on August 13, 2012.

17. The denial of the preliminary injunction was not reduced to writing prior to the hearing. This Court's reasoning for denying the preliminary injunction are part and parcel of this entire contested case and therefore will be set forth.

A. DUE PROCESS

18. Of primary interest is whether or not Respondent's enforcement of this federal regulation denies due process to petitioner and others similarly situated.

19. The federal regulation has a number of provisions that are troubling to this Tribunal wherein it makes it difficult for any petitioner to challenge the enforcement action of that regulation in any meaningful manner. As in this instant case, the Petitioner's Medicaid participation is suspended without a definitive statement of why it is being suspended. The nature of the investigation is protected by confidentiality so that the Petitioner cannot even ascertain with any degree of certainty why it's being suspended. The investigation may be extended for seemingly an indefinite period of time, so long as a quarterly report ascertains that the investigation is on-going. The ability to contest the suspension is not based on whether or not fraud or other misdeed has taken place, but rather it is based upon whether or not the proper procedure has been followed. If fraud or other misappropriation of funds is substantiated, that would be grounds for a separate contested case.

20. The query is whether or not any of this amounts to a denial of due process.

21. Article I, Section 19 of the North Carolina Constitution, often referred to as the “law of the land” clause, provides the basis for due process in North Carolina:

22. Our courts have long held that “[t]he ‘law of the land’ clause has the same meaning as ‘due process of law’ under the Federal Constitution.” The term “law of the land” in art. I, § 19 of the North Carolina Constitution has been found to be synonymous with “due process of law” as that term is used in the Fourteenth Amendment of the United States Constitution. It has also been determined that our State constitutional due process requirements may be more expansive than the minimal due process requirements of the United States Constitution, but that our state constitutional due process requirements must at least equal or surpass those imposed under the United States Constitution. (Internal cites omitted).

State v. Guice, 141 N.C. App. 177, 186-87, 541 S.E.2d 474, 480-81 (2000) opinion adhered to as modified on reconsideration, 151 N.C. App. 293, 564 S.E.2d 925 (2002)

23. The fundamental premise of procedural due process protection is notice and the opportunity to be heard. Moreover, the opportunity to be heard must be “at a meaningful time and in a meaningful manner.” While the United States Supreme Court has consistently held that some form of hearing is required prior to a final deprivation of a protected “property” interest, the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy. (Internal cites omitted). *Peace v. Employment Sec. Comm’n of N. Carolina*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998).

24. The case of *Godfrey Lumber Co., Inc. v. Howard*, 151 N.C. App. 738, 740-41, 566 S.E.2d 825, 826-27 (2002) provides

The due process clause encompasses a guarantee of fair procedure. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in “life, liberty, or property” is not in itself unconstitutional; *what is unconstitutional is the deprivation of such an interest without due process of law*. . . . The constitutional violation . . . is not complete when the deprivation occurs; *it is not complete unless and until the State fails to provide due*

process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law. (Emphasis in the original).

25. Through the administrative law contested case hearing procedure establish in N.C. GEN. STAT. § 150B, Petitioners were provided adequate constitutional procedural due process.

B. CONSTITUTIONAL CHALLENGE

26. It is well settled that the Office of Administrative Hearings is not a constitutional Court but rather one that is created statutorily by the General Assembly. OAH lacks the authority to find a particular provision unconstitutional, although OAH may find a provision unconstitutional as it is applied in a particular circumstance.

27. In the instant contested case, the federal regulation has not been applied to the Petitioner any differently from any other provider. For this Tribunal to find a constitutional violation by this particular federal regulation would constitute a finding that the regulation is unconstitutional substantively, something this Tribunal lacks the authority to do.

C. RESPONDENT'S ADMINISTRATION OF THE FEDERAL REGULATION

28. This Tribunal having concluded for purposes of the preliminary injunction that the requirements of due process had been met and that this Tribunal could not find the federal regulation unconstitutional, then the remaining task is to determine if the Respondent is administering the federal regulation correctly.

29. For purposes of the preliminary injunction only, it was concluded that the Respondent was in fact properly administering the federal regulation and that it was unlikely that Petitioner would prevail on the merits. Therefore, the preliminary injunction was denied.

II. EVIDENTIARY HEARING ON THE MERITS

A. PROPERTY INTERESTS

30. The findings of fact contained in the paragraphs above concerning the preliminary injunction numbered twelve through twenty-seven are incorporated by reference as though set forth in their entirety.

31. Determining that a Petitioner actually has a protected property interest is the first step in assessing whether or not due process has been met. In *Peace* the North Carolina Supreme Court stated

While the demonstration of a protected "property" interest is a condition precedent to procedural due process protection, the existence of the "property" interest does not resolve the matter before this Court. We must inquire further and determine exactly what procedure or "process" is due.

Peace v. Employment Sec. Comm'n of N. Carolina, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998)

32. Respondent contends that Petitioner does not have a property interest in future Medicaid reimbursement, in part relying on 10A N.C. A. C. 22F.0605. The Administrative Code provision states "[a]ll provider contracts with the North Carolina State Medicaid Agency are terminable at will. Nothing in these Regulations creates in the provider a property right or liberty right in continued participation in the Medicaid program."

33. Respondent contends that the Fourth Circuit case of *Bowens v. N.C. Dept. of Human Res.*, 710 F.2d 1015, 1017 (4th Cir. 1983) does not apply. Respondent relies in part on the fact that 10A N.C. Admin. Code 22F.0605 was enacted after *Bowens* was decided, and was enacted specifically to address the holding of the *Bowens* case.

34. "Terminal at will" means that no reason or justification has to be given for the termination. If such were the case then no procedural due process is accorded the entity or

person terminated. As mentioned above in *Peace*, if there is no property interest at stake then there is no inquiry as to whether or not due process has been afforded.

35. While 10A N.C. Admin. Code 22F.0605 would seem to indicate that every provider in North Carolina serves at the whim and pleasure of DHHS/DMA, without any recourse, such is not the case. North Carolina statutes and rules provide procedural due process, as evidenced in this very case wherein the federal regulation being enforced by the Respondent requires that notice be given to the provider of the suspension and at least a superficial statement of why they are being suspended.

36. Our statutes reinforce the continuation of those procedural safeguards. Our General Assembly continues to enact legislation which gives the providers procedural safeguards such as Chapter 108C, which became effective July 25, 2011.

37. Despite the fact that Dr. Bowens case was factually distinguishable from the instant case, the rationalization is still applicable. In *Bowens*, the federal court found that Dr. Bowens did have a property right but that he had been afforded all of the due process to which he was entitled.

38. *Bowens* states

The regulations contain procedural and substantive guarantees that expressly limit the reasons for and means by which a provider may be terminated. The only plausible inference that can be drawn from them is that a provider's participation is not terminable at the will of the state. Consequently, we conclude that the regulations create a property interest in continued participation in the program unless terminated for cause.

Bowens v. N.C. Dept. of Human Res., 710 F.2d 1015, 1018 (4th Cir. 1983)

39. This is analogous to what happened in this instant case in that the federal regulation itself has procedural and substantive safeguards, indicating that the provider's participation is not terminable at will.

40. *Bowens* also held “The Supreme Court has ruled that property rights can be created by administrative regulations and that the “sufficiency of the claim of entitlement must be decided by reference to state law.” (Internal cite omitted). *Bowens v. N.C. Dept. of Human Res.*, 710 F.2d 1015, 1017 (4th Cir. 1983)

B. LENGTH OF THE INVESTIGATION

41. Petitioner contends that Respondent acted erroneously by conducting a lengthy investigation.

42. 42 C.F.R. § 455.23(b)(2)(iii) establishes in part what the notice which is sent to providers who’s payments are being suspended must include . It requires the notice to state “that the suspension is for a temporary period, as stated in paragraph (c) of this section, and cite the circumstances under which the suspension will be terminated.” Paragraph (c) as referenced sets forth the “duration of suspension.”

43. The evidence in this hearing is that there had been an on-going investigation for some period of time, even though that was not specified. The fact that there was an investigation was first brought to the attention of Petitioner with the March 29, 2012 letter and suspension.

44. Petitioner addressed the allegations of fraud raised in the March 29, 2012 letter and that suspension was lifted with one of the letters to the Petitioner dated May 2, 2012. The suspension at issue herein was instituted in the second May 2, 2012 letter from Respondent to Petitioner.

45. 42 C.F.R. § 455.23(d)(1) and(2) require the Medicaid agency for the State to make a referral to the Medicaid fraud unit in writing not later than the next business day after a suspension has been enacted.

46. The evidence is that a referral was appropriately made to the Medicaid fraud unit and that there is still an on-going investigation.

47. 42 C.F.R. § 455.23(d)(3) establishes that once the Medicaid fraud unit accepts the allegations for investigation, the “payment suspension may be continued until such time as the investigation and any associated enforcement proceedings are completed.” As a condition, the State must request a certification from the fraud unit at least quarterly to justify the continuation of the suspension. The federal regulation does not have a time limitation.

48. The language of the regulation does not establish a definitive time within which the investigation must be completed which has the potential to lead to injustice in some cases. However, the Respondent is charged with enforcing the terms of the federal regulation as written. This Tribunal cannot find that Respondent has failed to do so. In this instant case, even if applying a test of reasonableness to the length of the suspension, it cannot be found that the length of time has been unreasonable as of the time of the hearing.

C. VAGUE ALLEGATIONS

49. Petitioner contends that Respondent acted erroneously by failing to set forth allegations with sufficient particularity that Petitioner could respond to those allegations.

50. 42 C.F.R. § 455.23(b)(2)(ii) further establishes in part what the notice must include which is sent to providers who’s payments are being suspended. It states “[S]et forth the general allegations as to the nature of the suspension action, but need not disclose any specific information concerning an ongoing investigation.”

51. 42 C.F.R. § 455.23(b)(2)(v) provides “[I]nform the provider of the right to submit written evidence for consideration by State Medicaid Agency.”

52. It would seem to be axiomatic that the provider cannot provide any written defense unless it is reasonably apprised of the allegations against it. However, the agency is likewise hamstrung because it is forbidden by 42 C.F.R. § 1007.11(f) from producing any confidential information and is allowed to provide only general allegations, without any need to provide more particular information which may be confidential in 42 C.F.R. § 455.23(b)(2)(v).

53. While the federal regulation may seemingly be problematic, the Respondent is only charged with enforcing the terms of that regulation as written. This Tribunal cannot find that Respondent has failed to do so. In this instant case, Respondent did in fact give Petitioner a recitation of the general allegations against Petitioner.

54. Patrick Piggott testified that a more definitive statement of the dates of the alleged violations may have been available to Petitioner had they asked. This too seems to be problematic to put the burden on the Petitioner to ask for information for which it had no idea it could ask or that it would have been provided even if it had been asked. It would seem the more prudent approach by Respondent would have been to voluntarily provide the dates in question; however, the failure to provide the dates does not invalidate the fact that Respondent did provide the general allegations as provided in the federal regulation.

D. CREDIBLE ALLEGATIONS

55. Suspension of payments must be based on a “credible allegation of fraud for which an investigation is pending.” 42 C.F.R. § 455.23(a).

56. 42 C.F.R. § 455.2 provides the definition for “credible allegation.” It states:

Credible allegation of fraud. A credible allegation of fraud may be an allegation, which has been verified by the State, from any source, including but not limited to the following:

- (1) Fraud hotline complaints.

(2) Claims data mining.

(3) Patterns identified through provider audits, civil false claims cases, and law enforcement investigations. Allegations are considered to be credible when they have indicia of reliability and the State Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis.

42 C.F.R. § 455.2

57. Mr. Piggott testified that the agency received credible allegations of fraud from multiple sources about Team Daniel. Mr. Piggott further testified that he verified the allegations, considered them carefully, found them to have indicia of reliability and to be credible. He considers each allegation on a case-specific basis. Mr. Piggott timely referred the case to the State Medicaid Fraud Investigations Unit (MIU). The MIU has accepted the fraud referral and is actively investigating Team Daniel for fraud. In accordance with 42 C.F.R. §455.23(d)(3)(ii), the MIU has certified that Team Daniel continues to be under investigation for fraud.

58. Respondent has met the requirements of §455.23(a) by determining that there exist “credible allegations” of fraud, and those allegations have properly been referred to MIU which has continued to certify that Petitioner is still under investigation.

E. “GOOD CAUSE”

59. The Petitioner contends that Respondent acted erroneously and arbitrarily and capriciously because Respondent did not consider “good cause” prior to suspending Medicaid payments. Respondent contends that the “good cause” exception is discretionary.

60. 42 C.F.R. § 455.23(a)(1) states: “The State Medicaid agency must suspend all Medicaid payments to a provider after the agency determines there is a credible allegation of fraud for which an investigation is pending under the Medicaid program against an individual or

entity unless the agency has good cause to not suspend payments or to suspend payment only in part.” (Emphasis added).

61. The very plain language of this regulation establishes a number of things that must happen in order for the Medicaid agency to suspend payments to a provider: 1) there must be a credible allegation of fraud; 2) there must be an investigation pending; 3) and the agency **MUST** consider good cause prior to the suspension.

62. The regulation says plainly that the suspension must take place unless good cause is found for not suspending payments or suspending them in part only. The word “unless” is the key in this sentence. “Unless” is defined in Merriam-Webster’s Dictionary as “except on the condition that; under any other circumstance; without the accompanying circumstance or condition that; but that.” (www.merriam-webster.com/dictionary/unless) In other words, the predecessor clause only happens if the succeeding clause exists. For the terms of this federal regulation, the suspension only takes place if the good cause for not suspending or suspending in part has been considered.

63. Patrick Piggott testified several times that his section did not make any effort to consider good cause prior to issuing the suspension letter. Mr. Piggott stated that it was not the job of his section to make a determination of good cause. In answer to the Court’s questions he twice stated that his section did not make any effort to consider good cause. (Transcript, pps. 145, 147) It is his section that issues the suspensions.

64. Mr. Piggott attempted to qualify his answer by stating that some consideration was given as to whether or not other providers were available in the area so that no recipient would be left without care. Such is merely one part of the requirements of “good cause.” Even

at that, his testimony was that this was not a concerted and consistent requirement for consideration, but rather just within general knowledge of the providers in the various areas.

65. There is no evidence that anyone else or any other section gave any consideration of the "good cause" exceptions prior to issuing the suspension. Mr. Piggott was asked questions about the good cause exceptions set forth in 42 C.F.R. § 455.23(e) as they existed at the time of the hearing, but no such consideration was given prior to the suspension. There was no evidence about the conditions in 42 C.F.R. § 455.23(f) although the conditions are almost identical to those in paragraph (e).

66. 42 C.F.R. § 455.23(e) sets forth six conditions under which the State may choose to not suspend payments during the investigation, or, alternatively to discontinue the suspension if any one of those six conditions are found to be applicable.

67. 42 C.F.R. § 455.23(f) sets forth five conditions under which the State may choose to only suspend payments in part during the investigation if any one of those five conditions are found to be applicable.

68. Both 42 C.F.R. § 455.23(e) and 42 C.F.R. § 455.23(f) establish under what circumstances the State may continue making payments to the provider while the investigation is on-going.

69. 42 C.F.R. § 455.23(d)(5) establishes that the State still has a duty to refer any credible allegations to the fraud investigation unit even if it determines that good cause exists for not suspending the payments or only suspending them in part.

70. The entirety of 42 C.F.R. § 455.23 must be read *in pari materia*. It is clear that paragraph (a) requires consideration of good cause. Paragraphs (e) and (f) set out the options the State has when considering good cause to either not suspend the payments at all or to only

suspend in part. Paragraph (a) has established that the payments have to be suspended unless one of those "good cause" exceptions exists, but that determination must be made.

71. Both 42 C.F.R. § 455.23(e) and 42 C.F.R. § 455.23(f) are discretionary only to the extent that the State must give consideration to the eleven potential circumstances set forth in the regulation and determine if any applies to the given set of factual circumstances in the particular case. If so, then the state may either not suspend payments or may suspend in part or may reinstate payments that have been suspended.

72. Good cause has to have been evaluated and determined before any "discretion" may be applied. The discretion amounts to exercise of a choice of options: a) to have evaluated the "good cause" exceptions and find none exist and therefore suspend payments; b) to have evaluated the "good cause" exceptions and find that exceptions exist that warrant not suspending the payments or to reinstate payments already suspended; and c) to have evaluated the "good cause" exceptions and find that exceptions exist that warrant suspension of payments in part. The State cannot simply choose to ignore those good cause exceptions.

73. A determination of whether or not good cause exists is required prior to suspending payments. No such evaluation of determination was made by Respondent prior to suspending payments.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has both subject matter and personal jurisdiction of this contested case hearing pursuant to N. C. Gen. Stat. § 150B-23 *et. seq.* All necessary and proper parties have been joined. Parties have received timely and appropriate notice of the hearing.

2. To the extent that the findings of fact contain conclusions of law or that the conclusions of law are findings of fact, they should be so considered without regard to given labels.

3. Respondent, North Carolina Department of Health and Human Services (DHHS), is the single state Medicaid agency as set forth in N.C.G.S. § 108A-54 and 42 C.F.R. § 431.210(e), and is responsible for administering the North Carolina Medicaid program in accordance with the Social Security Act and its implementing regulations.

4. Petitioner, Team Daniel, LLC, is a mental health provider in Cumberland County, North Carolina, and is an enrolled provider of Medicaid-reimbursable mental health and developmental disabilities services.

5. The Respondent Department conducted an ongoing investigation of Team Daniel beginning approximately January 2012 after receiving multiple allegations of fraud against it.

6. Pursuant to 42 C.F.R. § 455.23, DMA issued a payment suspension against Petitioner on May 2, 2012 based on “credible allegations” of fraud received from a variety of sources.

7. Petitioner has a protected property interest and is entitled to procedural due process as a result.

8. Petitioners have been provided adequate constitutional procedural due process through the administrative law contested case hearing procedure established in N.C. Gen. Stat. § 150B.

9. Respondent properly has conducted its investigation into the allegations of fraud in a timely manner in accord with the requirements of the federal regulation 42 C.F.R. § 455.23.

The Medicaid fraud unit has provided Respondent with quarterly certifications that an investigation as required by the regulation.

10. While the allegations are not specific and precise in depicting exactly what the Petitioner has done to run afoul of the regulation, nevertheless, the allegations are sufficient to satisfy the requirements of the federal regulation. The regulation only requires general allegations and need not disclose any specific information concerning an ongoing investigation.

11. Respondent properly relied upon allegations from multiple sources, verified the allegations and found them to have indicia of reliability and to be credible. The credible allegations were timely referred to the State Medicaid Fraud Investigations Unit.

12. Respondent failed to use proper procedure and failed to act as required by law or rule when it did not give any consideration to whether or not good cause exist for not suspending Petitioner's Medicaid payments, or whether those payments should have been suspended in part.

13. A determination of whether or not good cause exists is required prior to suspending payments. No such evaluation of determination was made by Respondent prior to suspending payments.

DECISION

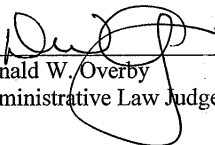
NOW THEREFORE, based upon the forgoing findings of fact and conclusions of law it is hereby decided that the Respondent's decision to suspend Petitioner's Medicaid payments should be and is REVERSED.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which

the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 11th day of September, 2012.



Donald W. Overby
Administrative Law Judge

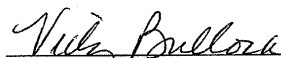
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **FINAL DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Jose A. Coker
William Aycock
The Charleston Group
Post Office Box 1762
Fayetteville, NC 28302
ATTORNEY FOR PETITION

Tracy Hayes, Esq.
Special Deputy Attorney General
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602

This the 11th day of September, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

Filed

2012 OCT 18 AM 9:47

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 EDC 00805

LIA C LONG

Petitioner

vs.

NC DEPARTMENT OF PUBLIC

INSTRUCTION

Respondent

Office of
Administrative Hearings

FINAL DECISION

On August 24, 2012, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. By Order dated September, 17, 2012, the undersigned ruled that Petitioner's non-teaching experience was not directly related to her area of licensure, and teaching assignment, and ordered Respondent to file a proposed Decision. Respondent filed a proposed Decision with the Office of Administrative Hearings on October 5, 2012.

APPEARANCES

For Petitioner: Lia C. Long, Pro Se
514 Oakland Drive
Burlington, NC 27215

For Respondent: Tiffany Y. Lucas
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Respondent wrongfully denied Petitioner's request for salary credit for non-teaching work experience based upon her prior work experience?

APPLICABLE STATUTES AND POLICIES

N.C. Gen. Stat. §150B-23, § 115C-296
State Board of Education Policy TCP-A-006

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: 1 – 4, 9 - 27

FINDINGS OF FACT

Procedural Background

1. By letter dated November 21, 2011, Respondent denied Petitioner's request for salary credit non-teaching work experience after determining that Petitioner's non-teaching work experience was not "directly related" to Petitioner's area of licensure and teaching assignment.

2. On January 20, 2012, Petitioner appealed Respondent's decision, alleging that Respondent had otherwise substantially prejudiced her rights, acted arbitrarily or capriciously, and failed to act as required by law or rule by:

NCDPI has denied my appeal for increased pay due to previous years of work experience. I have provided more than sufficient documentation of proof that my previous work experience directly relates to the classes I teach as well as those that may be assigned to me within the Family and Consumer Science Curriculum. I feel that this decision is discriminatory based on the current budget situation and has not been given adequate consideration. Furthermore, we are currently hiring inexperienced teachers in our profession without certification and paying them on the same level as myself who has completed all course work necessary to be certified not only in my current assignments but additional areas as well:

Petitioner noted that she has 16 years of experience and earns \$1026 per month of employment. She requested "additional inco [not readable text] in back pay, bump to the BA degree 16 yr salary scale."

Adjudicated Facts at Hearing

3. N.C. General Statute § 115C-296(a) provides, in pertinent part, as follows:

The State Board of Education shall have the entire control of certifying all applicants for teaching positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all certificates and shall determine and fix the salary for each grade and type of certificate which it authorizes.

N.C. Gen. Stat. § 115C-296(a)

4. Pursuant to its statutory authority to "determine and fix the salary for each grade and type of certificate which it authorizes," the State Board of Education (hereinafter the "SBE") has adopted a policy, TCP-A-006, entitled "Policies related to Experience/Degree Credit for Salary Purpose." (Resp. Exh. 1)

5. That policy recognizes that educators employed in the public schools may be awarded salary credit for past employment experience as well as for certain graduate degrees. Generally, the salary credit falls into three main categories: prior experience as a teacher, prior work experience that is non-teaching in nature, and possession of a graduate degree. (Resp. Exh. 1)

6. For salary purposes, non-teaching work experience can be credited towards an individual's total licensure experience rating on the recommendation of the designated personnel administrator of the NC LEA which has employed the individual in a professional position. (SBE policy TCP-A-006, sec. 6.20) To be eligible to receive credit for prior "non-teaching" work experience, the prior work experience must be "relevant non-teaching work experience" and meet several criteria. SBE policy TCP-A-006, sec. 6.20 defines "relevant non-teaching work experience as:

Relevant non-teaching work experience shall be defined as
Professional work experience in public or private sectors that is
Directly related to an individual's area of licensure and work assignment.

(SBE policy TCP-A-006, sec. 6.20. *Emphasis added*) Such experience must also meet the following criteria:

- 1) was at least half-time (20 hours or more per week);
- 2) was completed after age 18;
- 3) did not include on-the-job training;
- 4) was paid and documented.

(SBE policy TCP-A-006, sec. 6.20)

7. In this case, Petitioner is employed by the Alamance-Burlington Public Schools as a secondary level Family and Consumer Science teacher.

8. After beginning employment in 2009, Petitioner requested non-teaching credit for fifteen years of past non-teaching work experience. At the time of her request, Petitioner was licensed in Family and Consumer Science, and her teaching assignment was in Personal Finance and Foods I.

9. Specifically, Petitioner requested non-teaching credit for her experience as a Customer Service Representative and Training Coordinator for Teleco, a communications firm; as Director of Sales and Marketing at 1st State Bank, and as an owner of a retail store, U R Invited, LLC. In her request, Petitioner correlated the objectives from the Family and Consumer Science curriculum from which she teaches to her corresponding prior experience. Petitioner attached to her request the following documents, among other things: (1) verification of her work experience at Teleco, signed by Ester Teleco Inc. President E.P. Ester, Jr.; (2) verification of her work experience at 1st State Bank by that employer; (3) a list of job responsibilities for her Director of Sales and Marketing position at 1st State Bank from hrVillage.com; (4) self-described list of her job duties as owner of U R Invited, Inc; and (5) CPA letter who prepared federal tax returns for U R Invited, Inc. (Resp. Exh. 4)

10. A licensure specialist with Respondent reviewed Petitioner's request and information, and denied Petitioner's request based on "no direct related experience."

11. Following this initial denial, and pursuant to SBE Policy TCP-A-006, Petitioner through Alamance-Burlington Public Schools, requested a review by the Experience Credit Appeals Panel.

12. The Appeals Panel consists of fifteen professional educators, none of whom is employed by the State Board of Education or the Department of Public Instruction. The Appeals Panel was created to give another level of review in the process, and specifically, to permit teachers another opportunity to present information in an objective forum.

13. During its review of requests for credit, the Appeals Panel uses a checklist to determine if the required documentation is included in each request. (Resp. Exh. 4, p. 36)

a. In this case, the Panel thoroughly reviewed and considered the information Petitioner submitted, including a document prepared by Petitioner entitled "Verification of correlation between job responsibilities to the Family and Consumer Science NC Standard Course of Study", and job descriptions relating to Petitioner's past work experiences. One panel member participating in the review of Petitioner's case was skilled in the Family and Consumer Science area. (Vandenburgh testimony)

b. The Panel compared Petitioner's prior job descriptions with the applicable standard course of study, and considered Respondent's Exhibit 27. The Panel noted Petitioner's current teaching assignment was Personal Finance and Foods I. While the Panel saw some connections or relation between Petitioner's past work experiences and her current teaching assignment, the Panel did not find a direct connection or relation between Petitioner's prior work experience, and the subject area in which she was licensed. After deliberating, the Appeals Panel voted unanimously to deny Petitioner's request. (Vandenburgh testimony; Resp. Exh. 4, p. 36)

14. Petitioner asserted that her 6 years of experience as a Sales and Marketing Director for 1st State Bank included the responsibilities of budgeting, goal setting, and rewards, product and interior design, product and sales training, and planning and implementation of all corporate events and marketing programs. She argued that these responsibilities directly related to many areas of Family and Consumer Sciences such as Hospitality, Foods I and II, Housing and Interiors, Teen Living, and specifically her current teaching assignment of Personal Finance. For 8 years, Petitioner owned and operated U R Invited, a retail store front of children's clothing, interior design elements, age appropriate gifts and accessories for kids and adults, and products and services for home and corporate entertaining. That business also included contract services in event planning, interior design, and corporate apparel which "directly relates" to many of the Family and Consumer Science classes, and Personal Finance. At Teleco, Petitioner's job for 2 years involved training large groups of employees and customer how to properly use their newly purchased phone and voice mail systems, planning each training session, constructing manuals for customers to use such systems, and responding to questions on such systems. She also explained that there are teachers being paid at the same level as she, who have no degree, certification, or experience.

15. The term "directly related" as used in SBE Policy TCP-A-006, sec. 6.20, and as applied by DPI staff and the Panel members, is a term of art that is understood by the licensure staff, by members of the Appeals Panel, and by personnel administrators in the local school systems. It is defined by a "subject matter" test: Is the prior experience in a subject area that the teacher is both licensed in and assigned to teach?

16. In this case, while Petitioner's prior work experiences were certainly helpful in her performing her current teaching duties, Petitioner's documentation did not sufficiently show how Petitioner's specific job duties at Teleco, 1st State Bank, and U R Invited, Inc. were directly related to Petitioner's area of licensure, and and current teaching assignment, as required in SBE Policy TCP-A-006.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has subject matter and personal jurisdiction over this contested case, and the parties received proper Notice of Hearing. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. Petitioner bears the burden of proving the claims alleged in the Petition by a preponderance of the evidence. Peace v. Employment Sec. Comm'n, 349 N.C.315, 507 S.E. 2d 272 (1988).

3. The State Board of Education has the constitutional power "to supervise and administer the free public school system and the educational funds provided for its support." N.C. Const. art IX, § 5. This power includes the power to "regulate the grade [and] salary... of teachers." Guthrie v. Taylor, 279 N.C. 703, 709, 185 S.E.2d 193, 198 (1971), cert. denied, 406 U.S. 920, 32 L.Ed.2d 119 (1972). The State Board has the specific duty "to certify and regulate the grade and salary of teachers and other school employees." N.C. Gen. Stat. § 115C-12(9)a; Guthrie at 711.

4. The State Board has the statutory authority to "determine and fix the salary for each grade and type of certificate which it authorizes..." N.C. Gen. Stat. § 115C-296(a).

5. Based upon a preponderance of the evidence presented, the intent of the State Board of Education in adopting SBE Policy TCP-A-006 was to recognize prior work experience that directly supported the subject area to which a teacher was assigned and licensed to teach. Incidental skills or duties that are helpful in any work environment are not deemed to be directly related to the subject area in which the teacher is licensed and assigned to teach and thus are not creditable for salary purposes.

6. In reaching this determination, the undersigned relies upon the testimony of individuals with years of experience in applying the policy, and the uninterrupted interpretation of that policy over the years. The undersigned may also rely upon consistent interpretation by a State Agency of its own statutes and policies in reaching a conclusion with regard to the application of a particular policy to a given set of facts. See State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004); Frye Regional Medical Center, Inc. v. Hunt, 350 N.C. 39, 510 S.E.2d 159 (1999).

7. In this case, Petitioner failed to meet her burden of demonstrating that Respondent has deprived her of property, or otherwise substantially prejudiced her rights and exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in denying Petitioner's request for salary credit for her non-teaching work experiences.

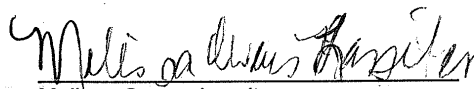
FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to deny Petitioner's request for salary credit for her prior non-teaching work experiences.

NOTICE AND ORDER

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 18th day of October, 2012.


Melissa Owens Lassiter
Administrative Law Judge

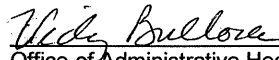
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **FINAL DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Lia C. Long
514 Oakland Drive
Burlington, NC 27215
PETITIONER

Tiffany Y. Lucas
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 18th day of October, 2012.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Phone: (919) 431-3000
Fax: (919) 431-3100

NORTH CAROLINA
COUNTY OF WAKE

Filed
2012 OCT 22 AM 11:14

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 04754

TERESA J. BARRETT,
Petitioner

v.

NORTH CAROLINA DEPARTMENT
OF ENVIRONMENT AND NATURAL
RESOURCES,
Respondent

Office of
Administrative Hearings

**ORDER
AMENDING DECISION**

Pursuant to 26 NCAC 03 .0129, the undersigned Administrative Law Judge hereby amends the September 14, 2012 Decision to correct clerical errors, so that Findings of Fact 21 and 28 reads as follows:

FINDINGS OF FACT

21. That same day, March 9, 2010, Gregson placed Petitioner on investigatory leave with pay. Between March 15, 2010 and March 29, 2010, DCM Director Gregson conducted an investigation into the March 8, 2010 matter. Gregson interviewed twenty-two DCM staff members, asking each staff the same 10 questions. These questions included:

1. Were you at work on Monday, March 8, 2010?
2. Were you at 400 Commerce Avenue, Morehead City?
3. Were you at work on Tuesday, March 9, 2010?
4. Were you at 400 Commerce Avenue, Morehead City?
5. Did anything unusual happen on Monday, March 8, 2010?
6. If so, could you explain what you saw and did you report it to anyone?
7. Have you ever had a weapon at the workplace? If so, why and under what circumstance? . . .
10. Is there any other information or comments you would like to provide?

Alice Johnson, DCM Human Resources Manager attended all interviews, and made notes of the answers provided by each person interviewed. (Resp. Exh. 37) Gregson also made notes during each interview.

28. In contrast to those employees, neither Angela Willis nor Maureen Will [Meehan] nor Heather Styron expressed any fear of Petitioner. Angela Willis did not think that Petitioner engaged in any conduct with the handgun that she considered to be threatening on March 8, 2010. (T. p. 273) Willis did not remember Petitioner even taking the handgun out of the box. (T. pp. 273-274) Willis felt fine about safety after Petitioner showed her the revolver. (T. p. 278) Heather Styron advised Gregson during her March 15, 2010 interview that she "personally did not feel threatened or that anyone else was threatened. Has not been through what everyone else has been through with Tere." Styron was in no way in fear for her safety when Petitioner showed her the handgun on March 8, 2010. (T. p. 306)

IT IS SO ORDERED.

This the 22nd day of October, 2012.



Melissa Owens Lassiter
Administrative Law Judge

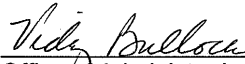
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **ORDER AMENDING DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Michael Byrne
Wachovia Capital Center
Suite 1130
150 Fayetteville Street Mall
Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Jay Osborne
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
ATTORNEY FOR RESPONDENT

This the 22nd day of October, 2012.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Phone: (919) 431-3000

NORTH CAROLINA
COUNTY OF WAKE

Filed

2012 SEP 14 PM 3:45

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 04754

TERESA J. BARRETT,
Petitioner

Office of
Administrative Hearings

v.

NORTH CAROLINA DEPARTMENT
OF ENVIRONMENT AND NATURAL
RESOURCES,
Respondent

DECISION

On April 17 - 18, 2012 and May 10, 2012, Administrative Law Judge Melissa Owens Lassiter heard this contested case in New Bern, North Carolina. On July 31, 2012, and August 7, 2012, the parties filed their respective proposed Decisions with the Office of Administrative Hearings.

APPEARANCES

For Petitioner: Michael C. Byrne, Law Offices of Michael C. Byrne, 150 Fayetteville Street, Suite 1130, Raleigh, NC 27601

For Respondent: Jay Osborne, Assistant Attorney General, Post Office Box 629, Raleigh, NC 27602

ISSUE

Whether Respondent had just cause to dismiss Petitioner from employment for unacceptable personal conduct for displaying a handgun, legally purchased during the lunch break, in the parking lot adjacent to the building where Petitioner worked?

EXHIBITS ADMITTED INTO THE RECORD:

For Petitioner: 1

For Respondent: 1 - 4, 7 - 21, 28 - 31, 33, 37 - 39

6 (Offer of Proof Only)

WITNESSES

For Petitioner: Tere Barrett

For Respondent: Michael Lopazanski, Lowana Barrett, Rita Richardson, Alice Johnson, Roy Brownlow, Ryan Davenport, James Guthrie, Angela Willis, Maureen Will Meehan, Heather Styron, Ted Tyndall, Tancred Miller, Doug Huggett, James (Jim) Gregson, Tere Barrett

STIPULATIONS BY PARTIES

1. Petitioner bought a 38-caliber revolver from Hardesty Gun Shop on Arendell Street, Morehead City, North Carolina.
2. There was no criminal charge against Petitioner for possessing the revolver at her workplace. (T pp. 469-471)

JUDICIAL NOTICE

1. On July 8, 2009, Petitioner filed a petition for a contested case hearing requesting removal of allegedly inaccurate or misleading information from her personnel file; to wit, written accounts of confrontations with four coworkers that served as a basis for a February 25, 2009 written warning. Petitioner also alleged that she had been subjected to harassment in the workplace based on her sex, and the harassment created a hostile work environment.
2. On September 17, 2009, Petitioner filed a complaint with the Equal Opportunity Employment Commission (EEOC) alleging that the four accounts upon which her February 25, 2009 written warning was based, were untrue, and that the written warning was issued in retaliation against her, based on her gender.

FINDINGS OF FACT

A. Procedural Background

1. On April 22, 2010, Respondent DCM Director Jim Gregson terminated Petitioner from employment for the engaging in the "unacceptable personal conduct" of possessing a handgun "at the workplace on March 8, 2010" in violation of Respondent's Workplace Violence Policy. In the dismissal letter, Respondent advised Petitioner that:
 5. As a long-term employee, Ms. Barrett should not have needed notice that she should not bring and display a weapon at the workplace. This action is considered conduct unbecoming a state employee, detrimental to state service, and constitutes unacceptable personal conduct.

6. Even in the absence of direct threats by Ms. Barrett, and whether intentional or not, considering the continuing hostility among Tere Barrett, Ryan Davenport, and Roy Brownlow, Ms. Barrett's possession and display of an handgun at the work place, readily visible by Ryan Davenport, Roy Brownlow, and others, reasonably created fear and distress among some staff.
7. In light of the recent national publicity related to workplace violence, e.g., the University of Alabama, Huntsville professor who killed co-workers, with a hand gun, and the recent Ohio State University shooting, with two co-workers shot, it is not unreasonable to believe that Ms. Barrett should have known that bringing and displaying a weapon at the workplace, in plain sight, and visible from office windows, could cause fear and concern, for DCM employees, as well as employees and clients of other businesses located in the building.
8. Organizationally, there is a business requirement that the Compliance Coordinator and District Manager work together, communicate and collaborative; yet, considering the long-term and continual animosity among Roy Brownlow, Ryan Davenport, and Tere Barrett, the damage to their relationships appears to be irreparable, making it difficult, if not impossible, for them to effectively work together, thereby adversely impacting the program.

(Resp. Exh. 20)

2. On July 30, 2010, Respondent's Secretary Dee Freeman issued a Final Agency Decision upholding the decision to dismiss Petitioner from employment for the "unacceptable personal conduct" of "brandishing a gun in the workplace parking lot causing employees to fear for their safety" in violation of Respondent's Workplace Violence Policy. (Resp. Exh. 17, COL No. 7) In the Final Agency Decision, Sec. Freeman added a second reason for dismissing Petitioner from employment, i.e. a conflict of interest, even though Respondent did not terminate Petitioner from employment on April 22, 2012 for that second reason. (Resp. Exh. 7 - FOF 14f, COL 2, 6)

3. On August 6, 2012, Petitioner filed a contested case petition with the Office of Administrative Hearings, appealing Respondent's termination of her employment. Petitioner alleged that:

Petitioner is a career state employee who was discharged without just cause for disciplinary reasons by the Respondent on or about April 22, 2010. By taking these actions, Respondent deprived Petitioner of property and substantially prejudiced Petitioner's rights and additionally (1)

Exceeded its authority or jurisdiction, (2) Acted erroneously, (3) Failed to use proper procedure, (4) Acted in violation of Constitutional provisions, (5) Failed to act as required by law or rule, and/or (6) Was arbitrary, and capricious, and/or abused its discretion. Petitioner has exhausted all requisite administrative remedies prior to filing this Petition. Petitioner is entitled to reinstatement, back pay, costs, and fees and all other relief under law.

(Petition)

4. At the time of her dismissal, Petitioner Tere Barrett was a career state employee with twenty-two years and four months of consecutive state service with Respondent, with an annual salary of approximately \$75,000. (T. p. 647) At the time of her dismissal, Petitioner was employed as an Environmental Specialist II, with a working title of District Manager, in Respondent's Division of Coastal Management ("DCM") office at 400 Commerce Avenue, Morehead City, North Carolina.

B. March 8, 2010 Hand gun at Work Incident

5. The State of North Carolina leases the office building and parking located at 400 Commerce Avenue, Morehead City, North Carolina for Respondent's DCM and its employees. (Resp. Exh. 33, p. B349) The parking lot is immediately adjacent to the DCM office building, wrapping around two sides of the building. (T pp. 514-515) Respondent is not assigned spaces in the lot, and the lot is not guarded, gated, or badge-accessed. There is no fee to park in the lot.

6. DCM occupies almost the entire office space of the 400 Commerce Avenue building. A psychiatrist's office is also located in the 400 Commerce Avenue building. (T p. 460) DCM employees, members of the public transacting business with DCM, and the general public park in the parking lot adjacent to 400 Commerce Avenue building.

7. At all times relevant to this case, Respondent had a Workplace Violence Policy in place. The Policy Statement stated that the workplace violence policy "applies to all DENR employees while in any place related to the individual's employment." It explained that:

It is a violation of this policy to:

- Engage in workplace violence as defined herein;
- Use or possess an unauthorized weapon during a time covered by this policy.

A violation of this policy shall be considered unacceptable personal conduct, . . . and shall subject the employee to a disciplinary action up to and including dismissal.

(Resp. Exh. 11)

8. Respondent's Workplace Violence policy defined the term "workplace violence" as including, but not limited to "intimidation, threats (physical and/or verbal) physical attack, or property damage." Such policy defined "threat" as:

The expression of an intent to cause physical or mental harm. An expression constitutes a threat without regard to whether the party communicating the threat has the present ability to carry it out and without regard to whether the expression is contingent, conditional, or future.

(Resp. Exh. 11) Exceptions to this policy apply only to (1) a certified law enforcement officer, or (2) [an employee who] is otherwise required as part of his duties, or (3) [is required to carry a weapon] for formal training purposes in connection with duties. (Resp. Exh. 11)

9. Similarly, the Office of State Personnel had a Workplace Violence policy in place which prohibits engaging in workplace violence, including "use, possess or threaten to use an unauthorized weapon" by an employee "while functioning in the course and scope of employment as well as off-duty violent conduct that has a potential adverse impact on a State employee's ability to perform the assigned duties and responsibilities." (Resp. Exh. 14)

10. As DCM Morehead City District Manager, Petitioner supervised three field reps: Brad Connell, Heather Styron, and Barry Guthrie. (Resp. Exh. 39) She had originally hired several employees, including Ryan Davenport. (T p. 187) In her position as supervisor, Petitioner gave policy manuals to her newly hired employees, and acted as a resource for any questions about those policies, including the workplace violence policy. (T pp. 626-627) She additionally received and read the workplace violence policy in January 1988, when she was hired, and again in 1996. (T p. 626)

11. Petitioner is not a certified law enforcement officer. Petitioner did not carry a handgun as a part of her formal training for her job, and carrying a handgun was not part of her job duties. Neither the Department Secretary nor his designee authorized Petitioner to have a handgun in the workplace. (Resp. Exh. 20; T pp. 627-628)

12. Around March 5, 2010, Petitioner legally obtained a permit from the Carteret County Sheriff's Office to purchase and own a handgun. (T. p. 633) Respondent did not contest that Petitioner obtained this permit, and had a legal right to purchase and own a handgun. About one week before March 8, 2010, Director Gregson knew that Petitioner intended to purchase the handgun. (T. pp. 519, 662)

13. During her lunch break on March 8, 2010, Petitioner purchased a 38-caliber Smith and Wesson revolver at a Morehead City gun store. (T. p. 633) Petitioner possessed a lawful gun permit, and purchased the handgun for protection when she

would go hiking on some rural property she owns in Virginia. (T. p. 649) Petitioner has very little prior experience with guns. (T. p. 650) Petitioner returned to work, and parked in the parking lot outside her office building, leaving the handgun in her car.

14. Petitioner asked coworkers Maureen Will Meehan, Angela Willis, and Heather Styron to walk to her car, as she wanted to show them something she bought during lunch. Will [Meehan], Styron, and Willis walked to Petitioner's car, where the handgun was inside its box on the front seat. Petitioner took the gun from its box, stood in the doorway of her car, and showed the gun to her coworkers. (T. pp. 638, 665) While holding the revolver, Petitioner was standing on the farthest side of the parking lot, approximately 20 yards from the DCM office building. (T. 515-516)

15. Petitioner never left the vicinity of her car while showing the gun, never attempted to approach the building with the gun, and never threatened any employee with her handgun. (T. p. 236 - 238, 312) The entire matter lasted no more than a few minutes.

16. On March 8, 2010, Petitioner understood that the parking lot of the DCM building was not considered part of the "workplace." In 1996 or 1997, Petitioner had attended a meeting at the DENR Wilmington Regional office conducted by then Director of Water Quality Preston Howard, among others. Based on the information provided at that meeting, Petitioner understood the DENR Workplace Violence Policy did not apply to the parking area of her Morehead City office. Based on the same information, Petitioner believed that DENR's Workplace Violence policy did not prohibit her from having a weapon in or around her personal vehicle in the parking lot [of her office.] (T. pp. 658-59)

17. On March 8, 2010, DCM employee Mike Lopazanski office looked out his second floor office window, and saw Petitioner holding the handgun by the grip, waving the handgun around as if she were talking with her hands. (T p. 37) DCM employee Tancred Miller also saw Petitioner with the handgun from his second story window. (T p. 383) Mr. Miller knocked on his window, trying to get the attention of DCM Director Jim Gregson, who was outside on the sidewalk adjacent to the DCM building. (T p. 383) DCM employee Ryan Davenport was located in the first floor office of a fellow DCM employee. From the first floor window, Mr. Davenport saw Petitioner holding the silver revolver in her hand, and waving it. (T. p. 201) After seeing the revolver, Mr. Davenport went to Jim Gregson's office, told him what he saw, and left the area. (T p. 201)

18. Gregson exited the DCM office building, and observed Petitioner and three DCM coworkers standing beside Petitioner's car in the parking lot, with the door open. Director Gregson observed Petitioner holding a small silver-colored revolver, "pointing it [the gun] in several directions." (Resp. Exh. 19; T. p. 453)

19. When Petitioner came back into the office, Director Gregson advised Petitioner that handguns were not allowed in the workplace, and directed Petitioner to

take the revolver home. Petitioner responded that she did not realize that she could not have a gun in the parking lot, that she had just purchased the handgun, and that it was unloaded. She agreed to take the gun home, and did so. (Resp. Exh. 17, p. B5)

20. On March 9, 2010, Director Gregson received several phone calls from employees who were concerned about being in the office after Petitioner brought a handgun to work on March 8, 2010. Based on those calls, Gregson specifically approved DCM employees Roy Brownlow and Ryan Davenport either to work in the field, or to work from home that day. Doug Huggett also advised Gregson that several of his staff, including Daniel Govoni, were not at work on March 9, 2010 as they felt it better not being in the office until things had blown over. Huggett reported to work at 400 Commerce Ave. office on March 9, 2010. Ted Tyndall, Petitioner's immediate supervisor, was on vacation during the week of March 8, 2010.

21. That same day, March 9, 2010, Gregson placed Petitioner on investigatory leave with pay. Between March 15, 2010 and March 29, 2010, DCM Director Gregson conducted an investigation into the March 8, 2010 matter. Gregson interviewed twenty-two DCM staff members, asking each staff the same 10 questions. These questions included:

1. Were you at work on Monday, March 8, 2010?
2. Were you at 400 Commerce Avenue, Morehead City?
3. Were you at work on Tuesday, March 9, 2010?
4. Were you at 400 Commerce Avenue, Morehead City?
5. Did anything unusual happen on Monday, March 8, 2010?
6. If so, could you explain what you saw and did you report it to anyone?
7. Have you ever had a weapon at the workplace? If so, why and under what circumstance? . . .
10. Is there any other information or comments you would like to provide?

Alice Johnson, DCM Human Resources Manager attended all interviews, and made notes of the answers provided by each person interviewed. Gregson also made notes during each interview. (Resp. Exhs. 25, 26)

22. Five of the twenty-four DCM employees interviewed indicated they felt unsafe at work after Petitioner showed her new handgun to coworkers in the parking lot on March 8, 2010.

- a. Fourteen of the twenty-five DCM employees felt safe at work after the March 8, 2010 event where Petitioner showed her handgun to coworkers.

b. Three of the twenty-five DCM employees questioned safety in the workplace after March 8, 2010, but those feelings were based on other reasons unrelated to the March 8, 2010 incident.

c. Angela Willis, Maureen Will Meehan, and Heather Styron were interviewed by Gregson. They were not alarmed, and/or did not feel threatened when Petitioner showed them her handgun on March 8, 2010. Maureen Will Meehan "never felt unsafe in this building." Angela Willis told Gregson she felt fine at work, and did not feel her life was in danger when Petitioner showed her the handgun. Heather Styron "did not feel threatened or that anyone else was threatened." (Resp. Exh. 19)

d. Six employees, including Ryan Davenport, Daniel Govoni, and Roy Brownlow, had specific safety concerns directly related to the March 8, 2010 handgun incident. Doug Huggett and Ted Tyndall were concerned about the safety of their staff. Three staff indicated did not feel safe anytime around Petitioner. (Resp. Exh. 19)

23. In Roy Brownlow's interview with Director Gregson, Brownlow indicated:

Worries about her violate temper and verbally humiliating derogatory remarks against staff. Change in personality and physical appearance. Surprised by her purchase of guns has always been anti-guns.

(Resp. Exhs. 37, p. B00208)

24. Doug Huggett advised Director Gregson that employee Daniel [Govoni] had a real concern for his safety, and felt unsafe because he thought Petitioner was intimidating. Huggett asked for a risk assessment before Petitioner returned to work. (Resp. Exhs. 37, p. B00216) Ryan Davenport advised Gregson that he did not feel safe anytime Petitioner is around, and that "[o]ver the past couple of years has number of documented run-ins with Tere. Feeling less and less comfortable around Tere." (Resp. Exh. 37, p. B000225)

25. At hearing, Ryan Davenport explained that before March 8, 2010, he felt uncomfortable when he heard that Petitioner was planning to buy a gun. On March 8, 2010, he saw Petitioner in the parking lot with a revolver. Seeing that was "pretty scary." (T p. 201) He immediately left the premises after advising Director Gregson that Petitioner had the gun. (T. p. 202) Doug Huggett was in a meeting on March 8, 2010, and did not see Petitioner with a gun. After finding out that Petitioner had been in the parking lot openly displaying a revolver, he was "very, very worried for my safety and ultimately the safety of my staff members." (T p. 418) Lowana Barrett did not see Petitioner with the gun, but upon hearing about it, felt like she had to be on "high alert." (T. p. 68)

26. Mike Lopazanski was disturbed to see the gun and how it was handled. He quickly moved away from the window, as he did not want to take any chance that something could happen. (T p. 39) Having received basic firearms training and having been a former member of a rifle team, Mr. Lopazanski observed that the gun was being handled contrary to the primary rules of gun safety, that every gun should be treated as if it were loaded. (T pp. 38-39)

27. DCM employee Tancred Miller received firearms training with the police, the National Rifle Association ("NRA") and the North Carolina Wildlife Resources Commission. (T p. 391) A friend of Petitioner, Mr. Miller was uncomfortable with seeing Petitioner in the parking lot with a revolver. (T pp. 382-384, 393) He walked to the office of Human Resources employee Alice Johnson. He asked Johnson about the policy on having weapons at the office, because he wanted other people to be aware of it, and wanted to make sure that it was properly put away or removed. (T p. 383, 393)

28. In contrast to those employees, neither Angela Willis nor Maureen Will [Meehan] nor Heather Styron expressed any fear of Petitioner. Angela Willis did not think that Petitioner engaged in any conduct with the handgun that she considered to be threatening on March 8, 2010. (T. p. 273) Willis did not remember Petitioner even taking the handgun out of the box. (T. pp. 273-274) Willis felt fine about safety after Petitioner showed her the revolver. (T. p. 278) Heather Styron advised Gregson during her March 15, 2010 interview that she "personally did not feel threatened or that anyone else was threatened. Has not been through what everyone else has been through with Tere." (Resp. Exhs. 27, 37) Styron was in no way in fear for her safety when Petitioner showed her the handgun on March 8, 2010. (T. p. 306)

29. At no time during the March 8, 2010 handgun incident was Maureen Meehan afraid for her safety. (T. p. 288) Meehan did not recall telling Director Gregson during his investigation that she told Petitioner to "quit pointing [the gun] at people and put it away." (T. p. 287) Meehan added that Petitioner is a vegan who spends much of her spare time caring for stray animals. (T. pp. 290-291)

C. Petitioner's February 25, 2009 Written Warning

30. On February 25, 2009, Petitioner's supervisor issued a written warning to Petitioner for engaging in unacceptable personal conduct with employees four different employees. The first incident occurred with employee Doug Huggett on or about November 13, 2008. On that date, Petitioner walked into Doug Huggett's office to talk about the transitioning of an employee, from a position supervised by Petitioner, to a position supervised by Mr. Huggett. Petitioner entered Mr. Huggett's office, sat down, and immediately started criticizing Mr. Huggett without asking to speak with him. Petitioner pointed her finger at him, started getting really angry, and accused him of never taking anyone else's workload into account. Huggett thought Petitioner spoke to him in a belligerent and accusatory tone, and cut Huggett off when he tried to reply. Mr. Huggett let her continue, so as not to escalate the situation. Huggett was not happy

with his own behavior, but felt he was responding to an uninvited attack on his character, loyalty, and professionalism. (Resp. Exh. 18)

31. In both his written statement of the event and at hearing, Mr. Huggett admitted that he raised his voice significantly and loudly during the November 13, 2008 conversation, and did not feel good about how he handled the situation. (Resp. Exh. 28; T. p. 413) He further explained that he felt provoked [by Petitioner], and was responding to an uninvited attack on his character, loyalty, and professionalism. (Resp. Exhs. 18, 28; T pp. 408-410)

32. At hearing, Mr. Huggett acknowledged that he "certainly had circumstances where other people have lost their tempers with me, and raised their voice at me." (T. pp. 413-414) However, he never responded to those other people "anywhere close" to how he responded to Petitioner. (T. pp. 413-414)

33. After this confrontation, Huggett's relationship with Petitioner was very, very strained. He tried to keep his interaction with Petitioner at a minimum, "only to what was necessary to carry out the jobs that we both were doing." (T. p. 415) At hearing, Huggett opined, "It was not a comfortable place to come to work. People were trying to stay away from getting involved to avoid any confrontation" during this time. (T. p. 417)

34. On December 1, 2008, Ryan Davenport was a DCM Compliance and Enforcement Field Representative whose immediate supervisor was Roy Brownlow. (Resp. Exh. 39; T. p. 186) On December 1, 2008, Mr. Davenport had drafted a Notice of Violation ("NOV") against Brian Deanhart for "major permit violations" of the Coastal Area Management Act ("CAMA"), and prepared a report recommending assessment for a "major permit violation."

a. On December 1, 2008, Petitioner entered Ryan Davenport's office, and directed Mr. Davenport to change the violation to a minor permit violation. Mr. Davenport told Petitioner that he did not feel comfortable changing his recommendation, but that he only made recommendations and Petitioner was free to alter his recommendation. Mr. Davenport did not feel comfortable making the change, because such a change would be contrary to the training he had received from his supervisor, Roy Brownlow. (T p. 193)

b. Petitioner told Mr. Davenport, "Whether you like it or not, I am the manager of the Morehead City district and if you work inside the district, you will have to do what I say." Petitioner stood near Mr. Davenport in his personal space, and pointed her finger at him in an accusatory manner. Several times, Mr. Davenport requested that the Petitioner take the issue up with his supervisor, yet Petitioner continued to argue. Mr. Davenport felt trapped and provoked, and firmly asked Petitioner to get out of his office and to talk with his supervisor. (Resp. Exhs. 18, 29; T pp. 193-194)

35. On December 15, 2008, Petitioner wrote a memorandum to Roy Brownlow, Davenport's supervisor, to "document actions taken by Ryan Davenport on 12/01/01 [sic], and the following conversation I had with you, Roy Brownlow, this morning, 12/15/08." (Resp. Exh. 29) In that memo, Petitioner advised Mr. Brownlow that on 12/01/08, she attempted to tell Ryan Davenport that while she agreed with his assessment on the Brian Deanhart violation, she would make the decision on [the assessment] because she, as the District Manager, is the "one the decision comes back on." However, Ryan began shouting loudly at her that:

[H]e would not change something because I say so, that he would not do what I say to do, and that he does not have to do as I say. He yelled several times for me to get out of my office, and said that he did not care if I was the District Manager.

(Resp. Exh. 38) She further advised Brownlow that two people told her that Ryan spent the remainder of the day strutting "like a peacock" and "rooster," bragging about his actions. She requested Brownlow include her memo in Ryan's permanent file as his behavior constituted insubordination, and unacceptable personal conduct. (Resp. Exh. 38)

36. On December 16, 2008, Petitioner raised her voice at DCM receptionist Lowana Barrett when asking Lowana why she had not hand-delivered a certified letter to a personal friend of Petitioner. Petitioner threw the certified letter on the ground, and continued to raise her voice. When Lowana asked Petitioner to leave her office, and Petitioner refused, Lowana left her own office, almost in tears. The next day, December 17, 2008, Petitioner called Lowana into her office to finish the discussion. When Lowana said she did not want to go over it again, Petitioner demanded that Lowana sit down until Petitioner was done. Lowana left Petitioner's office. Petitioner walked to Lowana's office window, and told Lowana that if she did not come back to Petitioner's office, then she would "write it up" and put it in Lowana's file. (Resp. Exhs. 18, 30; T pp. 58-63) At that time, DCM Assistant Director Ted Tyndall, not Petitioner, supervised Lowana Barrett. (Resp. Exh. 39; T p. 59)

37. At hearing, Lowana Barrett explained that because of her incident with Petitioner, she "felt a little threatened by Petitioner." (T. p. 64) She "was just always afraid of that she [Petitioner] was going to re-approach me again." (T pp. 64-65)

38. At hearing, Ryan Davenport conceded that he, Roy Brownlow "along with everybody else in the office" talked about how they dealt with Petitioner, and about their individual interactions with Petitioner. (T. p. 222) This staff included DCM receptionist Lowana Barrett, field representatives Brad Connell, Barry Guthrie, Heather Styron, and major permit staff such as Doug Huggett, Jonathan Howell, and Daniel Govoni. (T. p. 222) He explained, "people in the office were uncomfortable with the tension." (T. p. 226)

39. On February 13, 2009, Petitioner entered the office of DCM Compliance Coordinator Roy Brownlow to re-discuss the Deanhart matter, which Petitioner previously had discussed with Ryan Davenport.

a. Petitioner stood close to Mr. Brownlow's desk in what Brownlow perceived to be an aggressive manner, and engaged in dialogue in a heated tone. Mr. Brownlow asked Petitioner to leave as they were acting unprofessionally in an open door environment. Petitioner refused to acknowledge Mr. Brownlow's request, and moved closer to Mr. Brownlow's desk, entering his personal space in a hostile manner. Mr. Brownlow stood up, came to the side of his desk, and again asked Petitioner to leave his office. Petitioner eventually stepped outside of the door, but stood at the doorway staring back at Mr. Brownlow with her arms crossed. Mr. Brownlow closed his door. (Resp. Exhs. 18, 31; T pp. 158-159)

b. Mr. Brownlow had never had this type of interaction with any other staff person in his career. (T. pp. 173-174) After this incident, Mr. Brownlow's relationship with Petitioner was strictly professional, just enough to fulfill the day-to-day job duties. (T. p. 159) Brownlow felt humiliated and frustrated, as it was definitely a "morale killer." (T. p. 161)

40. On February 13, 2009, DCM Director Jim Gregson and Assistant DCM Director Ted Tyndall were sitting in Tyndall's office, immediately adjacent to Brownlow's office, when they overheard the loud voices of Brownlow and Petitioner.

41. Based on three "previous similar instances," Gregson met with Tyndall and advised Tyndall to take care of the situation. Gregson was "worried that continued arguments in the office that was in earshot of potentially other staff and visitors to the office was unprofessional." (T. pp. 327-28, 447-448) Tyndall thought a pattern was developing that was creating an "unhospitable workplace, inharmonious type workplace, and it seemed to be affecting the productivity in the office." (T. p. 328)

42. Tyndall asked DCM employees Roy Brownlow, Ryan Davenport, Lowana Barrett, and Doug Huggett provide written statements of their above-noted arguments with Petitioner to him. Each employee provided written statements to Tyndall about those events. (Resp. Exhs. 28 – 31)

43. On February 23, 2009, Tyndall met with Petitioner regarding her arguments with the four above-cited employees.

44. On February 25, 2009, Tyndall, with management's consent, issued a Written Warning as "the unacceptable behaviors exhibited by this employee, described in this document. . . constitute unacceptable personal job performance." (Resp. Exh. 18) He wrote that the four different workplace arguments between Petitioner and Ryan Davenport, Roy Brownlow, Doug Huggett, and Lowana Barrett individually "caused disruptions to the office that have created a stressful and uncomfortable workplace environment impairing the ability of the staff to effectively work together." Tyndall

described, in detail, the four employees' description of their respective arguments with Petitioner. Yet, in noting Petitioner's response to these arguments, Tyndall wrote:

Ms. Barrett downplayed the incidents, disputed raising her voice except with Mr. Brownlow, and vehemently denied being aggressive, pointing fingers, throwing document around, or getting into anyone's personal space.

(Resp. Exh. 18)

45. In the February 25, 2009 written warning, Tyndall concluded that:

The four preceding, closely confrontations exhibit a behavior pattern and unprofessional actions by Ms. Barrett that fail to meet the behavioral expectations described in her work plan, and are therefore, unacceptable. Her accusations, allegations, and threats of personnel actions against employees she does not supervise are not only unacceptable behavior but an abuse of authority.

(Resp. Exh. 18)

D. Analysis

46. A preponderance of the evidence established that Petitioner and her immediate supervisor, Ted Tyndall, had a poor relationship for much of their work history at DCM. According to Director James Gregson, there was no employee with whom Petitioner had a worse relationship than with Tyndall. (T. p. 552) Doug Huggett described how there was an ongoing and worsening conflict between Petitioner and Mr. Tyndall, and to a lesser degree Mr. Gregson. This conflict would arise in the vast majority of his conversations with Petitioner, and "seemed to be always at the forefront of her [Petitioner's] thoughts." (T. p. 432)

47. At hearing, Tyndall conceded that Petitioner had served with DENR for more than 20 years with no prior disciplinary action until Tyndall became her manager. (T. pp. 336-337) Tyndall also admitted that by 2009, he had been involved in various disputes with Petitioner for years. (T. p. 337)

48. Before being issued the February 25, 2009 written warning, Petitioner had not received or been subject to any formal disciplinary action by Respondent. Likewise, Petitioner has never been convicted of any crime barring minor speeding offenses. (T. p. 648)

49. The preponderance of the evidence established that there were no other workplace arguments between Petitioner and any other employee, including Davenport, Brownlow, Huggett, and Lowana Barrett, between the date of the issuance of the written warning in February of 2009 and March 8, 2010.

50. In each of the above-noted four incidents with coworkers, Petitioner was the only employee disciplined. (T. pp. 163, 168, 204) Respondent's management did not discipline Ryan Davenport, Doug Huggett, or Roy Brownlow for their behavior during their respective arguments with Petitioner, even though the other four employees apologized to Tyndall for their own behavior in their respective incidents with Petitioner. (Resp. Exh. 18)

51. On March 8, 2010, when Petitioner brought a handgun in the parking lot at 400 Commerce Avenue, she was aware, by virtue of the February 25, 2009 written warning, that other employees had described her as "belligerent" and "accusatory," and described how Petitioner had pointed her fingers at them. (T. pp. 695-96) At hearing, Petitioner asserted that the other employees' statements were not true "to differing and varying degrees." She opined, "Doug Huggett's is pretty darn close to true." (T. pp. 695-96) At the same time, Petitioner explained that she was not thinking about the February 2009 written warning when she showed her new hand gun to coworkers in the parking lot on March 8, 2010. (T. p. 697)

52. At hearing, Gregson admitted that Petitioner told him at her pre-disciplinary conference, and Gregson documented, that she had been advised of a "1996 decision at the AGs office that having a gun at office did not apply to parking lots." (Resp. Ex. 19; T. p. 561) Gregson did not dispute Petitioner's contention that she was told that the workplace weapons policy did not apply to parking lots. (T. pp. 561-562, 563) Gregson further acknowledged that:

Q. So if you had told an employee, or another senior person at DENR had told an employee, that this policy did not apply to parking lots, would it then be fair to dismiss an employee for having a weapon in the parking lot?

A. No, it would not.

(T. pp. 568-569)

53. Respondent did not produce any documents where Petitioner signed any version of the Respondent's Workplace Violence Policy. (T. p. 514) Neither the DCM office nor the adjacent parking lot in which the gun incident occurred has any signage prohibiting the usage or carrying of either concealed or unconcealed weapons.

54. A preponderance of the evidence at hearing established that Director Gregson never told Petitioner that she was prohibited from having a weapon in or around her car in the parking lot adjacent to the DCM workplace. Gregson did not give, or direct that orders be given, to anyone regarding what employees could or could not possess in that parking lot. (T. pp. 510-512) Employees consistently testified at hearing that they were not told that they could not keep weapons in their cars in the parking lot. (See, e.g., T. p. 388 (Tancred Miller); T. pp. 294-295 (Angela Wells); T. pp. 234-235 (Davenport))

A preponderance of the evidence showed that neither Roy Brownlow, nor Doug Huggett, nor Lowana Barrett saw Petitioner with a weapon in the parking lot of 400 Commerce Avenue, Morehead City, NC on March 8, 2012. Ryan Davenport saw Petitioner, and a group of people standing in the parking lot on March 8, 2012, and saw Petitioner with a gun in her hand, but could not tell what she was doing. While Davenport testified at hearing, that it was "pretty scary" seeing Petitioner with a gun, he did not know what she was doing with the gun.

56. The preponderance of the evidence at hearing showed that employees who heard that Petitioner had a gun in parking lot, but did not see Petitioner with a gun, were fearful of the thought of Petitioner having a gun. Their fear of Petitioner pre-existed the March 8, 2010 incident, being based on the arguments Petitioner had with coworkers in the workplace. There was no evidence that Petitioner threatened any employee with the gun in the parking lot, or threatened to use the gun. She never approached the DCM building, but stayed near her car while displaying the gun to coworkers. The coworkers to whom Petitioner showed her new handgun were not fearful for their safety, and did not feel threatened.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the subject matter and parties of this contested case. The parties received proper Notice of the hearing. N.C. Gen. Stat. §§ 126-1 et seq., 126-35, 126-37(a) To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. N.C. Gen. Stat. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause."

3. Pursuant to N.C. Gen. Stat. § 126-1.1, Petitioner is a "career State employee" subject to the provisions of the State Personnel Act, rules of the State Personnel Commission, and applicable personnel policies of the Office of State Personnel and of Respondent.

4. Pursuant to N.C. Gen. Stat. § 126-35(d)(2007), in a contested case hearing, the department or agency employer bears the burden of proving that "just cause" existed for agency's disciplinary action of a career State employee.

5. N.C. Gen. Stat. § 126-35(a) does not define the term "just cause." In *N.C.D.E.N.R. v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), our Supreme Court stated that the fundamental question in determining just cause is whether the disciplinary action taken was just. The Court said that there is no bright line test to determine "just cause" as it depends upon the specific facts and circumstances in each case. "Inevitably, this inquiry requires an irreducible act of judgment that cannot always

be satisfied by the mechanical application of rules and regulations.” *Id.* “Not every violation of law gives rise to ‘just cause’ for employee discipline.” *Id.*

6. In *Warren v. Crime Control and Public Safety*, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012), the N.C. Court of Appeals recently held that in just cause cases:

The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based ‘upon an examination of the facts and circumstances of each individual case.’

7. 25 NCAC 1J .0614(8)(d) and (e) define “unacceptable personal conduct” as, among other things, conduct for which no reasonable person should expect to receive a prior warning, the willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

8. In this case, Respondent, in its Final Agency Decision, dismissed Petitioner for two reasons:

unacceptable personal conduct for violating the NCDENR Workplace Violence Policy by brandishing a gun in the workplace parking lot causing employees to fear for their safety. . . .

unacceptable personal conduct for conflict of interest or self-dealing by participating in the permit review process on behalf of a person with whom she has a financial interest.

(Resp. Exh. 17, p. B000013)

9. In its April 22, 2010 initial letter dismissing Petitioner from employment, Respondent did not dismiss Petitioner for engaging in the unacceptable personal conduct of conflict of interest. Since Respondent did not notify Petitioner that a conflict of interest was a basis for its dismissal of her from employment, Respondent could not then dismiss Petitioner for engaging in a conduct that constituted a conflict of interest, in its Final Agency Decision.

10. At the contested case hearing, Respondent's counsel agreed that the only issue before the undersigned was whether Respondent had just cause to terminate Petitioner from employment for the “unacceptable personal conduct” of “brandishing a

gun in the workplace parking lot causing employees to fear for their safety" in violation of Respondent's Workplace Violence Policy. (Resp. Exh. 17, COL No. 7)

11. Respondent's Workplace Violence policy defines the term "workplace violence" as including, but not limited to "intimidation, threats (physical and/or verbal) physical attack, or property damage." Such policy defines "threat" as:

The expression of an intent to cause physical or mental harm. An expression constitutes a threat without regard to whether the party communicating the threat has the present ability to carry it out and without regard to whether the expression is contingent, conditional, or future.

(Resp. Exh. 11) Exceptions to this policy apply only to (1) a certified law enforcement officer, or (2) [an employee who] is otherwise required as part of his duties, or (3) [is required to carry a weapon] for formal training purposes in connection with duties. (Resp. Exh. 11) Respondent's Workplace Violence policy also defines "intimidation" as including, but not limited to "engaging in actions intended to frighten, coerce, or induce duress." (Resp. Exh. 11)

12. Respondent's Workplace Violence policy "applies to all DENR employees while in any place related to the individual's employment." (Resp. Exh. 11)

13. Respondent's Workplace Violence policy does not define or use the terms "brandish," "brandishing," or "brandished."

14. It is well-settled law in this State that the Courts of this state must give the plain and definite meaning to a statute where the statute is clear and unambiguous. *Begley v. Employment Sec. Comm'n*, 50 N.C. App. 432, 274 S.E.2d 370 (1981). Since Respondent dismissed Petitioner for "brandishing" a hand gun in the workplace parking lot, but Respondent's Workplace Violence policy failed to define "brandishing," the undersigned applies the plain and ordinary meaning of that term in analyzing this case.

15. The term "brandish" is defined as "to shake or wave (as a weapon) menacingly; to exhibit in an ostentatious or aggressive manner." (Merriam-Webster Online Dictionary copyright © 2012 by Merriam-Webster, Incorporated)

First prong of Just Cause Analysis

16. Applying the three-prong analysis from *Warren*, and the common definition of "brandish," a preponderance of the evidence showed the first prong of the Warren analysis is met. On March 8, 2010, Petitioner legally purchased a .38 caliber revolver, and brought that revolver to parking lot immediately adjacent to the DCM office building. In that parking lot, Petitioner openly displayed or showed that revolver to at least two coworkers near her car.

Second prong of Just Cause Analysis

17. Respondent did not prove that Petitioner's conduct falls within one of the categories of "unacceptable personal conduct" provided by the Administrative Code. Respondent failed to prove that on March 8, 2010 Petitioner was "brandishing" her handgun in the workplace parking lot.

a. A preponderance of the evidence showed that Petitioner waved or displayed her new handgun to at least two coworkers. Petitioner never left the vicinity of her car while showing the gun, never attempted to approach the building with the gun, and never threatened any employee with her handgun. The entire matter lasted no more than a few minutes.

b. The coworkers to whom Petitioner showed her handgun, were not afraid of Petitioner, and did not feel threatened when Petitioner showed them her new handgun.

c. Ryan Davenport was fearful, because he saw Petitioner with a gun. However, he could not tell what Petitioner was doing with the gun, and at hearing, described Petitioner as waving the gun around. Neither Roy Brownlow, nor Doug Huggett saw Petitioner with the handgun. Ted Tyndall, Petitioner's supervisor, and the DCM employee with whom Petitioner had the worst working relationship with, was on vacation that day.

d. DCM employees Mike Lopazanski and Tancred Miller had firearms training, and were disturbed and/or uncomfortable with how Petitioner was handling the handgun. They voiced no feelings of fear or being threatened from seeing Petitioner with a handgun. No DCM employees who saw Petitioner with her handgun in the parking lot reported that Petitioner was handling her handgun in a menacing, threatening or aggressive manner.

18. Respondent failed to prove by a preponderance of the evidence that Petitioner possessed her handgun in the parking lot of her office with the intent to threaten, intimidate, or cause harm to anyone in violation of Respondent's Workplace Violence policy. Instead, a preponderance of the evidence showed that Petitioner used poor judgment in displaying her newly purchased handgun to coworkers in a public parking lot adjacent to her office. The fear expressed by some DCM employees, such as Davenport, Brownlow, Govoni, L. Barrett, appeared to be based on those employees' fear of Petitioner personally, based on their own arguments with Petitioner, and based on their fear that Petitioner would possess a gun at all. Such fear was not based on Petitioner actually "brandishing" a gun in the parking lot on March 8, 2010, as those employees did not actually see Petitioner displaying her gun in the parking lot. As such, it was unreasonable for those employees to claim fear based on Petitioner's actions in the parking lot, adjacent to the DCM office, on March 8, 2010.

19. Nonetheless, assuming Petitioner's actions of showing the handgun in the parking lot on March 8, 2010 constituted "brandishing" a gun, Respondent failed to

show by a preponderance of the evidence that Petitioner possessed her handgun "in the workplace."

a. Respondent's Workplace Violence Policy applies "to all DENR employees while in any place related to the individual's employment." Thus, technically, Respondent's policy could have applied to the parking lot immediately adjacent to the DCM office. DCM rented the office building from a landlord who provided parking in the parking lot immediately adjacent to the 400 Commerce Avenue building. DCM employees parked in that parking lot when they worked.

b. However, parking was not assigned. The public, including patients of a psychiatrist who also rented in the same building, also used the parking lot.

b. Respondent did not dispute Petitioner's evidence that she had been advised in 1996/1997 by DENR Human Resources that Respondent's Workplace Violence policy did not apply to the parking lot of the DCM office. Director Gregson admitted that Petitioner told him at her pre-disciplinary conference that Petitioner had been advised of a "1996 decision at the AGs office that having a gun at office did not apply to parking lots." (Resp. Ex. 19; T. p. 561) Director Gregson had not told Petitioner or any other employee that they were prohibited from having a gun in the parking lot adjacent to the DCM office. No signage was displayed in the parking lot prohibiting weapons in the parking lot.

20. Under these facts, the Court cannot conclude that Respondent has proven that Petitioner violated the known or written work rule of Respondent's Workplace Violence policy.

Third prong of Just Cause Analysis

21. Based on the facts of this case, the Court cannot conclude that Petitioner engaged in conduct unbecoming a State employee. Any employee told and reasonably believing that Practice "X" was legitimate would certainly expect, and would be entitled to a warning, before being dismissed for engaging in the same practice. At hearing, Director Gregson conceded that it would not be fair to dismiss an employee for having a weapon in the parking lot, if he or other senior management at DENR had told that employee that the Workplace Violence policy did not apply to parking lots.

22. Certainly, Petitioner used poor judgment in displaying or showing her handgun to coworkers in the parking lot adjacent to her office on March 8, 2010. Petitioner had poor working relationships, and did not get along with several of her coworkers, and subordinates in the office. Given the circumstances surrounding the manner in how Petitioner displayed the hand gun on March 8, 2010, and the lack of evidence that Petitioner intended, or attempted, to threaten, harm, or intimidate anyone with her hand gun on March 8, 2010, the undersigned concludes that Petitioner's conduct on March 8, 2010 did not rise to a level of unacceptable personal conduct to warrant her dismissal from employment on March 8, 2010.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to dismiss Petitioner from employment for unacceptable personal conduct should be **REVERSED**. Pursuant to N.C. Gen. Stat. § 126-37(a), and the remedies noted in 25 NCAC 01B. 0400 et seq, Respondent should reinstate Petitioner to the same or similar position, at the same pay grade and step, which Petitioner enjoyed prior to dismissal.

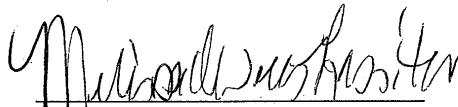
Petitioner is entitled to be awarded all back pay, front pay, and any salaries increases instituted by the General Assembly during this contested case. Respondent shall remove all references to such dismissal from Petitioner's personnel file. Pursuant to 25 N.C.A.C. 1B.0414, Petitioner should be awarded reasonable attorney fees, based upon Petitioner's attorney's submitting an itemized statement of the fees and costs incurred in representing the Petitioner, in a Petition to the North Carolina State Personnel Commission.

NOTICE AND ORDER

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this Decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 14th day of September, 2012.



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:

Michael Byrne
Wachovia Capital Center
Suite 1130
150 Fayetteville Street Mall
Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Jay Osborne
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
ATTORNEY FOR RESPONDENT

This the 17th day of September, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Phone: (919) 431-3000

Filed
2012 SEP 26 AM 8:56

STATE OF NORTH CAROLINA IN THE OFFICE OF
COUNTY OF SWAIN ADMINISTRATIVE HEARINGS
11 OSP 10307

	Office of Administrative Hearings	
TAMMY CAGLE,)	
Petitioner,)	
)	
v.)	DECISION
)	
SWAIN COUNTY DEPARTMENT OF)	
SOCIAL SERVICES,)	
Respondent.)	

This contested case was heard by Administrative Law Judge Donald W. Overby on July 10, 2012 in Waynesville, North Carolina at the Haywood County Justice Center.

APPEARANCES

For Petitioner: Michael C. Byrne, Attorney at Law, Raleigh, North Carolina
For Respondent: Randal Seago, Melrose, Seago, & Lay, P.A., Asheville, North Carolina

WITNESSES

For Petitioner: Petitioner Tammy Cagle
For Respondent: None

EXHIBITS

For Petitioner: Exhibits 1-7
For Respondent: None

ISSUE

Whether the Respondent had just cause to terminate Petitioner's employment for unacceptable personal conduct, violation of known or written work rules (insubordination), and/or conduct unbecoming a state employee that is detrimental to state service.

PROCEDURAL HISTORY

Petitioner previously moved for summary judgment, which was denied.

Based upon the evidence presented, observation of the witnesses, and the arguments of counsel, as well as upon all other competent matters of record, the Court makes the following:

FINDINGS OF FACT

1. This case was properly noticed and set for hearing to begin at 9 a.m. Tuesday, July 10, 2012 at the Haywood County Justice Center.

2. The Petitioner and her counsel were present at the noticed time and prepared to proceed, as was this Court. The Court takes notice of the fact that the Court and Petitioner's counsel both travelled from Raleigh, North Carolina to be present at this hearing, which was held in Waynesville, North Carolina at the request of the Respondent.

3. At 9:30 a.m., no one had appeared for the Respondent and no message was conveyed to the Court explaining the Respondent's absence. The case was then called for trial.

4. Petitioner Tammy Cagle is a career status employee of the Respondent with the position of Director of Social Services. Petitioner testified as a witness.

5. By letter dated June 22, 2011, Respondent dismissed Petitioner for disciplinary reasons. In its dismissal letter Respondent cited two reasons for the dismissal. The first stated

reason was, "*your conduct and procedure in administering agency programs that benefitted your immediate family.*" See Dismissal Letter. Respondent gave no details in the dismissal letter as to what this alleged conduct and procedure was, of what it consisted, how it benefitted Petitioner's immediate family, when it took place or how it violated any law, rule or regulation.

6. Petitioner testified that the allegations concerned some social services benefits obtained by members of her family in Swain County. She testified that the Respondent investigated all these allegations in 2010 and found no wrongdoing, and that the Respondent subsequently made a public statement to this effect and made and issued a resolution of support for Petitioner with respect to the matters at issue. Petitioner said she was unaware of any allegations regarding these social services benefits arising after this period in 2010.

7. According to Petitioner, Respondent has cited the same allegations in dismissing Petitioner in 2011.

8. The second stated allegation against Petitioner was "*failing to comply with the Board's directive of March 31, 2011 that you refrain from making business telephone calls to agency staff while placed on investigative status leave.*" See Dismissal Letter.

9. The letter cites no specifics as to who Petitioner called, when she called them, or how the calls were "business" telephone calls as opposed to personal communications.

10. Petitioner testified that one telephone call cited by Respondent occurred prior to March 31, on March 30.

11. Petitioner testified that she made another call to inquire about her own benefits and HR issues.

12. Petitioner testified that she made a couple of other calls to DSS employees that she considered to be friends, and did not consider the calls to be business related. Petitioner testified that while she was on leave, the temporary director consulted her regarding DSS

business, an action presumably in violation of Respondent's own directive on the part of the temporary director.

13. The Court finds Petitioner's testimony to be credible.

14. Following the hearing, the Court found that Respondent lacked just cause to dismiss Petitioner and found in favor of Petitioner.

CONCLUSIONS OF LAW

1. Petitioner was a career State employee at the time of her dismissal. Because she is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear her appeal and issue a Decision to the State Personnel Commission. N.C. GEN. STAT. §§ 126-1 *et seq.*, 126-35, 126-37(a). (2007)

2. All parties had proper notice for the hearing. Despite having proper notice, Respondent did not appear in a timely fashion.

3. N.C. GEN. STAT. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career State employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C. GEN. STAT. § 126-35(d) (2007).

4. 25 NCAC 11.2301(c) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. One definition of "unacceptable personal conduct" is insubordination, which is the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is considered unacceptable personal conduct. 25 NCAC 11.2304(b)(8) (2007).

5. Insubordination is the “willful violation of a reasonable order from a superior.” Whether the order was reasonable is based on the facts and circumstances of each case.

6. N.C.D.E.N.R. v. Clifton Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was just. Citing further, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court has said that there is no bright line test to determine “just cause”—it depends upon the specific facts and circumstances in each case. Furthermore, “not every violation of law gives rise to ‘just cause’ for employee discipline.”

7. Respondent has not met the burden of persuading the Court by the greater weight of the evidence presented that it had just cause to terminate Petitioner’s employment. Based on the evidence presented concerning one allegation, Petitioner was dismissed for prior actions for which she had been previously exonerated after a review by Respondent. In the second allegation, the Court finds as matter of law that Petitioner’s actions did not rise to the level of insubordination. The credible evidence presented shows that Petitioner did not place any “business related” telephone calls in violation of her directive. While no definition of “business related” appears to have been provided to the Petitioner, but the phrase would be accorded its usual and customary definition in that it is not a complex phrase.

8. Respondent has failed to carry its burden of proof and has failed to prove that Petitioner should be dismissed for unacceptable personal conduct violations, violation of known or written work rules (insubordination) and/or conduct unbecoming a state employee that is detrimental to state service.

DECISION

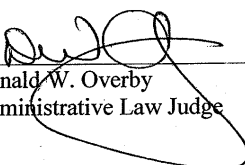
Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent’s decision to terminate Petitioner’s employment should be **reversed** and Petitioner should be retroactively reinstated with back pay and attorney’s fees.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this Decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 26th day of July, 2012.



Donald W. Overby
Administrative Law Judge


A copy of the foregoing was mailed to:

Michael Byrne
Wachovia Capital Center
Suite 1130
150 Fayetteville Street Mall
Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Mr. Walter Brock
Mr. Matthew Gray
Young Moore and Henderson PA
Post Office Box 31627
Raleigh, NC 27622

Mr. Randal Seago
Melrose, Seago & Lay, PA
PO Box 1011
Sylva, NC 28779
ATTORNEY FOR RESPONDENT

This the 26th day of September, 2012.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431-3000
Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA 2012 SEP 26 PM 3:06 IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF ORANGE

Office of
Administrative Hearings

12 OSP 02222

LARRY C. GOLDSTON,

Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA AT
CHAPEL HILL,

Respondent.

FINAL DECISION

The above-captioned case was heard before the Honorable Joe L. Webster,
Administrative Law Judge, on 28 August 2012, in Raleigh, North Carolina.

APPEARANCES

FOR PETITIONER:

Henry Clay Turner
McSurely & Turner
109 North Graham Street, Suite 100
Chapel Hill, North Carolina 27516

FOR RESPONDENT:

Brian R. Berman
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602

EXHIBITS

Admitted for Petitioner:

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
1	06/07/11	Performance review of Larry Goldston for 06/01/2010 – 05/31/2011
2	06/03/10	Performance review of Larry Goldston for 06/01/2009 – 05/31/2010
3	05/19/09	Performance review of Larry Goldston for 06/01/2008 – 05/31/2009

4	05/23/08	Performance review of Larry Goldston for 06/01/2007 – 05/31/2008
5	05/25/07	Performance review of Larry Goldston for 06/01/2006 – 05/31/2007
7	06/04/11	Callback log from computer assisted dispatch for 06/04/2011
8	06/05/11	Callback log from computer assisted dispatch for 06/05/2011 (at 6:21 a.m.)
9	06/05/11	Callback log from computer assisted dispatch for 06/05/2011 (at 11:00 a.m.)
12	07/14/11	Disciplinary decision of suspension without pay
13	10/18/11	Email from Kurt Squires to Robert Humphreys
14	10/20/11	Disciplinary decision of dismissal
18		UNC-Chapel Hill Facilities Services On-Call Policy

Admitted for Respondent:

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
A		UNC-Chapel Hill Facilities Services On-Call Policy
B	06/30/11	Email from Steven Lofgren to Robert Humphreys
C	06/30/11	Photographs from email from Steven Lofgren to Robert Humphreys
D	12/01/11	Email from Dennis Pickett to Robert Humphreys
E	06/07/11	Performance review of Larry Goldston for 06/1/2010 – 05/31/2011
F	05/27/11	Weekly callback duty for May 31, 2011 to June 7, 2011
G	06/09/11	Written warning for unsatisfactory job performance
H	07/14/11	Disciplinary decision of suspension without pay
I	09/26/11	Weekly callback duty for October 4, 2011 to October 11, 2011
J	10/17/11	Notice to attend pre-disciplinary conference
K	10/20/11	Disciplinary decision of dismissal
L	06/04/11	Callback log from computer assisted dispatch for 06/04/2011

M		Callback log from computer assisted dispatch for 10/08/2011
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WITNESSES

Called by Petitioner: Larry Goldston

Called by Respondent: Robert Humphreys
Kurt Squires
Amy Oakley
Mari Forbes

ISSUES

1. Whether Respondent had just cause to terminate Petitioner's employment for unsatisfactory job performance.
2. Whether UNC-Chapel Hill discriminated against Petitioner on the basis of his race or color when terminating his employment.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, 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, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. At the time of his discharge, Petitioner Larry C. Goldston was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act), and was a citizen of Chatham County, North Carolina. Petitioner's race is African American.
3. Respondent, The University of North Carolina at Chapel Hill (UNC-Chapel Hill), is subject to Chapter 126 of the North Carolina General Statutes, and was Petitioner's employer.

4. Petitioner was employed by Respondent as a Facility Maintenance Technician (i.e., a maintenance mechanic) within UNC-Chapel Hill's Facilities Services-Housing Support department. In his job as a maintenance mechanic, Petitioner was expected to perform plumbing, electrical, carpentry, and other general maintenance and repair work for the residence halls and other housing buildings on campus.
T pp. 20-21; Resp.'s Ex. E
5. At the time of the incidents relevant to this case, Petitioner was supervised by Kurt Squires, who supervised a shop of eleven mechanics and plumbers in the Housing Support department of Facilities Services. Squires had been a supervisor for approximately 12 years, and he had supervised Petitioner for approximately 18 months. Squires was supervised by Robert Humphreys, the superintendent of Housing Support for the Facilities Services division. Humphreys had been in his position for more than 19 years. Humphreys supervised five supervisors, including Squires, and approximately 60 tradesmen, including Petitioner. In turn, Humphreys was supervised by Edd Lovette, the Building Services director within Facilities Services. **T pp. 15-16; 65-66**
6. One of the five "principal functions" of Petitioner's job was to perform on-call or "callback" duty. Callback duty is maintenance work performed after working hours or on weekends, with the mechanic on-call for service requests or emergencies that may arise.
T p. 20, 67-69; Resp.'s Ex. E
7. With callback duty a principal function of the job, Petitioner was required to be familiar with campus facilities and the residence halls, including the locations of significant mechanical systems, water valves, electrical switchgear, emergency generators, and utility systems. Petitioner was expected to repair or find help in correcting any maintenance problems arising while on-call. He was expected to know the callback process and be familiar with the communication equipment provided by UNC-Chapel Hill for callback duties. Finally, as part of fulfilling this principal function of his job, Petitioner was expected to respond to callbacks in a reasonable amount of time. He was instructed to keep the cell phone and pager provided by UNC-Chapel Hill within arm's-length at all times while on callback duty. **T p. 68, 70-71; Resp.'s Ex. A; Resp.'s Ex. E**
8. A maintenance mechanic on callback duty is on-call for one week at a time, from Tuesday morning to the following Tuesday morning. He is on-call during weekdays from 6:30 p.m. until 8:00 a.m., and all 24 hours a day on weekends or holidays. Depending on the number of mechanics in various departments, a mechanic is only on callback duty once every 20 weeks or so. **T pp. 20-21**
9. Besides their regular salary, mechanics on callback duty are paid \$3.00 per hour for every hour of callback duty regardless of whether they are called in, totaling approximately \$350 per week. If they are called in, maintenance mechanics receive additional pay for their work, at their overtime pay rate. **T pp. 21-22**

10. UNC-Chapel Hill provides maintenance mechanics on callback duty with cell phones and pagers during their week of duty. The UNC cell phones and pagers are rotated to the new maintenance mechanics on-call for each week. **T pp. 22-23, 73, 80**
11. UNC-Chapel Hill's Public Safety Department, which has a twenty-four hour dispatch center, makes the calls and pages to the maintenance mechanics that are on callback duty. The Public Safety Department receives a weekly callback list to contact various tradesmen who are on-call. The Public Safety Department generates a log of each call and page made through its computer-aided dispatch system. **T pp. 22, 111-113; Resp.'s Ex. F; Resp.'s Ex. I**
12. For callbacks, UNC-Chapel Hill's Facilities Services procedure is for the Public Safety Department to call the UNC cell phone first. If there is no response, the Public Safety Department then pages the maintenance mechanic on the UNC pager. If there is still no response, they then call another contact number, such as a home phone or personal cell phone. The dispatchers may try these methods multiple times to reach the on-call mechanic. **T pp. 22-23, 115-116; Resp.'s Ex. F; Resp.'s Ex. I; Resp.'s Ex. L; Resp.'s Ex. M**
13. According to UNC-Chapel Hill's Facilities Services On-Call Policy, the maintenance mechanic on callback duty "must be available" via either phone or pager "at all times." **T p. 26, 59; Resp.'s Ex. A**
14. A maintenance mechanic on callback duty should respond "in a timely manner," generally no more than 15 or 20 minutes after the Public Safety Department tries to reach him. **T pp. 26-27, 120; Resp.'s Ex. A**
15. If the maintenance mechanic cannot be reached while on-call, UNC-Chapel Hill's Facilities Services procedure is for the Public Safety Department to call a supervisor of the maintenance mechanic. Robert Humphreys is designated as the first supervisor to contact for maintenance mechanics in the Housing Support department. If Humphreys cannot be reached, the Public Safety Department contacts Humphrey's supervisor. **T pp. 23, 121; Resp.'s Ex. F; Resp.'s Ex. I**
16. If a maintenance mechanic knows there may be a problem reaching him via the UNC cell phone, the UNC pager, or his third contact number, he can alert his supervisor and the Public Safety Department and designate a different number to reach him. **T pp. 25-26, 120**
17. UNC-Chapel Hill's Facilities Services issued its current on-call policy in September 2007. The policy specifies:

An employee designated for on-call time is not normally required to remain on University premises, but is required to be in fit physical condition in order to respond to any callback received during the period he or she is designated for on-

call duty. If an employee becomes physically unable to respond to a call, it is the employee's responsibility to notify the Public Safety Department and his/her supervisor.

An employee scheduled for on-call duty is subject to callback by the Public Safety Department or appropriate supervisors of the Facilities Services Division. Contact may be made by telephone or by use of the On-Call Pager System. Thus, an employee designated for on-call time must be available by one of these means of communication at all times.

An employee contacted should respond to the Public Safety Department dispatcher in a timely manner by calling 919-962-8100 for further instructions regarding the callback situation. If the on-call person is not within the Chapel Hill telephone district, the call may be placed as a collect call.

Resp.'s Ex. A

18. Prompt responses by maintenance mechanics on callback duty are important because, depending on the nature of the problem, a failure to respond could put the health or safety of residents in jeopardy, or could result in damage to the property of the residents or UNC-Chapel Hill. **T p. 24; Resp.'s Ex. A**
19. Because of the potential danger or jeopardy involved for maintenance problems or emergencies, UNC-Chapel Hill's on-call policy states that "[i]t is imperative that employees of the Facilities Services Division comply with the policy and procedures outlined." Accordingly, maintenance mechanics can be subject to discipline for failing to respond while on-call. "Failure to respond to a telephone call or a page and/or refusal to report for duty when called by the Public Safety Department or an authorized Facilities Services supervisor during the period an employee is designated for on-call duty will result in loss of on-call pay for that shift, and may also result in disciplinary action, up to and including dismissal." **T pp. 27-28; Resp.'s Ex. A**
20. The UNC-Chapel Hill Facilities Services on-call policy was reasonable and appropriate. Petitioner made no allegation and presented no evidence that it was unreasonable or inappropriate, nor that it was unevenly or inconsistently applied.
21. It is very rare for maintenance mechanics not to respond to calls or pages when they are on callback duty. Amy Oakley, the communications manager for UNC-Chapel Hill's Public Safety Department, served six years as a police telecommunicator in its police dispatch center and has served as the manager for the past 12 years. She testified that only "very seldom" would employees on callback duty fail to respond to the Public Safety Department's calls, and that she did not recall any instance of it happening other than when Petitioner failed to respond. **T pp. 109-110, 119**

22. Kurt Squires testified that in his 12 years as a supervisor, none of the maintenance mechanics he supervised had ever had more than one failure to respond while on callback duty, except Petitioner. **T p. 91**

23. Robert Humphreys testified that in his 19 years as a supervisor, he has been called only half a dozen times because a maintenance mechanic did not respond to a call or page. Humphreys testified that in those 19 years, no mechanic other than Petitioner had ever failed more than once to respond to the Public Safety Department while on-call. Humphreys further testified he has never had to discipline anyone other than Petitioner for failing to respond to the Public Safety Department. **T pp. 44-45, 47**

24. On 4 June 2011, a Saturday, Petitioner was on callback duty. The Public Safety Department attempted to reach Petitioner to respond to a resident's stopped up kitchen sink and leaking pipe. At 9:43 a.m., the dispatcher called Petitioner's UNC cell phone and left a voicemail message; paged him; called his home phone but no answering machine was set up; and paged him again. At 9:52 a.m., the dispatcher called Petitioner on his UNC cell phone; paged him; and called his home phone. At 10:04 a.m., the dispatcher again called Petitioner on his UNC cell phone; paged him; and called his home phone. **T pp. 28, 73, 75-76, 115-116; Resp.'s Ex. F; Resp.'s Ex. G; Resp.'s Ex. L**

25. Because the dispatcher could not reach Petitioner, she followed the procedure and called Robert Humphreys. Starting at about 10:30 a.m., Humphreys called Petitioner's UNC cell phone and home phone but could not reach Petitioner. He left a message on the UNC cell phone. Humphreys then went to campus to try to respond to the maintenance problem. **T pp. 28-29, 75; Resp.'s Ex. G; Resp.'s Ex. L**

26. Humphreys again called Petitioner's home phone. At around 11:30 a.m., Petitioner's wife answered and said that Petitioner was out running errands and did not have his UNC cell phone on him. Since Petitioner was carrying his own personal cell phone, Humphreys asked Petitioner's wife to call her husband and have him call Humphreys. **T pp. 29, 75; Resp.'s Ex. G**

27. Petitioner finally responded to the Public Safety Department dispatcher at 11:55 a.m. He spoke to Humphreys at approximately 12:00 p.m. Humphreys gave Petitioner a verbal counseling and told him he should have his UNC cell phone with him at all times while on-call. **T pp. 29, 75; Resp.'s Ex. G**

28. Although the UNC cell phone was designated as the primary means of contact for maintenance mechanics while on callback duty, Petitioner admitted he did not have the UNC cell phone with him on 4 June 2011. **T p. 75, 161, 167; Resp.'s Ex. G**

29. The next day, on 5 June 2011, a Sunday, Petitioner was again on callback duty. After receiving a maintenance request at 6:23 a.m. for a malfunctioning disposal, the Public Safety Department attempted to reach Petitioner. The dispatcher called Petitioner's UNC

cell phone; paged him; and called his home phone. Petitioner did not respond. **T pp. 30, 77-78; Pet.'s Ex. 8; Resp.'s Ex. G;**

30. When the dispatcher could not reach Petitioner, he called Robert Humphreys at 6:29 a.m. Humphreys repeatedly called Petitioner's UNC cell phone and home phone but could not reach Petitioner until approximately 8:00 a.m. **T p. 30; Pet.'s Ex. 8; Resp.'s Ex. G**
31. On 9 June 2011, Petitioner received a written warning regarding his two failures to respond while on-call. As a "required correction" for his performance, the written warning specified that when Petitioner was on callback duty in the future, "you will ensure that you maintain the capability of being contacted by UNC Public Safety." **T pp. 31, 74-75, 79; Resp.'s Ex. G**
32. The written warning further warned that if Petitioner did not "make and sustain these job performance corrections immediately" he could be subject to "further disciplinary action, up to and including dismissal." **Resp.'s Ex. G**
33. Petitioner did not file a grievance challenging his written warning. **T pp. 31, 78**
34. As an excuse for his failures to respond to the Public Safety Department's calls on June 4 and June 5, 2011, Petitioner claimed that his pager did not receive the pages. Kurt Squires took the pager to the university's information technology staff, which found no problems with the pager. Although that same pager had been rotated every week among the various other maintenance mechanics on call, no one else ever reported a problem with the pager. Nevertheless, Squires replaced the pager with a new pager. **T pp. 79-80**
35. Squires held a meeting with the maintenance mechanics and plumbers he supervised and instructed them to keep their UNC cell phone and pager with them at all times when they were on callback duty, and to put the UNC cell phone and pager on their headboard or nightstand at night. **T p. 100; Resp.'s Ex. K**
36. On 30 June 2011, Petitioner was working with another maintenance mechanic, Michael Green, in a campus residence hall. That morning, the assistant director of UNC-Chapel Hill's Department of Housing and Residential Education, Steve Lofgren, was conducting a random check of the residence hall. On the third floor, Lofgren came across a locked room, which differed from all the other rooms, which were unlocked. He made noise trying to enter the room but could not do so, went downstairs to get a key, and returned to the room. Upon unlocking the door, Lofgren found Petitioner and Green. The lights were off and the blinds were closed. Unlike all the other rooms, which had furniture piled on the beds to allow for floor cleaning, this room had the furniture off the beds and on the floor. The beds were rumpled as though they had been slept on. There was no sign of any work tools or materials. Green claimed that he and Petitioner were changing air filters, but there were no filters in the room, and regardless that would not explain the other conditions in the room. **T pp. 31-38; Resp.'s Ex. B; Resp.'s Ex. C; Resp.'s Ex. H**

37. When questioned about their conduct in the locked room, Michael Green claimed that Petitioner was buying a cell phone game. But Petitioner gave a different story in his pre-disciplinary conference on 13 July 2011. Although he gave many excuses for his conduct in the locked room, he made no mention whatsoever of his cell phone, nor of buying or playing a game on it. At the 28 August 2012 OAH hearing, however, Petitioner claimed for the first time that he was learning how to operate his cell phone and learning its controls. On cross-examination, he admitted he could have been buying or playing a game on his cell phone. **T pp. 175, 192-193; Resp.'s Ex. H**
38. Petitioner admitted his conduct in the locked room on 30 June 2011 was mistaken and inappropriate, and that he had done something wrong. **T p. 177, 194; Resp.'s Ex. H**
39. On 14 July 2011, Petitioner received a disciplinary decision of suspension without pay for the week beginning 18 July 2011. **T pp. 38, 81-83; Resp.'s Ex. H**
40. Michael Green, a Caucasian, received the same disciplinary decision of suspension without pay as Petitioner, an African American. **T pp. 39, 83-84**
41. Petitioner did not file a grievance challenging his suspension for a week without pay. **T pp. 38, 83**
42. On 9 October 2011, a Sunday, Petitioner was on callback duty. This was the first time he had been on callback duty since June 2011, when he had received his written warning. The Public Safety Department attempted to reach Petitioner to respond to a maintenance request by a locksmith working on an exterior door to a residence hall that could not close or be secured. At 3:07 a.m., the dispatcher called Petitioner's UNC cell phone and paged him. When Petitioner did not respond, the dispatcher called Robert Humphreys at 3:22 a.m. Humphreys called Petitioner's UNC cell phone and left a message, and called Petitioner's home phone. After several attempts at contacting Petitioner, Humphreys called the locksmith and had the locksmith call another mechanic to provide assistance. **T pp. 40-41, 89-90, 117-119; Resp.'s Ex. I; Resp.'s Ex. J; Resp.'s Ex. K; Resp.'s Ex. M**
43. Almost five hours after the first calls and pages were sent to Petitioner, he finally responded to Humphreys at approximately 7:50 a.m. Petitioner told Humphreys that he didn't hear his phone ring and that his pager did not receive the pages. **T p. 41, 182; Resp.'s Ex. J; Resp.'s Ex. K**
44. Humphreys checked with UNC-Chapel Hill's information technology staff to determine if the pager used by Petitioner was receiving pages. The information technology staff checked with the pager's service provider, USA Mobility, which indicated that the pager received 9 pages during the month of October 2011. The pager was used regularly and received pages in the months prior to and following October 2011. **T pp. 41-42; Resp.'s Ex. D**

45. On 18 October 2011, Kurt Squires conducted a pre-disciplinary conference with Petitioner. Also present at the pre-disciplinary conference was Mari Forbes, Manager of Employee and Management Relations in UNC-Chapel Hill's Office of Human Resources. **T pp. 86-87, 138-139; Resp.'s Ex. J; Resp.'s Ex. K**
46. At his pre-disciplinary conference, Petitioner admitted that his UNC cell phone was not with him in the bedroom while he was asleep during the night of 9 October 2011, but instead he had left the UNC cell phone in his kitchen. Petitioner stated he did not hear the UNC cell phone ring. He also claimed he did not receive pages on his pager. **T pp. 86, 139, 178, 180, 182; Resp.'s Ex. K**
47. Petitioner also stated that he had taken a pain pill for his leg. Petitioner said the pain pill had not previously made him sleepy when he had taken it during the day. Petitioner had not indicated to anyone at the University that he had any kind of health condition, nor informed anyone at the University that he was taking any pills which could interfere with fulfilling his callback responsibilities. **T pp. 86-87, 139, 178, 182; Resp.'s Ex. K**
48. On 20 October 2011, UNC-Chapel Hill discharged Petitioner for unsatisfactory job performance. Petitioner had failed a principal function of his job to respond to the Public Safety Department while on callback duty on three separate occasions. He had received a prior written warning for the first two failures while on callback duty, and he had a separate suspension without pay for unacceptable personal conduct regarding his conduct in the locked dorm room with Michael Green. **Resp.'s Ex. K**
49. After his discharge on 20 October 2011, Petitioner appealed through UNC-Chapel Hill's grievance process. Petitioner argued he was discharged without just cause, and also argued his discharge was a result of race or color discrimination. The university grievance committee heard testimony from UNC-Chapel Hill's and Petitioner's witnesses. At the hearing, Petitioner presented no evidence of any kind relating to race or color discrimination. On the issue of just cause the grievance committee found, among other things, that Petitioner was unable to provide a valid explanation for his failure to respond to pages. The grievance committee unanimously affirmed the discharge of Petitioner for unsatisfactory job performance. **T p. 200; Document Constituting Agency Action**
50. At the 28 August 2012 OAH hearing, Petitioner admitted it was his responsibility to keep the UNC cell phone and pager with him at all times while on callback duty. **T p. 196**
51. At the 28 August 2012 OAH hearing, Petitioner made various assertions for why he was unable to be reached while on callback duty via his home phone, pager, or UNC cell phone, or pager. He claimed his home phone worked "intermittently" and would "ring sometimes but not all the time." For the pager, Petitioner claimed he did not receive pages on each of the three occasions he failed to respond to the Public Safety Department's attempts at reaching him, though he also claimed that "the best way to reach me would be to page me because, you know, that had been working for me since

I've been working -- since I've been on call-back for years even before they had cell phones." Petitioner claimed he did not receive pages on only those three instances, in spite of the evidence that UNC-Chapel Hill made repeated pages to him on those occasions, that he claimed this same problem occurred on two different pagers, that he received pages at all other times, that the information technology staff found no problem with the pagers, and that the many other workers who used those same pagers had no problems with them. As for his UNC cell phone, Petitioner gave conflicting answers regarding his cell phone service. At first he testified he could neither make nor receive calls on his UNC cell phone when he was at his house. However, Petitioner later testified he told Humphreys that the cell phone service at his house was "spotty" and that he did not get "good reception" though he did not claim he got no reception. In cross-examination, he admitted his cell phone service was "spotty," contradicting claims that he received no reception. He further stated on redirect examination that to be "reachable in the call-back process," he needed to make sure "the cell phone stayed charged, and to keep it in open view. If I've got it in open view, I should be able to hear it, you know, because I don't live in a great big house. So if it went off at any time, it should -- I should be able to hear it." He also acknowledged that he received messages and indications of missed calls on his UNC cell phone. **T pp. 159, 160, 167, 168, 178, 180, 182, 189, 190, 195, 196, 203**

52. Petitioner's testimony regarding his home phone, pager, and UNC cell phone was not plausible or credible. According to Petitioner, he was unable to be reached on three separate occasions when he was on callback duty because of simultaneous failures of his home phone, pager, and UNC cell phone. For his 9 October 2011 failure to respond to calls and pages from both the Public Safety Department and Robert Humphreys, Petitioner failed to respond for nearly five hours. Petitioner asserts that his claimed intermittent home telephone did not ring any of the times it was called. At the same time, he claims that his UNC cell phone did not ring on any of the times it was called, though the phone registered calls and a voicemail message and Petitioner admits the cell phone was in his kitchen and he was in his bedroom asleep. Simultaneously, Petitioner claims his pager received none of the pages sent to it despite working at all other times, the same as he claimed with the previous pager, even though none of the numerous other people using the pager had any problems and the information technology staff found no problems with either pager. Petitioner's self-serving claims must be weighed against the testimonial and documentary evidence presented by UNC-Chapel Hill of numerous calls and pages to his home phone, UNC cell phone, and pager, as well as weighed against his own inconsistent and contradictory testimony described above. At hearing, Petitioner testified he had problems with his home phone; that it had been broken and would ring sometimes and not at other times. He also testified they had small children would mess with it. Petitioner offered no plausible reason as to why he did not simply buy a new home telephone. **T. p. 159**
53. By letter dated 6 March 2012, UNC-Chapel Hill issued its final agency decision to discharge Petitioner on the basis of unsatisfactory job performance. **Document Constituting Agency Action**

54. As explained in the above findings of fact, from the hearing testimony of Robert Humphreys, Kurt Squires, Amy Oakley, and Mari Forbes, as well as the presentation of its exhibits, Respondent UNC-Chapel Hill demonstrated with substantial evidence that Petitioner was properly discharged with just cause for unsatisfactory job performance.
55. Petitioner, who is African American, contends his discharge was discriminatory on the basis of race and color. However, Petitioner presented no evidence of any kind of race or color discrimination. He produced no testimony from any witness showing race or color discrimination. He presented no testimony that any of the people directly or indirectly involved in his several disciplinary actions—including Robert Humphreys, Kurt Squires, Edd Lovette, Steve Lofgren, Amy Oakley, Mari Forbes, or others—were discriminating against him. He presented no documents of any kind indicating or showing discrimination. Even in his own testimony, Petitioner made no allegation of race or color discrimination, providing only his vague recollections of the waxing and waning of numbers of African Americans working in his department over the course of 21 years. Moreover, Petitioner's counsel indicated prior to opening statements that Petitioner viewed his discharge "primarily as a just-cause case."
56. Furthermore, the evidence showed that when Petitioner was suspended without pay for a week for his conduct in the locked dorm room, his white co-worker received an identical punishment. In addition, UNC-Chapel Hill presented testimony that when a white tradesman (a "life safety technician") failed to respond while he was on-call, he received for his first offense a suspension of a week without pay, in contrast to Petitioner who received a written warning for two failures to respond while on callback duty.
T pp. 39, 83-84, 143-144
57. Petitioner did not present sufficient evidence to make a prima facie case of race or color discrimination.
58. UNC-Chapel Hill provided a legitimate, non-discriminatory rationale for discharging Petitioner for his unsatisfactory job performance.
59. Petitioner did not present evidence to show UNC-Chapel Hill's stated rationale was a pretext for discrimination.
60. At the close of evidence during the 28 August 2012 hearing, the undersigned granted UNC-Chapel Hill's motion to dismiss Petitioner's claim of race and color discrimination.
T p. 217
61. The undersigned finds as a fact that UNC-Chapel Hill dismissed Petitioner because of his unsatisfactory job performance and not because of his race or color.
62. The undersigned finds as a fact that UNC-Chapel Hill complied with all procedural requirements in dismissing Petitioner.

63. Portions of Petitioner's testimony were not credible.
64. Robert Humphreys, Kurt Squires, Amy Oakley, and Mari Forbes were all credible witnesses. Furthermore, crucial parts of their testimony were supported by documentation. All of Respondent's exhibits were admitted into evidence.
65. Petitioner had in excess of 20 years employment with the University of North Carolina and there is no evidence of record that prior to the incidents giving rise to Petitioner's termination, that Petitioner had not previously been cited for failing to respond to emergency callbacks. Petitioner's Annual Performance Review dated June 1, 2010-May 31, 2011 indicates he received a "good" relating to emergency callback service orders.

CONCLUSIONS OF LAW

Based on: the sworn testimony of witnesses, including assessment of the witnesses' credibility, demeanor, interest, bias, and prejudice; assessment of the reasonableness and consistency of each witness's testimony; consideration of the documents admitted into evidence; and the entire record in this proceeding; the undersigned makes the following conclusions of law, as follows:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the issues in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. For the issue of just cause termination, Respondent met its burden of preponderance of evidence to show it had just cause to discharge Petitioner. Petitioner's arguments to the contrary are without merit.
3. The undersigned finds no pre-hearing procedural errors which violate NCGS 150B-23.
4. For the issue of race or color discrimination, Petitioner failed to meet his burden of preponderance of evidence to show discrimination. Petitioner's arguments to the contrary are without merit.
5. A career State employee may be discharged only for just cause. N.C.G.S. § 126-35(a). The State employer bears the burden of demonstrating just cause. N.C.G.S. § 126-35(d).
6. "Unsatisfactory job performance is defined as "work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency." 25 N.C.A.C. 1J.0614(9). While Petitioner attorney's argument that discipline for unsatisfactory job performance "is to assist and promote improved employee performance, rather than to punish, (citing 25NCAC 01J .0605 (a), it is well settled that unsatisfactory job performance may constitute just cause for dismissal. 25 N.C.A.C. 1J.0604(c).

7. To be dismissed for unsatisfactory job performance, an employee must have a current unresolved incident of unsatisfactory job performance and at least two prior active warnings for unsatisfactory job performance or unacceptable personal conduct, as well as a pre-disciplinary conference. 25 N.C.A.C. 1J.0605(b) and (c); State Personnel Manual, § 7, page 6.
8. Prior to his discharge for unsatisfactory job performance on 20 October 2011, Petitioner had a written warning for unsatisfactory job performance on 10 June 2011; a suspension for a week without pay on 14 July 2011 for unacceptable personal conduct; and a pre-disciplinary conference on 17 October 2011.
9. Petitioner did not file a grievance regarding either his written warning or his suspension for a week without pay.
10. The UNC-Chapel Hill Facilities Services on-call policy was reasonable and appropriate. Petitioner did not allege it was unreasonable or inappropriate, or that it was unevenly or inconsistently applied.
11. Petitioner's job performance, summarized in the 20 October 2011 disciplinary decision of dismissal and the final agency decision dated 6 March 2012, and detailed above in the Findings of Fact, constituted unsatisfactory job performance.
12. Petitioner had three separate instances of failing to respond to calls and pages from the Public Safety Department and his supervisor while he was on callback duty, violating one of the "principal functions" of his job. For the last instance that led to his discharge—after a verbal counseling from Humphreys, a written warning, and a shop meeting repeating expectations—Petitioner failed to respond for nearly five hours. UNC-Chapel Hill's policy explicitly set forth that "[f]ailure to respond to a telephone call or a page and/or refusal to report for duty when called by the Public Safety Department or an authorized Facilities Services supervisor during the period an employee is designated for on-call duty will result in loss of on-call pay for that shift, and may also result in disciplinary action, up to and including dismissal." In addition to his unsatisfactory performance, Petitioner had a separate disciplinary suspension for a week without pay for unacceptable personal conduct. Petitioner's job performance was work-related performance that failed to satisfactorily meet his job requirements as specified in the relevant job description, in his annual reviews, and as directed by the management of UNC-Chapel Hill. 25 N.C.A.C. 1J.0614(9).
13. UNC-Chapel Hill demonstrated with credible and substantial evidence that it had just cause for discharging Petitioner.
14. UNC-Chapel Hill had just cause for discharging Petitioner.
15. Petitioner bears the burden of proof on claims of race or color discrimination.

16. North Carolina courts “look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases.” North Carolina Dep’t of Correction v. Gibson, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).
17. The United States Supreme Court has established a burden-shifting framework by which employees may prove employment discrimination. North Carolina Dep’t of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 537-38, 616 S.E.2d 594, 600 (2005). Under this federal scheme, the employee is required to establish a prima facie case of discrimination. Id. Once the employee establishes a prima facie case of discrimination, the burden shifts to the employer to provide a “legitimate, non-discriminatory” rationale for its employment decision. Id. If the employer provides a “legitimate, nondiscriminatory” rationale for its employment decision, the burden shifts back to the employee to provide evidence that the employer’s stated rationale is a “mere pretext” for discrimination. Id. However, the “ultimate burden” of proving that the employer intentionally discriminated against the employee remains with the employee at all times. Gibson, 308 N.C. at 138, 301 S.E.2d at 83.
18. To establish a prima facie case of discrimination, Petitioner must show the following: “(1) that he is a member of a [protected] class . . . (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class, and (3) that the disciplinary measures enforced against him were more severe than those enforced against other employees.” Cook v. CSX Transportation, 988 F.2d 507, 511 (4th Cir. 1992); see also Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1984).
19. Furthermore, Petitioner must raise any allegation of discrimination “within 30 days, either in a direct appeal to the State Personnel Commission or within the departmental grievance procedure, of the date of the action that is alleged to be discriminatory. Failure to raise such an allegation within 30 days shall be cause to have such allegation dismissed.” 25 N.C.A.C. 1B.0350; see also N.C.G.S. § 126-38.
20. The only allegation of discrimination raised by Petitioner was in his grievance regarding his discharge. Accordingly, Petitioner cannot allege his written warning or suspension without pay were discriminatory, and only his discharge is subject to review for discrimination.
21. Although Petitioner raised an allegation of discrimination on the basis of race or color when filing his grievance at UNC-Chapel Hill, he admittedly presented no evidence of any kind in the grievance hearing showing discrimination.
22. At his OAH hearing, Petitioner did not affirmatively attempt to prove a prima facie case, nor did he succeed in meeting his burden for a prima facie case. He did not present evidence to meet the second prong to show that his failure to respond while on callback duty was comparable to misconduct of employees outside his protected class. He

presented no evidence that the disciplinary measures enforced against him were more severe than those enforced against other employees.

23. Even if Petitioner met his burden on the prima facie case, UNC-Chapel Hill provided a legitimate, non-discriminatory rationale for discharging Petitioner for failure to respond while on callback duty, which constituted a failure to meet a "principal function" of his job and thus was unsatisfactory job performance
24. Petitioner did not rebut UNC-Chapel Hill's legitimate, non-discriminatory rationale by providing any evidence that UNC-Chapel Hill's reasons for discharge were a mere pretext for race or color discrimination.
25. Petitioner did not meet his ultimate burden of proving that UNC-Chapel Hill discriminated against him on the basis of race or color. He presented neither direct nor indirect testimonial evidence of discrimination. He presented no testimony from any witness showing race or color discrimination. He presented no documents of any kind showing discrimination. Petitioner's own testimony did not make any allegation of race or color discrimination against any of the individuals involved in his discharge. Petitioner presented no evidence of any racial or color animus on the part of any employee of UNC-Chapel Hill, or any other evidence that would give rise to a reasonable inference that any UNC-Chapel Hill employee made his decision based on Petitioner's race or color.
26. UNC-Chapel Hill moved at the close of evidence to dismiss Petitioner's claim of race or color discrimination. The undersigned granted UNC-Chapel Hill's motion.
27. Petitioner's testimony was not credible relating to why he did not respond to emergency callback.
28. Robert Humphreys, Kurt Squires, Amy Oakley, and Mari Forbes were all credible witnesses.
29. Respondent followed all the required procedures required to dismiss Petitioner for unsatisfactory job performance.
30. Based on all foregoing Findings of Fact and Conclusions of Law, Petitioner's actions constituted unsatisfactory job performance. Respondent UNC-Chapel Hill had just cause to discharge Petitioner. Respondent did not discriminate against Petitioner on the basis of race or color.
31. Petitioner's long past exemplary work history with the University of North Carolina has been considered by the undersigned; however, it alone is not sufficient to rebut Respondent's production at hearing of overwhelming evidence regarding Petitioner's recent unsatisfactory job performance proven by a preponderance of the evidence.

32. Counsel for Petitioner argues that the undersigned should find that the conduct of Petitioner giving rise to his dismissal should have been categorized as "unacceptable personal conduct" rather than "unsatisfactory job performance, and that "just cause requires commensurate discipline citing an "unacceptable conduct" case, Warren v. N.C. Dept. of Crime Control, N.C. Ct. of Appeals No. COA11-884 (June 19, 2012). While the undersigned finds no reason not to extend the commensurate discipline analysis to "unsatisfactory job performance" discipline cases, extending that principle in the instant case does not affect the decision reached herein.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned finds that Respondent has sufficiently proved it had just cause to discharge Petitioner based on his unsatisfactory job performance, and UNC-Chapel Hill's decision to discharge Petitioner is **AFFIRMED**. It is further ordered that Petitioner's claim of discrimination on the basis of race or color is **DISMISSED**.


ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 26th day of September, 2012.

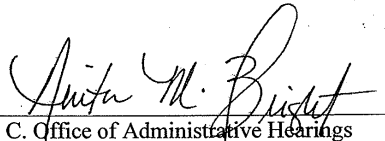

Joe L. Webster
Administrative Law Judge

On this date mailed to:

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This the 26th day of September, 2012:



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