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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:	270th 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
28:04	08/15/13	07/25/13	08/30/13	10/14/13	10/21/13	12/01/13	05/2014	05/12/14
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

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EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

(1) temporary rules;
(2) notices of rule-making proceedings;
(3) text of proposed rules;
(4) text of permanent rules approved by the Rules Review Commission;
(5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
(6) Executive Orders of the Governor;
(7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
(8) orders of the Tax Review Board issued under G.S. 105-241.2; and
(9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

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TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

***Notice** is hereby given that the Department of Environment and Natural Resources, Division of Water Resources (DWR), on behalf of the Environmental Management Commission (EMC), intends to hold a public hearing with the intent to review water quality regulations in Title 15A NCAC 02B .0100-.0110, .0201-.0228, .0230-.0231 and .0300-.0317 located at 15A NCAC 02B Regulations.*

Under Section 303(c)(1) of the federal Water Pollution Control Act (Clean Water Act), each state is required to hold a public hearing, at least once every three years, for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. This process is referred to as the "Triennial Review". North Carolina (NC) Division of Water Resources (DWR), on behalf of the Environmental Management Commission (EMC), is providing this notice to initiate a Triennial Review of water quality standards regulations in Title 15A NCAC 02B .0100-.0110, .0201-.0228, .0230-.0231 and .0300-.0317 located at 15A NCAC 02B Regulations.

Under the Clean Water Act, NC is delegated authority to establish the water body classifications and applicable water quality standards to protect human health and the aquatic environment. Per this delegation, the state is expected to adopt water quality standards (WQS), which include numeric and narrative criteria and designated use classifications, as well as antidegradation provisions, to protect all uses of the waters of the state. Requirements to establish these standards is authorized to the EMC by NC General Statutes (NC GS §143-214.1 and 215.3(a)). Water quality standards are used in various ways such as setting NC's National Pollutant Discharge Elimination System (NPDES) permit limits and evaluating the conditions of the surface waters of the state per Clean Water Act Sections 303(d) and 305(b). Changes to regulations could affect permitting, monitoring, and assessment programs.

No specific changes are proposed by the EMC with this notice. In addition to water quality criteria, use classifications and antidegradation policy, the state will accept comments on variances from surface water quality standards including: two chloride variances for Mt. Olive Pickle Company (Wayne County) and Bay Valley Foods, LLC (Duplin County); a variance from the narrative color standard for Evergreen Paper Products (Haywood County); and Clean Water Act Section 316(a) thermal variances.

Public Hearing:
Date: November 19, 2013
Time: 1:30 PM
Location: Ground Floor Hearing Room,
Archdale Building,
512 N. Salisbury Street,
Raleigh, NC

Comment Period:
Opens: November 1, 2013
Closes: 5:00 PM, January 3, 2014

Comment Procedures:
It is important that all interested and potentially affected persons or parties make their views known to the EMC whether in favor of, or opposed to, any and all of the current regulations. As the state and US Environmental Protection Agency (US EPA) have a strong interest in assuring that the decisions are legally defensible, are based on the best scientific information available, and are subject to full and meaningful public comment and participation, clear records are critical to the administrative review by the EMC and the US EPA.

The public hearing will be recorded. It will consist of a presentation by DWR staff at 1:30 PM, followed by an open comment period. The EMC appointed hearing officer may limit the length of time that you may speak, if necessary, so that all those who wish to speak will have an opportunity. You may attend the public hearing to make verbal comments and/or submit written comments. You may present conceptual ideas, technical justifications, or specific language you believe is necessary and relevant to 15A NCAC 02B surface water quality classifications and standards regulations. No items will be voted on and no decisions will be made at this hearing.

All written comments, data or relevant information received by 5:00 PM, Friday, January 3, 2014 will be considered and included in this Triennial Review hearing record.

Please submit to:

Connie Brower
DENR/Division of Water Resources/Water Planning Section
1611 Mail Service Center
Raleigh, NC 27699-1611

By fax: (919) 807-6497
Or e-mail to: Connie.Brower@ncdenr.gov

Additional questions should be directed to:
Connie Brower
(919) 807-6416.

In case of inclement weather on November 19th, 2013, a continuance date for the public hearing has been established as December 3rd, 2013, 1:30 PM, Ground Floor Hearing Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC. A recorded message regarding any continuance to the hearing record will be available at the above noted telephone number

MEDICAL CARE COMMISISON
EXTENSION OF COMMENT PERIOD

Re: Extension of Public Comment Period for Nursing Home Licensure & Certification Rule 10A NCAC 13D .2210 *Reporting and Investigating Abuse, Neglect or Misappropriation*

The N.C. Medical Care Commission has extended the public comment period for rule 10A NCAC 13D .2210. The comment period, as published in the October 1, 2013 edition of the N.C. Register, was scheduled to conclude on December 2, 2013, but has been extended and will end on December 18, 2013.

The public hearing will be held as published on November 19, 2013 at 10:00am at the Wright Building (Room 131) on the Dorothea Dix Campus, 1201 Umstead Drive, Raleigh, NC 27603.

http://www.ncdhhs.gov/dhsr/ruleactions.html

The 2014 Low-Income Housing Tax Credit Qualified Allocation Plan For the State of North Carolina

I. INTRODUCTION

The 2014 Qualified Allocation Plan (the Plan) has been developed by the North Carolina Housing Finance Agency (the Agency) as administrative agent for the North Carolina Federal Tax Reform Allocation Committee (the Committee) in compliance with Section 42 of the Internal Revenue Code of 1986, as amended (the Code). For purposes of the Plan, the term "Agency" shall mean the Agency acting on behalf of the Committee, unless otherwise provided.

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

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

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

B. Threshold, underwriting and process requirements.

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

In the process of administering the tax credit and Rental Production Program (RPP), the Agency will make decisions and interpretations regarding project applications and the Plan. Unless otherwise stated, the Agency is entitled to the full discretion allowed by law in making all such decisions and interpretations. The Agency reserves the right to amend, modify, or withdraw provisions contained in the Plan that are inconsistent or in conflict with state or federal laws or regulations. In the event of a major:
- natural disaster,
- disruption in the financial markets, or
- reduction in subsidy resources available, including tax credits and RPP funding,

the Agency may disregard any section of the Plan, including point scoring and evaluation criteria, that interferes with an appropriate response.

II. SET-ASIDES, AWARD LIMITATIONS AND COUNTY DESIGNATIONS

The Agency will determine whether applications are eligible under Section II(A) or II(B). This Section II only applies to 9% Tax Credit applications.

A. REHABILITATION SET-ASIDE

The Agency will award up to ten percent (10%) of tax credits available after forward commitments to projects proposing rehabilitation of existing housing. The Agency may exceed this limitation in order to completely fund a project request. In the event eligible requests exceed the amount available, the Agency will determine awards based on the evaluation criteria in Section IV(H)(3).

The following will be considered new construction under Section II(B) below:

- adaptive reuse projects,
- entirely vacant residential buildings,

proposals to increase and/or substantially re-configure residential units.

B. NEW CONSTRUCTION SET-ASIDES

1. GEOGRAPHIC REGIONS

The Agency will award tax credits remaining after awards described above ~~and any under Section II(G)(2)~~ to ~~other~~ new construction projects, starting with those earning the highest scoring totals within each of the following four geographic set-asides and continuing in descending score order through the last project that can be fully funded. The Agency reserves the right to revise the available credits in each set-aside in order to award the next highest scoring application statewide under Section II(G)(1).

WEST 16~~19~~%		CENTRAL 24~~35~~%		METRO 37~~19~~%	EAST 23~~27~~%	
Alexander	Jackson	Alamance	Lee	Buncombe	Beaufort	Johnston
Alleghany	Lincoln	Anson	Montgomery	Cumberland	Bertie	Jones
Ashe	Macon	Cabarrus	Moore	Durham	Bladen	Lenoir
Avery	Madison	Caswell	Orange	Guilford	Brunswick	Martin
~~Buncombe~~	McDowell	Chatham	Person	Forsyth	Camden	Nash
Burke	Mitchell	Davidson	Randolph	Mecklenburg	Carteret	New Hanover
Caldwell	Polk	Davie	Richmond	Wake	Chowan	Northampton
Catawba	Rutherford	~~Durham~~	Rockingham		Columbus	Onslow
Cherokee	Surry	~~Forsyth~~	Rowan		Craven	Pamlico
Clay	Swain	Franklin	Scotland		~~Cumberland~~	Pasquotank
Cleveland	Transylvania	Granville	Stanly		Currituck	Pender
Gaston	Watauga	~~Guilford~~	Stokes		Dare	Perquimans
Graham	Wilkes	Harnett	Union		Duplin	Pitt
Haywood	Yadkin	Hoke	Vance		Edgecombe	Robeson
Henderson	Yancey	Iredell	Warren		Gates	Sampson
					Greene	Tyrrell
					Halifax	Washington
					Hertford	Wayne
					Hyde	Wilson

2. REDEVELOPMENT PROJECTS

(a) If necessary, the Agency will adjust the awards under the Plan to ensure the overall allocation results in awards for two (2) Redevelopment Projects. Specifically, tax credits that would have been awarded to the lowest ranking project(s) that do(es) not meet the criteria below will be

awarded to the next highest ranking Redevelopment Project(s). The Agency may make such adjustment(s) in any set-aside.

(b) The following are required to qualify as a Redevelopment Project:

(i) The site currently contains or contained at least one structure used for commercial, residential, educational, or governmental purposes.

(ii) The application proposes adaptive reuse with historic rehabilitation credits and/or new construction.

(iii) Any required demolition has been completed or is scheduled for completion in 2014 (not including the project buildings).

(iv) A unit of local government initiated the project and has invested community development resources in the Half Mile area within the last ten years.

(v) As of the preliminary application deadline, a unit of local government formally adopted a plan to address the deterioration in the Half Mile area and approved one or more of the following for the project:

- donation of at least one parcel of land,
- waiver of impact, tap, or related fees normally charged, or
- commitment to lend/grant at least $750,000 in the Metro region and $250,000 in the East, Central or West of its housing development funds (net of any amount paid to the unit of government) as a source of permanent funding.

The Agency will require official documentation of each element of local government participation.

C. USDA RURAL DEVELOPMENT

Up to $750,000 will be awarded to eligible rehabilitation and/or new construction project(s) identified by the U.S. Department of Agriculture, Rural Development (RD) state office as a priority. These projects will count towards the applicable set-asides and limits. The maximum award under this set-aside to any one Principal will be one project. Other RD applications will be considered under the applicable set-asides.

D. NONPROFIT AND CHDO SET-ASIDES AND LIMITS

1. SET-ASIDES

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

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

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

(a) Nonprofit Set-Aside

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

- not involve any for-profit Principals or

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

(b) CHDO Set-Aside

In order to qualify as a CHDO application,

- the proposed project must meet the requirements of subsection (D)(1)(a) above and 24 CFR 92.300(a)(1),
- as of the full application deadline, the applicant, any Principal, or any affiliate must not undertake any choice-limiting activity prior to successful completion of the U.S. Department of Housing and Urban Development (HUD) environmental clearance review, and
- the project and owner must comply with regulations regarding the federal CHDO set-aside.

The Agency may determine that the requirements of the federal CHDO set-aside have been or will be met without implementing subsection (D)(1)(b).

2. LIMITS

No more than twenty percent (20%) of the overall allocation will be awarded to projects where a nonprofit organization (or its qualified corporation) is the applicant under Section III(C)(5). New construction awards will be counted towards this limitation first (in score order~~, excluding mortgage subsidy~~), then rehabilitation awards.

E. PRINCIPAL AND PROJECT AWARD LIMITS; BASIS BOOST

1. PRINCIPAL LIMITS

(a) The maximum awards to any one Principal will be a total of $1,800,000 in tax credits, including all set-asides. New construction awards will be counted towards this limitation first (in score order), then rehabilitation awards.

(b) The Agency may further limit awards based on unforeseen circumstances.

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

2. PROJECT LIMIT

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

3. AGENCY-DESIGNATED BASIS BOOST

The Agency may boost the eligible basis of projects awarded in 2014 by up to fifteen percent (15%) if the deadline for the flat nine percent tax credit rate in Section 42(b)(2)(A) is not extended (excluding projects using the DDA or QCT basis increase).

F. COUNTY AWARD LIMITS AND INCOME DESIGNATIONS

1. AWARD LIMITS

(a) Rehabilitation and East, Central, and West Regions

No county will be awarded more than one project under the rehabilitation set-aside. ~~Other than the Metro region, n~~No county will be awarded more than one project under the new construction set aside. ~~Each county in the Metro region will be awarded a minimum of two new construction projects.~~

(b) Metro Region

The initial maximum awards for each county will be its percent share of the Metro region based on population. If any tax credits remain, the Agency will make awards to the next highest scoring application(s). Each county may receive one additional award, even if in excess of its share. ~~The Agency will not accept applications in the following counties: Carteret, Columbus, Davie, Duplin, Edgecombe, Halifax, Hoke, Lee, Macon, and Wilkes.~~

2. INCOME DESIGNATIONS

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

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

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

G. OTHER AWARDS AND RETURNED ALLOCATIONS ~~EXCEEDING LIMITATIONS~~

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

2. An owner returning a valid allocation of 2011 tax credits between October 1, 2013 and December 31, 2013 will receive an allocation of the same amount of 2014 tax credits if:
   - the project has obtained a building permit and closed its construction loan,
   - the owner pays a fee equal to the original allocation fee amount upon the return, and
   - the project's design is the same as approved at full application (other than changes approved by the Agency in writing).

   None of the Principals for the returned project may be part of a 2014 application. The project must place in service in 2014.

~~The Agency may award 2014 tax credits outside of the normal process to projects that: a) allow the Agency to comply with HUD regulations regarding timely commitment of funds, b) prevent the loss of state or federal investment, c) provide housing for underserved populations or d) are part of a settlement agreement of legal action brought against a local government. The total amount of such awards(s) shall not exceed $1,000,000.~~

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

~~4. The Agency may exceed the limitations on awards contained in Sections II(A) and this Section II(G) in order to completely fund a project request.~~

III. DEADLINES, APPLICATION AND FEES

A. APPLICATION AND AWARD SCHEDULE

The following schedule will apply to the 2014 application process for 9% Tax Credits and the first round of tax-exempt bond volume and 4% Tax Credits. The Agency will announce the application schedule for a second round of bond volume and 4% Tax Credits at a later time.

January 2~~4~~5	Deadline for submission of preliminary applications (12:00 noon)
March 1~~7~~8	Market analysts will mail studies to the Agency and Applicants
March 28	Notification of final site scores
April ~~7~~8	Deadline for market-related project revisions
April 1~~4~~5	Deadline for the Agency and Applicant to receive a hard copy of the revised market study, if applicable
May 1~~6~~7	Deadline for full applications (12:00 noon)
August	Notification of tax credit awards

The Agency reserves the right to change the schedule to accommodate weather events or other unforeseen circumstances.

B. APPLICATION, ALLOCATION, MONITORING AND PENALTY FEES

1. All Applicants are required to pay a nonrefundable fee of $5,660~~540~~ at the submission of the preliminary application. This fee covers the cost of the market study or physical needs assessment and a $1,260~~40~~ preliminary application processing fee (which will be assessed for every electronic application submitted). The Agency may charge additional fee(s) to cover the cost of direct contracting with other providers (such as appraisers).
2. All Applicants are required to pay a nonrefundable processing fee of $1, 260~~40~~ upon submission of the full application.
3. Entities receiving tax credit awards, including those involving tax-exempt bond volume, are required to pay a nonrefundable allocation fee equal to 0.72~~0~~% of the project's total qualified basis.
4. The allocation fee will be due at the time of either the carryover allocation or bond volume award. Failure to return the required documentation and fee by the date specified may result in cancellation of the allocation. The Agency may assess other fees for additional monitoring responsibilities.

5. Owners must pay a monitoring fee of $800~~780~~ per unit (includes all units, qualified, unrestricted and employee) prior to issuance of the project's IRS Form 8609.
6. If expenses for legal services are incurred by the Committee or Agency to correct mistakes of the Owner which jeopardize use of the tax credits, such legal costs will be paid by the Owner in the amount charged to the Agency or the Committee.
7. The Agency may assess Applicants or owners a fee of up to $2,000 for each instance of failure to comply with a written requirement, whether or not such requirement is in the Plan. The Agency will not process applications or other documentation relating to any Principal who has an outstanding balance of fees owed; such a delay in processing may result in disqualification of application(s).
8. The Agency will assess $1,500 for closing a state tax credit loan and $2,000 for an RPP closing.

C. APPLICATION PROCESS AND REQUIREMENTS

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

   (a) corporation, including nonprofits,

   (b) limited partnership, or

   (c) limited liability company.

   Only the identified Applicant will have the ability to make decisions with regard to that application and be considered under Section IV(D)(1). The Applicant may enter into joint venture or other agreements but the Agency will not be responsible for evaluating those documents to determine the relative rights of the parties. If the application receives an award the Applicant must become a managing member or general partner of the ownership entity.

IV. SELECTION CRITERIA AND THRESHOLD REQUIREMENTS

Applications must meet all applicable threshold requirements to be considered for award and funding. Scoring and threshold determinations made in prior years are not binding on the Agency for the 2014 cycle.

A. SITE AND MARKET EVALUATION

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

1. SITE EVALUATION (MAXIMUM 60 POINTS)

(a) General Site Requirements:

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

(ii) Required zoning must be in place by the full application submission date, including special/conditional use permits, and any other discretionary land use approval required (includes all legislative or quasi-judicial decisions).

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

(iv) In order to be eligible for RPP funds, the preliminary application must contain the Agency's "Notice of Real Property Acquisition" form. The form must be executed by all parties before or at the same time as the option or contract.

(b) Criteria for Site Score Evaluation:

Site scores will be based on the following factors. Each will also serve as a threshold requirement; the Agency may remove an application from consideration if the site is sufficiently inadequate in one of the categories.

(i) NEIGHBORHOOD CHARACTERISTICS (MAXIMUM 18 POINTS)

Good: 18 points if structures within a Half Mile are well maintained or the site qualifies as a Redevelopment Project (see Section II(B)(2)(b))

Fair: 9 points if structures within a Half Mile are not well maintained and there are visible signs of deterioration

Poor: 0 points if structures within a Half Mile are Blighted or have physical security modifications (e.g. barbed wire fencing or bars on windows)

Half Mile: The half mile radius from the approximate center of the site (does not apply to Amenities below).

Blighted: A structure that is abandoned, deteriorated substantially beyond normal wear and tear, a public nuisance, or appears to violate minimum health and safety standards.

(ii) AMENITIES (MAXIMUM 27 POINTS)

Points will be determined according to the matrix below. The amenity must be open for business as of the preliminary application deadline to be considered.

	driving distance in miles			
	≤ 1	**≤ 2**	**≤ 3**	**> 3**
Grocery	18 pts.	12 pts.	6 pts.	0 pts.
Shopping or pharmacy	9 pts.	6 pts.	3 pts.	0 pts.

For example, an application will receive 6 points if the driving distance between the site and either Shopping or a pharmacy is greater than 1 mile but not more than 2 miles.

The driving distance will be the mileage as calculated by Google Maps and must be a drivable route as of the preliminary application deadline. The measurement will be:

- the point closest to the site entrance to or from
- the point closest to the amenity entrance.

Driveways, access easements, and other distances in excess of 500 feet between the nearest residential building of the proposed project and road shown on Google Maps will be included in the driving distance. For scattered site projects, the measurement will be from the location with the longest driving distance(s).

The following establishments qualify as a Grocery:

Aldi	The Fresh Market	Lowes Foods	Super Target
Bi-Lo	Harris Teeter	Piggly Wiggly	Trader Joe's
Bo's Food Stores	IGA	Publix	Walmart Express
Bloom	Ingle's Market	Red & White	Walmart Neighborhood Market
Compare Foods	Just $ave	Sav-Mor	Walmart Supercenter
Earth Fare	Kroger	Save-A-Lot	Whole Foods
Food Lion			

The following establishments qualify as Shopping:

Big Lot's	Family Dollar	Target	Walmart
Dollar General	Kmart	Super Target	Walmart Express
Dollar Tree	Roses'	Walmart Supercenter	

To qualify as a pharmacy the establishment must have general merchandise items for sale.

(iii) SITE SUITABILITY (MAXIMUM 15 POINTS)

6 points if there is no Incompatible Use, which includes the following activities, conditions, or uses within the distance ranges specified:

Half Mile

- airports
- chemical or hazardous materials storage/disposal
- industrial or agricultural activities with environmental concerns (such as odors or pollution)
- commercial junk or salvage yards
- landfills currently in operation
- sources of excessive noise
- wastewater treatment facilities

A parcel or right of way within 500 feet containing any of the following:

- adult entertainment establishment
- electrical utility substation, whether active or not
- distribution facility
- factory or similar operation
- frequently used railroad tracks
- high traffic corridor
- jail or prison
- large swamp
- power transmission lines and tower

3 points if there are no negative features, design challenges, physical barriers, or other unusual and problematic circumstances that would impede project construction or adversely affect future tenants, including but not limited to: power transmission lines and towers, flood hazards, steep slopes, large boulders, ravines, year-round streams, wetlands, and other similar features (for adaptive reuse projects: suitability for residential use and

difficulties posed by the building(s), such as limited parking, environmental problems or the need for excessive demolition)

3 points if the project would be visible to potential tenants using normal travel patterns and is within 500 feet of a building that is currently in use for residential, commercial, educational, or governmental purposes (excluding Blighted structures or Incompatible Uses)

3 points if traffic controls allow for safe access to the site; for example limited sight distance (blind curve) or having to cross three or more lanes of traffic going the same direction when exiting the site would not receive points.

2. MARKET ANALYSIS

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

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

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

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

(i) the project's capture rate,

(ii) the project's absorption rate,

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

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

(d) Applicants may not increase the total number of units after submission of the preliminary application. After the deadline for completing market-related project revisions Applicants may not increase:

(i) rents, irrespective of a decrease in utility allowances,

(ii) the number of income targeted units in any bedroom type~~the total number of units~~, or

(iii) the number of units in any bedroom type.

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

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

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

(ii) having a particular disability, or

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

B. RENT AFFORDABILITY

1. FEDERAL RENTAL ASSISTANCE

Applicants proposing to convert tenant-based Housing Choice Vouchers (Section 8) to a project-based subsidy (pursuant to 24 CFR Part 983) must submit a letter from the issuing authority in a form approved by the Agency. Conversion of vouchers will be treated as a funding source under

Section VI(B)(6)(d); a project will be ineligible for an allocation if it does not meet requirements set by the Agency as part of the application and award process. Such requirements may involve the public housing authority's (PHA's) Annual Plan, selection policy, and approval for advertising.

2. TENANT RENT LEVELS (MAXIMUM 5 POINTS)

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

(a) If the project is in a High Income county:
- Five (5) points will be awarded if at least twenty-five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below thirty percent (30%) of county median income.
- Two (2) points will be awarded if at least fifty percent (50%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.

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

(b) If the project is in a Moderate Income county:
- Five (5) points will be awarded if at least twenty-five percent (25%) of qualified low-income units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.
- Two (2) points will be awarded if at least fifty percent (50%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income.

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

(c) If the project is in a Low Income county, five (5) points will be awarded for projects in which at least forty percent (40%) of qualified low-income units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income.

(d) Five (5) points will be awarded if the application does not list the state tax credit as a funding source. This option is mutually exclusive with those in subsections (a), (b), and (c) above.

C. PROJECT DEVELOPMENT COSTS AND RPP LIMITATIONS

1. MAXIMUM PROJECT DEVELOPMENT COSTS (NEGATIVE 20 POINTS)

(a) The Agency will assess negative points to applications listing more than the following in lines 5 and 6 of the Project Development Cost (PDC) description, as outlined in Chart A below. The point structure in Chart B will apply to the following:
- all units are detached single family houses or duplexes,
- serving persons with severe mobility impairments,
- development challenges resulting from being within or adjacent to a central business district,
- public housing redevelopment projects, or
- building(s) with both steel and concrete construction and at least four stories of housing.

The per-unit amount calculation includes all items covered by the construction contract, building permits, Energy Star, certifications for green programs, and any other costs not unique to the specific proposal.

Chart A		Chart B	
~~$60~~62,000	-10	~~$71~~73,000	-10
~~$69~~71,000	-20	~~$85~~87,000	-20

(b) The Agency will consider an Applicant's past applications and final cost certifications in determining whether the listed costs are reasonable. For example, if an Applicant has a history of developing projects with a cost-certified line 5 per unit cost of $70,000 but has submitted an application with $59,000 per unit, the Agency may require an explanation. If the justification is inadequate the Agency may either require an increased amount or determine the application is ineligible for award.

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

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

2. RESTRICTIONS ON RPP AWARDS

(a) Projects requesting RPP funds must submit the Agency's "Notice of Real Property Acquisition" form with the preliminary application and may not:

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

(ii) include market-rate units,

(iii) involve Principals who have entered into a workout or deferment plan within the previous year for an RPP loan awarded after January 1, 2004,

(iv) request less than $150,000 or more than $800,000 per project, ~~or~~

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

(vi) have a federally insured loan.

The maximum award of RPP funds to any one Principal will be a total of $1,600,000. Requesting an RPP loan may result in an application being ineligible under Section VI(B)(6)(d) if the Agency has inadequate funds.

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

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

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

RPP Loan = $400,000

local government loan = $200,000

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

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

D. CAPABILITY OF THE PROJECT TEAM

1. DEVELOPMENT EXPERIENCE (MAXIMUM 5 POINTS)

(a) In order to be eligible for an award of 9% Tax Credits, at least one Principal must have successfully developed, operated and maintained in compliance one ~~9%~~ Tax Credit project in North Carolina (excluding any Applicant eligible in the 2012 cycle by virtue of a waiver). The project must have been placed in service between December 1, 200~~7~~6 and January 1, 201~~3~~2. Such Principal must:

(i) be identified in the preliminary application as the Applicant under Section III(C)(5),

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

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

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

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

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

(d) Five (5) points will be awarded if the Principal meeting the eligibility requirement in subsection (D)(1)(a) either:

(i) was a Principal in ten awards of 9% Tax Credits in North Carolina from 200~~7~~6 through 201~~3~~2, or

(ii) has her/his/its principal office in North Carolina (see **Appendix J** for guidance).

2. MANAGEMENT EXPERIENCE

The management agent must have at least:

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

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

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

3. PROJECT TEAM DISQUALIFICATIONS

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

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

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

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

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

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

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

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

(h) has been involved in any project awarded 9% Tax Credits in 2013~~2~~ for which either the equity investment has not closed as of the full application deadline or the "10% test" has not been met;

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

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

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

A disqualification under this subsection (D)(3) will result in the individual or entity involved not being allowed to participate in the 2014 cycle and removing from consideration any application where they are identified.

E. UNIT MIX AND PROJECT SIZE

1. Ten (-10) points will be subtracted from any full application that includes market-rate units. This penalty will not apply where either
   - the rents for all market rate units are at least five percent (5%) higher than the maximum allowed for a unit at 60% AMI and the market study indicates that such rents are feasible, or
   - there is a commitment for a grant or no-payment financing equal to at least the amount of foregone federal tax credit equity and state tax credits.
2. New construction 9% Tax Credit projects may not exceed one hundred and twenty (120) units.
3. New construction tax-exempt bond projects may not exceed two hundred (200) units.
4. All projects must have at least twenty four (24) qualified low-income units.

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

F. SPECIAL CRITERIA AND TIEBREAKERS

1. ENERGY STAR

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

2. GENERAL CONTRACTOR (MAXIMUM 2 POINTS)

Two (2) points will be awarded if the general contractor listed in the full application has its principal office in North Carolina (see **Appendix J** for guidance).

3. UNITS FOR THE MOBILITY IMPAIRED

Five percent (5%) of all units in new construction projects must meet the accessibility standards as defined in **Appendix B** (incorporated herein by reference). THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES). If laws or codes do not require mobility impaired units for a project, a total of ten percent (10%) of the units must be fully accessible. Units for the mobility impaired should be available to all tenants who would benefit from their design and are not necessarily reserved under the Targeting Plan requirements of subsection (F)(4).

4. TARGETING PLANS

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and

not require total income for persons with rental assistance beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSDI benefits.

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

The requirements of this subsection (F)(4) may be fully or partially waived to the extent the Agency determines that they are not feasible. A Targeting Plan template and other documents related to this subsection are included in **Appendix D** (incorporated herein by reference). Owners will agree to complete the requirements of this subsection (F)(4) and **Appendix D** by the earlier of July 178, 20154 or four months prior to the project's placed in service date. (The Agency may set additional interim requirements.) This subsection (F)(4) does not apply to tax-exempt bond applications.

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

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

6. TIEBREAKER CRITERIA

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

(a) First Tiebreaker: The project requesting the least amount of federal tax credits plus RPP per unit based on the Agency's equity needs analysis. The tax credit amount considered for this calculation will be the ten year total.

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

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

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

G. DESIGN STANDARDS

All proposed measures must be shown in the application in order to receive points.

1. THRESHOLD REQUIREMENTS

The minimum threshold requirements for design are found in **Appendix B** (incorporated herein by reference) and must be used for all projects receiving tax credits or RPP funding.

2. CRITERIA FOR SCORE EVALUATION (MAXIMUM OF 30 POINTS)

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

(a) Site Layout

The Agency will award up to five (5) points based on its evaluation of the site layout. The following characteristics will be considered.

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

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

(b) Quality of Design and Construction

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

The Agency will award up to twenty five (25) points for new construction projects based on its evaluation of the quality of the building design, and the materials and finishes specified. The following characteristics will be considered:

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

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

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

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

(c) Adaptive Re-Use

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

The Agency will award up to twenty five (25) points based on the following characteristics:

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

(ii) Aesthetics after adaptation.

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

H. CRITERIA FOR SELECTION OF REHABILITATION PROJECTS

1. GENERAL THRESHOLD REQUIREMENTS

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

(a) have either (i) received a tax credit allocation or (ii) federal project-based rental assistance for at least thirty percent (30%) of the total units,

(b) have been placed in service on or before December 31, 1997,

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

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

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

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

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

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

(i) have total replacement costs of less than $120,000 per unit, including all Agency-required rehabilitation work.

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

2. THRESHOLD DESIGN REQUIREMENTS

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

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

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

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

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

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

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

3. EVALUATION CRITERIA

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

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

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

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

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

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

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

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

V. ALLOCATION OF BOND CAP

A. ORDER OF PRIORITY

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

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

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

B. ELIGIBILITY FOR AWARD

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

1. All projects must meet one of the following requirements:
   (a) at least ten percent (10%) of total units will be affordable to and occupied by households with incomes at or below fifty percent (50%) of county median income, or
   (b) at least five percent (5%) of total units will be affordable to and occupied by households with incomes at or below forty percent (40%) of county median income.
2. Rehabilitation applications must:
   (a) have been placed in service on or before December 31, 1997,
   (b) require rehabilitation expenses in excess of $10,000 per unit,
   (c) not have an acquisition cost in excess of sixty percent (60%) of the total replacement costs,
   (d) not have begun or completed a full debt restructuring under the Mark to Market process (or any similar HUD program) within the last five years, and
   (e) not be deteriorated to the point of requiring demolition.
3. The inducement resolution must be submitted with the full application.
4. In order to be eligible for an award of tax-exempt bond volume, at least one Principal must have successfully developed, operated and maintained in compliance either one 9% Tax Credit project in North Carolina or one tax-exempt bond project. The project(s) must have been placed in service between December 1, 2007~~6~~ and January 1, 2013~~2~~. Such Principal must:
   - be identified in the preliminary application as the Applicant under Section III(C)(5),
   - become a general partner or managing member of the ownership entity, and

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

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

VI. GENERAL REQUIREMENTS

A. GENERAL THRESHOLD REQUIREMENTS FOR PROJECT PROPOSALS

1. PROJECTS WITH HISTORIC TAX CREDITS

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

2. NONPROFIT SET-ASIDE

For purposes of being considered as a nonprofit sponsored application under Section II(D)(1)(a), at least one nonprofit entity (or, where applicable, its qualified corporation) involved in a project must:

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

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

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

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

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

3. ENVIRONMENTAL HAZARDS

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

4. APPRAISALS

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

5. CONCENTRATION

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

6. DISPLACEMENT

For rehabilitation projects and in every other instance of tenant displacement, including temporary, the Applicant must supply with the full application a plan describing how displaced persons will be relocated, including a description of the costs of relocation. The owner is responsible for all relocation expenses, which must be included in the project's development budget. Owners must also comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as revised in 49 C.F.R. Part 24.

7. FEASIBILITY

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

B. UNDERWRITING THRESHOLD REQUIREMENTS

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

1. LOAN UNDERWRITING STANDARDS

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

(b) All projects will be underwritten assuming a constant seven percent (7%) vacancy and must reflect a 1.15 Debt Coverage Ratio (DCR) for twenty (20) years.

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

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

2. OPERATING EXPENSES

(a) New construction (excluding adaptive reuse): minimum of $3,200 per unit per year not including taxes, reserves and resident support services.

(b) Renovation (includes rehabilitation and adaptive reuse): minimum of $3,400 per unit per year not including taxes, reserves and resident support services. For projects with RD loans, the operating expenses will be based upon the current RD approved operating budget.

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

3. EQUITY PRICING

(a) The Agency will conduct a survey of tax credit equity investors to determine appropriate pricing assumptions. Projects will be underwritten using the greater of this amount and the Applicant's projection. The Agency may also set a maximum price. The Agency will announce these amounts by the deadline for market analysts to mail studies. The tax credit rates used for underwriting will be those in effect for the months before the preliminary and full application deadlines.

(b) Equity should be calculated net of any syndication fees. Bridge loan interest typically incurred by the syndicator to enable an up front payment of equity should not be charged to the project directly, but be reflected in the net payment of equity. Equity should be based on tax credits to be used by the investor(s), excluding those allocated to the Principals unless these entities are making an equity contribution in exchange for the tax credits.

4. RESERVES

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

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

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

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

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

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

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

5. DEFERRED DEVELOPER FEES

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

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

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

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

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

6. FINANCING COMMITMENT

(a) For all projects proposing private permanent financing, a letter of intent is required. This letter must clearly state the term of the permanent loan is at least ~~eighteen (18)~~ fifteen (15) years, how the interest rate will be indexed and the current rate at the time of the letter, the amortization period, any prepayment penalties, anticipated security interest in the property and lien position. The interest rate must be fixed and no balloon payments may be due for ~~eighteen~~ fifteenyears.

(b) For all projects proposing public permanent financing, binding commitments are required to be submitted by the full application deadline. Local governments also must identify the source of funding (e.g. HOME, trust fund). All loans must have a fixed interest rate and no balloon payments for at least ~~eighteen (18)~~ fifteen (15) years after project completion. A binding commitment is defined as a letter, resolution or binding contract from a unit of government. The same terms described for the letter of intent (using the format approved by the Agency) from a private lender must be included in the commitment.

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

(d) Applications may only include one set of proposed funding sources; the Agency will not consider multiple financial scenarios. A project will be ineligible for allocation if any of the listed funding sources will not be available in an amount or under the terms described in the application. The Agency may waive this limitation if the project otherwise demonstrates financial feasibility. Project cash flow may not be used as a source of funds.

7. DEVELOPER FEES AND ADDITIONAL CONTINGENCY

(a) Developer fees shall be $12,500~~000~~ per unit for new construction projects and twenty-eight percent point five (28.5%) of PDC line item 4 for rehabilitation projects, both being set at award.

(b) Notwithstanding the amount calculated in subsection (7)(a), the developer fee for any project shall be a maximum of $1,000,000 (the maximum for projects with tax-exempt bonds is $1,500,000).

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

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

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

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

8. CONSULTING FEES

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

9. ARCHITECTS' FEES

The architects' fees, including design and inspection fees, shall be limited to three percent (3%) of the total hard costs plus general requirements, overhead, profit and construction contingency (total of lines 2 through 10 on the PDC description). This amount does not include engineering costs.

10. INVESTOR SERVICES FEES

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

11. PROJECT CONTINGENCY FUNDING

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

12. PROJECT OWNERSHIP

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

13. SECTION 8 PROJECT-BASED RENTAL ASSISTANCE

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

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

14. WATER, SEWER, AND TAP FEES

Any water, sewer, and tap fees charged to the project must be entered on a separate line item of the PDC description. Applications must provide letters from local provider(s) documenting either the amounts or if no fees will be charged.

VII. POST-AWARD PROCESSES AND REQUIREMENTS

A. ALLOCATION TERMS AND REVOCATION

1. At any time between award and issuance of the Form 8609, owners must have written approval from the Agency prior to:

   (a) changing the anticipated or final sources (amount, terms, or provider), including equity;

   (b) increasing the anticipated or final uses by more than two percent (2%);

   (c) altering the designs approved by
   - the Agency at full application, or
   - local building code office,

   including amenities, site layout, floor plans and elevations ("Approved Design");

   (d) starting construction, including sitework; or

   (e) increasing rents for low-income units (does not apply to tax-exempt bonds).

   If an increase in uses or design alteration is due to a local government requirement, owners do not need prior approval but rather must provide the Agency with prompt written notice. Failure to comply with a requirement of this subsection may result in a fine of up to $25,000, revocation of the reservation or allocation, future disqualification under Section IV(D)(3) of any Principal involved, or other recourse available to the Agency.

2. Ownership entities must submit a completed carryover agreement and expend at least ten percent (10%) of the project's reasonably expected basis, both by dates to be determined by the Agency.
3. A federal form 8609 will not be issued until:
   (a) submission of a Final Cost Certification that complies with the Agency's requirements, including a listing of the name and address for all contractors and subcontractors;
   (b) the owner and management company document attendance at an Agency sponsored or approved tax credit compliance seminar sponsored within the previous 12 months;
   (c) monitoring fees have been paid;
   (d) the project has been built according to the Approved Design;
   (e) the Agency determines the project has adhered to all representations made in the approved application and will meet all relevant Plan requirements; and
   (f) documentation of the ownership entity having paid all applicable state and local taxes for the most recent year due.
4. The actual tax credits allocated will be the lesser of the tax credits reserved, the applicable rate multiplied by qualified basis (as approved by the Agency), or the amount determined by the Agency pursuant to its evaluation as required under Section 42(m)(2) of the Code. Projects will be required to elect a project-based allocation. An allocation does not constitute a representation or warranty by the Agency or Committee that the ownership entity or its owners will qualify for the tax credits. The Agency's interpretation of the Code, regulations, notices, or other guidance is not binding on the federal government.
5. Owners must record a thirty (30) year Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits (Extended Use Agreement) stating that the owner will not apply for relief under Section 42(h)(6)(E)(i)(II) of the Code and will comply with other requirements under the Code, Plan, other relevant statutes and regulations and all representations made in the approved application. The Extended Use Agreement also may contain other provisions as determined by the Agency. The owner must have good and marketable title and obtain the consent of any prior recorded lienholder (other than for construction financing) to be bound by the Extended Use Agreement terms.
6. The Agency may revoke an allocation if the owner fails to implement all representations in the approved application. In addition to the terms of Section VII(A)(1), owners will acknowledge that the following constitute conditions to their allocation:
   (a) accuracy of all representations made to the Agency, including exhibits and attachments,
   (b) adherence to the Plan and all applicable federal, state and local laws and ordinances, including the Code and Fair Housing Act,
   (c) provision and maintenance of amenities for the benefit of the tenants, and
   (d) not incurring a penalty under N.C.G.S. § 105-236 for failure to file a return, failure to pay taxes, or having a large tax deficiency (as defined under N.C.G.S. § 105-236). The Agency may request documentation demonstrating all project related taxes have been paid.

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

B. STATE TAX CREDITS

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

1. Loan Option: Loans made by the Agency pursuant to N.C.G.S. § 105-129.42(d) will not be closed until the outstanding balance on the first-tier construction financing exceeds fifty percent (50%) of the state credit amount; the entire loan must be used to pay down a portion of the then existing construction debt.
2. Direct Refund Option: The Agency and ownership entity will enter into an escrow agreement with regard to the refund dollars. The agreement will state, among other reasonable limitations, that issuance of the funds under N.C.G.S. § 105-129.42(g)(1) will not occur until all of the following requirements have been met:
   (a) at least fifty percent (50%) of the activities included in the project's eligible basis have been completed;
   (b) the Agency and local government inspector have conducted their framing inspections and approved all buildings (including community facilities); and
   (c) the outstanding balance on the first-tier construction financing exceeds the total state credit amount (the entire refund must be used to pay down a portion of the then existing construction debt).

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

C. COMPLIANCE MONITORING

1. Owners must comply with Section 42 of the Code, IRS regulations, rulings, procedures, decisions and notices, state statutes, the Fair Housing Act, state laws, local codes, Agency loan documents, **Appendix F** (incorporated herein by reference), and any other legal requirements. The Agency may treat any failure to do so as a violation of the Plan.
2. The Agency will adopt and revise standards, policies, procedures, and other requirements in administering the tax credit program. Examples include training and on-line reporting. Owners must comply with all such requirements regardless of whether or not they expressly appear in the Plan or **Appendix F**. The Agency will have access to any project information, including physical access to the property, all financial records and tenant information.

VIII. DEFINITIONS

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

4% Tax Credit: Low-income housing tax credits available pursuant to Section 42(h)(4) of the Code.

9% Tax Credit: Low-income housing tax credits available for allocation under the state's volume cap pursuant to Section 42(h)(3) of the Code.

Affiliate: As to any person or entity (i) any entity of which a majority of the voting interest is owned by such person or entity, (ii) any person or entity directly or indirectly controlling (10% or more) such person or

entity, (iii) any person or entity under direct or indirect common control with any such person or entity, or (iv) any officer, director, employee, manager, stockholder (10% or more), partner or member of any such person or entity or of any person or entity referred to in the preceding clauses (i), (ii) or (iii).

Applicant: The entity considered under Section III(C)(5).

Choice-Limiting Activity: Includes leasing or disposition of real property and any activity that will result in a physical change to the property, including acquisition, demolition, movement, rehabilitation, conversion, repair, or construction.

Community Service Facility: Any building or portion of building that qualifies under Section 42(d)(4)(C)(iii) of the Code, Revenue Ruling 2003-77, and any Agency requirements for such facilities (which may be published as part of the Plan, an Appendix or separately).

Developer: Any individual or entity responsible for initiating and controlling the development process and ensuring that all, or any material portion of all, phases of the development process are accomplished. Furthermore, the developer is the individual or entity identified as such in the Ownership Entity Agreement and any and all Development Fee Agreements.

Displacement: The moving of a person or such person's personal property from their current residence.

Entity: Without limitation, any general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, public agency or other entity, other than a human being.

Homeless Populations: People who are living in places not meant for habitation (such as streets, cars, parks), emergency shelters, or in transitional or temporary housing but originally came from places not meant for habitation or emergency shelters.

Management Agent: Individual(s) or Entity responsible for the day to day operations of the project, which may or may not be related to the Owner(s) or ownership entity.

Market-Rate Units: Units that are not subject to tax credit restrictions; does not include manager units.

Material Participation: Involvement in the development and operation of the project on a basis which is regular, continuous and substantial throughout the compliance period as defined in Code Sections 42 and 469(h) and the regulations promulgated thereunder.

Net Square Footage: The outside to outside measurements of all finished areas that are heated and cooled (conditioned). Examples include hallways, community and office buildings, dwelling units, meeting rooms, sitting areas, recreation rooms, game rooms, etc. Breezeways, stairwells, gazebos and picnic shelters are examples of unconditioned outside structures that may not be used as net square footage.

Owner(s): Person(s) or entity(ies) that own an equity interest in the Ownership Entity.

Ownership Entity: The ownership entity to which tax credits and/or any RPP loan funds will be awarded.

Ownership Entity Agreement: A written, legally binding agreement describing the rights, duties and obligations of owners in the ownership entity.

Person: Any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so requires.

Person with a Disability: An adult who has a permanent physical or mental impairment which substantially limits one or more major life activities as further defined in North Carolina's Persons with Disabilities Protection Act (N.C.G.S. § 168A-3 (7a)).

Principal: Principal includes (1) all persons or entities who are or who will become partners or members of the ownership entity, (2) all persons or entities whose affiliates are or who will become partners or members of the ownership entity, (3) all persons or entities who directly or indirectly earn a portion of the development fee for development services with respect to a project and/or earn any compensation for development services rendered to such project, which compensation is funded directly or indirectly from the development fee of such project, and such amount earned exceeds the lesser of twenty-five percent (25%) of the development fee for such project or $100,000, and (4) all affiliates of such persons or entities in clause (3) who directly or indirectly earn a portion of the development fee for development services with respect to any project in the current year and/or earn any compensation for development services rendered to any project in the current year, which compensation is funded directly or indirectly from the development fee of any such project, and such amount earned exceeds the lesser of twenty-five percent 25% of the development fee for such project or $100,000. For purposes of determining Principal status the Agency may disregard multiple layers of pass-through or corporate entities. A partner or member will not be a Principal where its only involvement is that of the tax credit equity investor.

Qualified Corporation: Any corporation if, at all times such corporation is in existence, 100% of the stock of such corporation is held by a nonprofit organization that meets the requirements under Code Section 42(h)(5).

Rental Production Program (RPP): Agency loan program for multifamily affordable rental housing.

APPENDIX B

Design Quality Standards and Requirements

The terms of this Appendix B are the minimum requirements for any project awarded tax credits in 2014. Required documents must be prepared by an engineer or architect licensed to do business in North Carolina.

Once final plans and specifications have been completed, owners must submit them to the Agency and receive written approval before commencing site work or construction.

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

I. DESIGN DOCUMENT STANDARDS

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

A. PRELIMINARY APPLICATION PLAN REQUIREMENTS

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

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

B. FULL APPLICATION PLAN REQUIREMENTS

Site and floor plans must be on a CD in PDF format and 24" x 36" paper only (stapled together) and indicate the following:

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

11. For projects involving removal of asbestos and/or lead based paint removal, general notes identifying location and procedures for removal.

II. BUILDING AND UNIT DESIGN PROVISIONS

A. EXTERIOR DESIGN AND MATERIALS

1. Building design must use different roof planes and contours to "break" up roof lines. Wide window and door trim must be used to better accent siding. If horizontal banding is used between floor levels, use separate color tones for upper and lower levels. If possible, use horizontal and vertical siding applications to add detail to dormers, gables, and extended front facade areas.
2. The use of no or very low maintenance materials is required for exterior building coverings on all new construction projects. These include high quality vinyl siding, brick, or fiber cement siding. The use of metal siding is prohibited. Vinyl siding must have a .044" thickness or greater and a limited lifetime warranty. Where band boards attach to and are part of the vinyl siding application, z-flashing must be installed behind, on top of, and below bands.
3. All exterior trim, including fascia and soffits, window and door trim, gable vents, etc, must also be constructed of no or very low maintenance materials.
4. All buildings must include seamless gutters and aluminum drip edge on all gable rakes and fascia boards. Drip edge must extend 2 inches minimum under the shingles.
5. All building foundations must have a minimum of 12 inches exposed brick veneer above finished grade level (after landscaping).
6. Breezeway and stairwell ceilings must be constructed of materials rated for exterior exposure.
7. Buildings and units must be identified using clearly visible signage and numbers. Building and unit identification signage must be well lit from dusk till dawn.
8. Exterior stairs must have a minimum clear width of 40 inches between handrails and be completely under roof cover.
9. Exterior railings must be made of vinyl, aluminum, or steel (no wood).
10. Anti-fungal dimensional (architectural) shingles with a minimum 30-year warranty are required for all shingle roof applications.
11. Covered drop-offs must have a minimum 13 foot vehicle headroom clearance.
12. In vinyl siding applications, all exterior lights, GFIs, HVAC sub panels, hose bibs, telephone boxes, and cable boxes must be installed in plastic J-boxes.
13. Weep holes must be below finished slab elevation and not covered with sod, mulch, finished grade or landscaping. ~~When gang mailboxes are provided on a site or within a building, the number of mail box compartments must be equal or greater to those apartment units that are Type A or Type B units and not be installed higher than 48 inches above finished floor.~~

B. DOORS AND WINDOWS

1. All primary unit entries must either be within a breezeway or have a minimum roof covering of 3 feet deep by 5 feet wide, including a corresponding porch or concrete pad.
2. High durability, insulated doors (such as steel and fiberglass) are required at all exterior locations. Single lever deadbolts and eye viewers are required on all main entry doors to residential units.
3. Exterior doors for fully accessible units ("Type A") must include spring hinges.
4. Insulated, double pane, vinyl windows with a U-factor of 0.32 or below and a SHGC of 0.40 or below are required for new construction.
5. Windows must not be located over tub or shower units.
6. Install a continuous bead of silicone caulk behind all nail fins before installing new vinyl windows per manufacturer's specifications.

7. In Type A accessible units, an audible alarm and strobe light must be installed above the entry door.

C. INTERIOR DESIGN AND MATERIALS

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

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

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

2. All units must have a separate dining area, except for SRO, Studio and Efficiency units (see "Definitions" for description).
3. Newly constructed residential units ~~containing two (2) or more bedrooms~~ must have an exterior storage closet (interior for congregate) with a minimum of 16 unobstructed square feet. The square footage utilized by a water heater in the exterior storage closet may not be included in the 16 square foot calculation.
4. Carpet and pad must meet FHA minimum standards. Carpets in Type A units must be glue-down type without padding.
5. Kitchens, dining areas, and entrance areas must have vinyl, VCT or other non-carpet flooring.
6. The minimum width of interior hallways in residential units is 40 inches.
7. For new construction, interior doors must be constructed of six panel hardboard, solid core birch or solid core lauan. Hollow core, flat-panel ~~wood~~ doors are prohibited.
8. Bi-fold, pocket, louvered, and by-pass doors are prohibited. ~~Pocket doors are not allowed in elderly properties or Type A accessible units.~~
9. Fireplaces are prohibited in residential units.
10. Residential floors and common tenant walls must have sound insulation batts.
11. All bedroom closets, interior storage rooms, coat closets and laundry rooms/closets must have a 4 inch tall by 8 inch wide minimum pass-thru grille above doors for air circulation in those areas that do not get conditioned.
12. There must be a minimum of ¾ inch air space under all interior doors measured from finished floor for air circulation.
13. All interior and exterior mechanical and storage closets must have finished floor coverings. Interior closets must have either carpet, sheet vinyl or VCT flooring. Exterior storage closets may have sealed, painted concrete floors.
14. Signage for designated common areas and all apartment units must be in Braille and meet ANSI standards.
15. The following areas must contain moisture resistant drywall: ceilings and walls of bathrooms, laundry rooms, mechanical closets, exterior storage closets, and behind kitchen sink base.

D. BEDROOMS

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

2. Secondary bedrooms must have at least 110 square feet, excluding the closet(s).
3. Every bedroom must have a closet with a shelf, closet rod and door. The average size of all bedroom closets in each unit type must be at least 7 linear feet.
4. In Type A accessible units, an emergency pull station is required in all master bedrooms.

E. BATHROOMS

1. A recessed medicine cabinet must be installed in every full bathroom in each residential unit.
2. Exclusive of fully accessible units, the average size of all vanities in each unit type must be at least 36 inches.
3. Mirrors in bathrooms must be low enough to reach the counter backsplashes.
4. All full bathrooms must have an overhead ceiling light and exhaust fan on the same switch. Vanity lights (if provided) must be on a separate switch.
5. All bathrooms must include an Energy Star rated exhaust fan rated at 70 CFM (minimum) vented to the exterior of the building using hard ductwork along the shortest run possible.
6. For ceramic tile applications, tile should be applied over cement backer board rather than directly to drywall.
7. All new construction and adaptive re-use projects must comply with QAP Section IV(F)(3) and Appendix B Section VIII(D) regarding additional fully accessible bathrooms, including roll-in showers. All roll-in showers must have a collapsible water dam or beveled threshold that meets code. All roll-in showers must be 36 inches wide and have an adjustable shower rod and weighted curtain installed before occupancy.
8. Approaches to roll-in showers must be level, not sloped.

~~All bathroom ceilings and walls must utilize mold and water-resistant wall board.~~

9. All domestic water line cut off valves must have metal handles, not plastic.
10. In all Type A accessible units, the grab bars must be installed per ANSI A117.1 specifications around toilets and in the tubs/showers. In roll-in showers the shower head with wand must be installed on a sliding bar.
11. In Type A accessible units, an emergency pull station is required in all bathrooms.
12. Offset toilet flanges are prohibited.

F. KITCHENS

1. New cabinets must include dual side tracks on drawers. Door fronts, styles, and drawer fronts must be made with solid wood or wood/plastic veneer products. Particle board or hardboard doors, stiles, and drawer fronts are prohibited.
2. The minimum aisle width between cabinets and/or appliances is 42 inches.
3. A pantry cabinet or closet in or near each kitchen must be provided (does not include SRO, studio or efficiency units). Pantry cabinet or closet door must be 24 inches minimum width.
4. All residential units must have either a dry chemical fire extinguisher mounted and readily visible and accessible in every kitchen, including kitchen in community building if present, or an automatic fire suppression canister mounted in each range hood.
5. Each kitchen must have at the least the following minimum linear footage of countertop, excluding the sink space (only include countertops that are at or below 36 inches in height above finished floor):

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

3 Bedroom	13.0 linear feet
4 Bedroom	13.0 linear feet

Bar tops may be counted as long as they are 16 inches minimum width and installed no higher than 48 inches above finished floor.

6. All residential units must have a frost-free Energy Star rated refrigerator with a freezer compartment. Water and/or ice dispensers (if provided) must be connected and operational. For fully accessible ("Type A") units the refrigerator must be side by side or bottom freezer type. Doors must open beyond 90 degrees to allow bin removal. The following are the minimum sizes:

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

7. All residential units must have an Energy Star rated dishwasher (excluding elderly properties).
8. In Type "A" accessible units:
   - kitchen sinks must be rear-draining and have sink bottoms insulated if bottom of sink is at or below 29" above finished floor;
   - pull-out worktops are prohibited;
   - workstations must be installed beside the range;
   - the wall cabinet mounted over the work station must be 48 inches maximum above finished floor to the top of the bottom shelf; and
   - both the range hood fan and light must have separate remote switches.
11. Range hoods must be ~~70 CFM (minimum) and~~ vented to the outside using hard duct.
12. Anti-tip devices must be installed on all kitchen ranges and be securely fastened to the floor. Walls behind or directly beside ranges must be covered with a splash panel.

G. LAUNDRY ROOM CLOSETS

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

~~All laundry room ceilings and walls must utilize mold and water resistant wall board.~~

3. Washer water shutoff valves must be installed right side up with the hose connection below the shutoff handle.
4. In Type A and Type B units, each clothes washer and dryer must be centered for a side approach only in a four foot clear floor space area. The washer and dryer clear floor space areas may overlap.

H. PROVISIONS FOR ALL ELDERLY HOUSING

1. All elderly residential units must be equipped with emergency pull chains in the master bedroom and full bathroom. The pull chains must be wired to an exterior warning device which consists of a strobe light and an audible alarm.
2. Provide loop or "D" shape handles on cabinet doors and drawers.
3. Exhaust vents and lighting above ranges must be wired to remote switches for both the light and fan near the range in an accessible location.
4. Provide solid blocking at all water closets and tub/shower units for grab bar installation.
5. Provide a minimum 18 inch grab bar in all tub/shower units. The grab bar will be installed centered vertically at 48" A.F.F. on the wall opposite the controls.
6. Corridors in any common areas must have a continuous suitable handrail on ~~one~~ both sides mounted 34 inches above finished floor, and be 1 ¼ inches in diameter.

7. All doors leading to habitable rooms must have a minimum 3'-0" door and include lever handle hardware.
8. Hallways must have a minimum width of 42 inches.
9. The maximum threshold height at any entry door is ½ inch.

I. PROVISIONS FOR SIGHT AND HEARING IMPAIRED UNITS

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

1. The unit(s) must be roughed in to allow for smoke alarms with strobe lights in every bedroom and living area.
2. The units must have a receptacle next to phone jacks in units for future installation of TTY devices.
3. Each overhead light fixture and receptacle must be wired to accommodate a 150 watt load.
4. The unit must also be fully accessible ("Type A").
5. Lighted or contrasting color ~~D~~door bells button connected to an audible and strobe alarm installed in each bathroom, bedroom and common area is~~are~~ required for each sight and hearing impaired unit.

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

III. MECHANICAL, SITE AND INSULATION PROVISIONS

A. PLUMBING PROVISIONS

1. All rental units require at least one (1) full bathroom.
2. Three bedroom units require at least 1.75 bathrooms (including one bath with upright shower and one bath with full tub).
3. Four bedroom units require at least two (2) full bathrooms.
4. All tubs and showers must have slip resistant floors.
5. All electric water heaters must have an Energy Factor of at least 0.93. This can be achieved by using an insulated water heater jacket. All natural gas water heaters must have an Energy Factor of at least .61efficiency.
6. In new construction and adaptive re-use projects, all water heater tanks must be placed in an overflow pan piped to the exterior of the building, regardless of location and floor level unless a primed p-trap is installed. The temperature and relief valve must also be piped to the exterior. Water heater must be placed in closets to allow for their removal and inspection by or through the closet door. Water heaters may not be installed over the clothes washer or dryer space.
7. Whirlpool baths or spas are prohibited.
8. A frost-proof exterior faucet must be installed on an exterior wall of the community/office building.
9. All tub/shower control knobs must be single lever handled and offset towards the front of the tub/shower.
10. Provide lever faucet controls for the kitchen and bathroom sinks.
11. All bathroom faucets, shower heads, and toilets must be EPA "Watersense" rated.
12. When using electric tankless water heaters the electrical panel must be rated at 200 amps or greater.

13. Domestic water lines are not allowed in unconditioned spaces.
14. In all Type A accessible units, the toilets, tubs and showers must have all grab bars installed. See ANSI A117.1 for mounting heights and locations.

B. ELECTRICAL PROVISIONS

1. Provide overhead lighting, a ceiling fan, telephone jack and a cable connection in every bedroom and living room. If using ceiling fans with light kits, the fan and light must have separate switches.
2. Any walk-in closets must also have a switched overhead light. A walk in closet is defined as any closet deeper than 36 inches from the back wall to the back of the closet door in the closed position.
3. Switches and thermostats must not be located more than 48 inches above finished floor height.
4. Receptacles, telephone jacks and cable jacks must not be located less than 16 inches above finished floor height.
5. Exterior lighting is required at each unit entry door.
6. Additional exterior light fixtures not specific to a unit will be wired to a "house" panel. The fixtures will be activated by a photo cell placed on the east or north side of the buildings.
7. All exterior stairways must have light fixtures wired to a "house" panel and activated by a photo cell placed on the east or north side of the buildings.
8. Projects with gas heating and/or appliances must provide a hard-wired carbon monoxide detector with a battery back-up in each residential unit.
9. All non-residential and residential spaces must have separate electrical systems.
10. Initially-installed bulbs in residential units and common areas must be compact fluorescent, LED, or pin-based lighting in 80% of all fixtures.
11. All telephone lines must be toned and tagged properly to each unit.

C. HEATING, VENTILATING AND AIR CONDITIONING PROVISIONS

1. All non-residential areas and residential units must have their own separate heating and air conditioning systems.
2. Through the wall HVAC units are prohibited in all but Studio, Efficiency and SRO units. They are allowed in laundry rooms and management offices where provided.
3. HVAC interior air handlers must be enclosed from return air grille to blower motor/filter.~~HVAC systems, including the air handler and line sets, must be rated at 13 SEER, 7.7 HSPF or greater and properly sized for the unit.~~
4. Connections in duct system must be sealed with mastic and fiberglass mesh.
5. All openings in duct work at registers and grills must be covered after installation to keep out debris during construction.
6. Fresh air returns must be a minimum of 12" above the floor.
7. Electric mechanical condensate pumps are not allowed.
8. Supply ducts in unconditioned attics must be insulated with an R-8 or greater value.
9. Range hoods and micro-hoods must be vented to the exterior of the building with hard duct, using the shortest possible run.
10. All hub drains serving HVAC condensate lines must be piped to the outside. Piping to the sanitary sewer is not allowed unless a primed p-trap is installed.
11. Exterior clothes dryer vents must be mechanically secured to siding and/or brick veneers.

D. BUILDING ENVELOPE AND INSULATION

1. Buildings with residential units must be wrapped with an exterior air and water infiltration barrier.

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

E. SITEWORK AND LANDSCAPING

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

F. RADON VENTILATION

Passive, "stack effect" radon ventilation systems are required for all new construction projects in Zone 1 and 2 counties. For a list of county zones visit http://www.ncradon.org/Data.html These systems reduce soil gas entry into the buildings by venting the gases to the outdoors and must include the following components.

1. Gas Permeable Layer of Aggregate: This layer is placed beneath the slab or flooring system to allow the soil gas to move freely underneath the house and enter an exhaust pipe. In many cases, the material used is a 4-inch layer of clean gravel.
2. Plastic Sheeting/Soil Gas Retarder: This is the primary soil gas barrier and serves to support any cracks that may form after the basement slab is cured. The retarder is usually made of 6 mil polyethylene sheeting, overlapped 12 inches at the seams, fitted closely around all pipe, wire, or other penetrations, and placed over the gas permeable layer of aggregate.
3. PVC Vent Pipe: A straight (no elbows) vertical PVC vent pipe of 3 inch diameter will be connected to a vent pipe "T" which is installed below the slab in the aggregate. The straight vent pipe runs from the gas permeable layer (where the "T" is) through the apartment to the roof to safely vent radon and other soil gases above the roof. A 12 inch perforated PVC pipe must be attached to the "T" on both ends in the aggregate to allow radon gas to easily enter the piping. The straight vent pipe runs vertically through the building and terminates at least 12 inches above the roof's surface in a location at least 10 feet from windows or other openings and adjoining or adjacent buildings. On each floor of the apartment, the pipe should be labeled as a "**Radon Reduction System**". Sealing and caulking with polyurethane or silicone on all openings in the concrete foundation floor must be used.

Check applicable federal, state and local building codes to see if more stringent codes apply.

IV. ENERGY STAR CERTIFICATION

New construction projects must meet the standards and requirements of ENERGY STAR 2.0

as verified by an independent, third-party expert who assists with project design, verify construction quality, and tests completed units. Adaptive re-use and rehabilitation projects must comply to the extent doing so is economically feasible and as allowed by historic preservation rules.

V. COMMON AREA AND SITE AMENITY PROVISIONS

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

A. REQUIRED SITE AMENITIES

All new construction projects are required to include a minimum of six (6) tenant amenities. There are three (3) amenities that are mandatory and the additional three (3) can be selected from the list below. The required amenities vary by project type:

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

In addition to the required amenities, projects must also include at least three (3) of the following additional amenities and be on an accessible route:

- covered drive-thru or drop-off at entry
- covered patio with seating (150 sq. ft.)
- covered picnic area with two tables and one grille (150 sq. ft.)
- exercise room (must include new equipment)
- raised bed garden plots (50 sq. ft. per plot, 24 inches deep, one plot per 10 residents, elderly projects only) served by a water stand pipe for watering plants
- gazebo (100 sq. ft.; door must accommodate a 36" minimum clear opening)
- high-speed Internet access (involves both a data connection in the living area of each unit that is separate from the cable/telephone connection and support from a project-wide network or a functional equivalent)
- resident computer center (minimum of 2 computers)
- sunroom with chairs (150 sq. ft.)
- screened porch (150 sq. ft.)
- tot lot (family projects only)
- walking trails (4 ft. wide paved and continuous around property)

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

B. PLAYGROUND AREAS

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

C. POSTAL FACILITIES

1. Postal facilities must be located adjacent to available parking and sited such that tenants will not obstruct traffic while collecting mail.
2. On-site postal facilities must have a roof covering which offers residents ample protection from the rain while gathering mail.
3. Postal facilities must include adequate lighting on from dusk to dawn.
4. For Type A and Type B units the mailboxes may not be installed higher than 48" above finished floor.

D. LAUNDRY FACILITIES

1. Laundry facilities are required at all projects.
2. There must be a minimum of one washer and one dryer per twelve (12) residential units if washer/dryer hookups are not available in each unit. If hookups are available in each unit, there must be a minimum of one washer and one dryer per twenty (20) units.

~~Laundry facilities must be located on an accessible route.~~

3. The entrance must have a minimum roof covering of 20 square feet.

~~The threshold height of the entrance door to the laundry room must not exceed ½ inch above finished interior grade level.~~

4. A "folding" table or countertop must be installed. The working surface must be 28 to 34 inches above the floor, and must have a 29 inch high clear knee space below. The working surface must be a minimum 48 inches long, and have a 30 by 48 inch clear floor space around it.
5. The primary entrance door to the laundry must be of solid construction and include a full height tempered glassed panel to allow residents a view of the outside/inside.
6. The laundry room must be positioned on the site to allow for a high level of visibility from residential units or the community building/office.
7. The laundry room must have adequate entrance lighting that is on from dusk to dawn.
8. If the project has only one laundry facility, it must be adjacent to the community building/office (if provided) to allow easy access and provide a handicap parking space(s).
9. One washer and one dryer must be front loading and usable by residents with mobility impairments (front loading), including at least a 30 by 48 inch clear floor space in front of each.

E. COMMUNITY / OFFICE SPACES

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

F. PARKING

1. Two parking spaces per unit are required for family projects.
2. Elderly projects require a minimum of two-thirds (2/3) parking space per unit.
3. If local guidelines require less parking, the number of parking spaces required by the Agency may be reduced to meet those standards upon receiving Agency approval.
4. There must be at least one handicap parking space for each designated fully accessible apartment unit and must be the nearest available parking space to the unit.
5. Handicap ramps may not protrude into parking lot. Handicap parking spaces and access isles may not exceed 2% slope in any direction.

G. REFUSE COLLECTION AREAS

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

VI. ADDITIONAL PROVISIONS FOR REHABILITATION OF EXISTING HOUSING

The following requirements apply to rehabilitation of existing units. Other than as described below, existing apartments do not need to be physically altered to meet new construction standards.

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

B. Any replacement of existing materials or components must comply with the design standards for new construction. In addition to needs identified by the Agency, the rehabilitation scope of work will include/address the following issues:

- All mechanical and storage closets must have finished flooring.
- All water heaters must be in an overflow pan and piped to the outside (where possible).
- If range hoods were previously vented to the outside, the replacement hoods must be similar.
- All bifold and accordion doors must be replaced with hinged doors.
- All units must have individual water shut off valves in the unit.
- All units must have looped smoke alarms.
- Water heaters under kitchen countertops must be relocated.
- All polybutylene ("Quest") piping must be replaced.
- All original cast iron p-traps must be replaced.
- Attic insulation must meet R-30 minimum value.
- Tub/shower valves over twenty-five years old must be replaced.
- Hard duct all new and existing bathroom exhaust fans where possible (in attics).
- Shoe molding must be installed in areas where glue down flooring is/was installed.
- Existing HVAC air handlers must have a secondary condensate overflow line or cutoff switch.

C. Applicants must submit the following:

1. A hazardous material report that provides the results of testing for asbestos containing materials,

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

2. A report assessing the structural integrity of the building(s) being renovated from an architect or engineer.

3. A current termite inspection report.

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

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

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

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

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

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

~~## VIII. APPLICABLE ACCESSIBILITY REGULATIONS~~

~~A. FAIR HOUSING AMENDMENTS ACT~~

~~All new construction projects are required by law to meet the handicap accessibility standards outlined in the Fair Housing Laws, including the Federal Fair Housing Amendments Act of 1988 (the "Act"). The law provides that failure to design and construct certain residential dwelling units to include certain features of accessible design will be regarded as unlawful discrimination. Renovation projects may be exempt from design guidelines.~~

~~The law applies to all housing built after March 13, 1991 with four or more units. All units in buildings with four or more units must meet the requirements of the law if the buildings have one or more elevators. All ground floor units in other buildings containing four or more units must meet the requirements of the law. Certain sites with steep terrain may have some exclusions.~~

~~B. THE AMERICANS WITH DISABILITIES ACT~~

~~All projects are required by law to meet the handicap accessibility standards outlined in the Americans With Disabilities Act (ADA). The law provides that failure to design and construct certain public accommodations to include certain features of accessible design will be regarded as unlawful discrimination.~~

~~ADA Legislation became effective on July 26, 1992. Title III deals with non-discrimination on the basis of disability by public accommodations and in commercial facilities. Public accommodations include all new construction effective January 26, 1993 and impacts any rental office, model unit, public bathroom, building entrances, or any other public or common use area. Existing public accommodations must be retrofitted or altered beginning January 26, 1992, unless a financial or administrative burden exists.~~

~~The ADA guidelines do not affect residential units, since these are covered under Fair Housing and Section 504 laws.~~

~~C. NORTH CAROLINA STATE ACCESSIBILITY CODE~~

~~All projects are required by law to meet the handicap accessibility standards as outlined in the North Carolina State Building Code, Chapter 11, and ANSI A117.1. State and/or local building code officials enforce the design and construction guidelines. Compliance with these guidelines is mandatory in order to receive a Certificate of Occupancy for your proposed development. A main feature of the state accessibility code is the provision requiring all multifamily residential projects intended as full time residences for rent or lease that have eleven or more living units to have a minimum of five percent of the units, or a minimum of one, that meet the requirements.~~

VIII. QUALIFIED ALLOCATION PLAN

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

1. be fully accessible according to the standards set forth in Chapter 11 of the North Carolina State Building Code and ANSI A117.1,
2. have at least one bathroom with a toilet located in a five foot by five foot clear floor space (may overlap with the five foot turning diameter described in ANSI A117.1, with no overlapping elements or fixtures; the toilet must be positioned in a corner with the centerline of the toilet bowl 16 to 18 inches from the sidewall, and
3. have at least one bathroom with a 36" x 60" roll-in shower as described in Appendix B. Such showers must also meet the requirements for accessible controls and clear floor spaces as required by ANSI A117.1.

At least one unit in each class of fully accessible units must meet the above requirements. Unit classes are measured by the number of bedrooms. THESE UNITS ARE IN ADDITION TO MOBILITY IMPAIRED UNITS REQUIRED BY FEDERAL AND STATE LAW (INCLUDING BUILDING CODES). If laws or codes do not require mobility impaired units for a project, a total of ten percent (10%) of the units must be fully accessible. In congregate buildings served by an elevator, these units must be on each residential floor.

DEFINITIONS

Efficiency Apartment: A unit with a minimum of 450 heated square footage (assuming new construction) in which the bedroom and living area are contained in the same room. Each unit has a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, full size refrigerator) that is located in a separate room.

Heated Square Feet: The floor area of an apartment unit, measured interior wall to interior wall, not including exterior wall square footage. Interior walls are not to be deducted, and the area occupied by a staircase may only be counted once.

Net Square Feet: Total area, including exterior wall square footage, of all conditioned (heated/cooled) space, including hallways and common areas.

One Bedroom Apartment: A unit of at least 660 heated square feet (assuming new construction) containing at least four separate rooms including a living/dining room, full kitchen, a bedroom and full bathroom.

Single Room Occupancy (SRO) Unit: A single room unit with a minimum of 250 heated square feet (assuming new construction) that is the primary residence of its occupant(s). The unit must contain either food preparation or sanitary facilities. At least one component of either a full bathroom (shower, water closet, lavatory) and/or a full kitchen (refrigerator, stove top and oven, sink) is missing. There are shared common areas in each building that contain elements of food preparation and/or sanitary facilities that are missing in the individual units.

Studio Apartment: A unit with a minimum of 375 heated square feet (assuming new construction) in which the bedroom, living area and kitchenette are contained in the same room. Each unit has components of a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, refrigerator).

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

Two Bedroom Apartment: A unit with a minimum of 900 heated square feet (assuming new construction) containing at least five separate rooms including a living/dining room, full kitchen, two bedrooms and full bathroom.

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 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 18 – BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the State Board of Examiners of Electrical Contractors intends to adopt the rule cited as 21 NCAC 18B .0811 and amend the rules cited as 21 NCAC 18B .0404, .0801 and .0907.*

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): *www.ncbeec.org*

Proposed Effective Date: *March 1, 2014*

Public Hearing:
Date: *December 5, 2013*
Time: *8:30 a.m.*
Location: *State Board of Examiners of Electrical Contractors, 3101 Industrial Drive, Suite 206, Raleigh, NC 27609*

Reason for Proposed Action: *In order to respond to industry requests for alternative means to address and enhance on-site supervision of work, the Board is creating an optional limited license called a Special Restricted Electrical Technician. Such a person would be able to provide supervision in the absence of the principal licensee. The Board also proposes to adjust fees for the first time in five years within the limits previously authorized by the General Assembly.*

Comments may be submitted to: *Robert L. Brooks, Jr., 3101 Industrial Drive, Suite 206, Raleigh, NC 27609; phone (919) 733-9042*

Comment period ends: *January 14, 2014*

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**
☐ **Substantial economic impact (≥$1,000,000)**
☒ **No fiscal note required by G.S. 150B-21.4**

SUBCHAPTER 18B – BOARD'S RULES FOR THE IMPLEMENTATION OF THE ELECTRICAL CONTRACTING LICENSING ACT

SECTION 0400 – LICENSING REQUIREMENTS

21 NCAC 18B .0404 ANNUAL LICENSE FEES
(a) The annual license fees and license renewal fees for the various license classifications are as follows:

LICENSE FEE SCHEDULE

CLASSIFICATION	LICENSE FEE
Limited	~~$ 75.00~~ $ 85.00
Intermediate	~~$115.00~~ $130.00
Unlimited	~~$165.00~~ $180.00
SP-SFD	~~$ 75.00~~ $ 85.00
Special Restricted	~~$ 75.00~~ $ 85.00

(b) License fees may be paid by cash, check, money order, Visa or Mastercard made payable to the Board. Payment must accompany any license or license renewal application filed with the Board.

Authority G.S. 87-42; 87-44.

SECTION .0800 – SPECIAL RESTRICTED LICENSES

21 NCAC 18B .0801 GENERAL PROVISIONS
(a) Types. A special restricted electrical contracting license classification is a classification established pursuant to G.S. 87-43.3 or by G.S. 87-43.4. Its purpose is to license persons, partnerships, firms, or corporations to engage or offer to engage in only a limited phase of electrical contracting work. Each special restricted license classification is separate from all other special restricted and regular license classifications. The

General Assembly created the special restricted single family dwelling electrical contractor license in G.S. 87-43.4. Pursuant to G.S. 87-43.3, the Board has established the following special restricted electrical contracting licenses:

(1) fire alarm/low voltage wiring license (SP-FA/LV);
(2) elevator license (SP-EL);
(3) plumbing, heating, and air conditioning license (SP-PH);
(4) groundwater pump license (SP-WP);
(5) electric sign license (SP-ES); ~~and~~
(6) swimming pool license ~~(SP-SP).~~ (SP-SP); and
(7) electrical technician license (SP-ET).

(b) Limited Scope. A special restricted contracting license does not authorize the licensee to engage or offer to engage in the business of electrical contracting in general. It authorizes the licensee to engage or offer to engage only in the limited phase of electrical contracting described in the Rule in this Section that specifies the scope of the applicable special restricted license.

(c) No Project Value Limit. The limitations concerning the dollar value of projects that may be undertaken by a limited or an intermediate licensee do not apply to special restricted licensees. Thus, the holder of a special restricted ~~license~~ license, other than an electrical technician licensee, may engage or offer to engage in any project authorized by the license regardless of the dollar value of the project.

(d) Effect of Regular License. A licensee in the regular license classifications, whether limited, intermediate or unlimited, is qualified to engage or offer to engage in any activity authorized by a special restricted license, subject to the project value limitations contained in G.S. 87-43.3, and does not have to obtain a special restricted license.

Authority G.S. 87-42; 87-43.3; 87-43.4.

21 NCAC 18B .0811 ELECTRICAL TECHNICIAN LICENSE CLASSIFICATION

(a) Definitions. The following words and terms, when used in this Chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Special Restricted Electrical Technician – a person, licensed as an electrical technician as a result of having passed a qualifying examination approved by the Board, who is a bona fide employee of a licensee of this Board and works under the general supervision of a listed qualified individual on behalf of said licensee of the Board, and is qualified to provide only onsite supervision of the electrical contracting work contracted by said licensee.
(2) Special Restricted Electrical Technician License Scope – a person licensed as an electrical technician is authorized to work as a bona fide employee of a licensee of the Board or in other employment and supervise the work of others on the jobsite in the absence of the listed qualified individual. Person licensed as an electrical technician shall not contract or offer to contract work defined as electrical contracting in G.S. 87-43. No person is required to hold a Special Restricted Electrical Technician License in order to be employed by a licensed electrical contractor.
(3) Special Restricted Electrical Technician – a special restricted electrical technician license (SP-ET) is issued to a person having passed the qualifying examination approved by the Board. License is valid throughout this state and is not transferable.

(b) Requirements for Examination Applicants. To take an examination for the special restricted electrical technician license classification, the applicant must:

(1) be at least 18 years of age;
(2) submit a completed application to the Board on a form provided by the Board;
(3) submit examination application fee of ninety dollars ($90.00);
(4) submit with the application written statements from at least two persons attesting to the applicant's good character;
(5) submit with the application written verification of at least four years of secondary experience, as defined in Rule .0202(b) of this Subchapter;
(6) an applicant with a failed examination score may review their failed examination for a fee of twenty-five dollars ($25.00). All reviews are supervised by the Board or staff;
(7) any fee retained by the Board shall not be creditable toward any future examination or examination review; and
(8) meet all other applicable requirements in Section .0200 of this Subchapter.

(c) Requirements for License Applicants. To apply for a license in the special restricted electrical technician classification, the applicant must:

(1) pass a qualifying examination approved by the Board;
(2) submit a completed application to the Board on a form provided by the Board;
(3) submit the initial license fee of fifty dollars ($50.00);
(4) meet all other applicable requirements in Section .0400 of this Subchapter;
(5) annual license period shall be for one year from date of original issuance; and
(6) notify the Board within 30 days of any change in mailing address, telephone number and email address.

(d) Continuing Education. To renew a license in the special restricted electrical technician classification, the license holder must:

(1) complete at least four hours of approved continuing education annually. The license holder can carry forward extra hours up to two additional license periods;

(2) complete list of approved continuing education courses and sponsors is available on the Board website; and

(3) meet all other applicable requirements in Section .1100 of this Subchapter.

(e) License Renewal. To renew a license in the special restricted electrical technician classification, the license holder must:

(1) complete required continuing education;

(2) file license renewal application and fifty dollar ($50.00) fee 30 days prior to the license expiration date. An administrative fee of twenty-five dollars ($25.00) shall be imposed upon applications received after the expiration date. Applications filed with the Board by mail shall be considered filed on the date such mail is postmarked; and

(3) annual license renewal period shall be for one year from date of original issuance.

(f) Local Government Journeyman License Programs. A local municipality or county may not require a person to hold a local government license if that person holds the Special Restricted Electrical Technician License issued under this Rule and is working within the scope of that license.

Authority G.S. 87-42; 87-43.3.

SECTION .0900 – VIOLATIONS AND CONTESTED CASE HEARINGS

21 NCAC 18B .0907 RESPONSIBILITY OF LICENSEES AND QUALIFIED INDIVIDUALS

(a) "Gross negligence" within the meaning of G.S. 87-47 means such lack of due care as evidences reckless disregard of human life or the safety of the person exposed to its dangerous effects, or creating a clear and present danger of personal injury, illness or property damage, or that entire want of care as would raise the presumption of a conscious indifference to the rights of others, which is equivalent to an intentional violation of the law.

(b) "Gross incompetence" refers to such lack of knowledge, supervision or technical competence as to correspond or create risk similar to the consequences of gross negligence.

(c) "Supervision" within the meaning of G.S. 87-43 refers to that degree of attendance, participation and oversight which is necessary and sufficient to ensure that the project is carried out in a workmanlike manner, with the requisite skill and that the installation is made properly, safely and in accordance with applicable codes and rules. Supervision means active onsite review of the work by a qualified individual while the work is in progress. If a licensee of the Board employs a properly licensed Special Restricted Electrical Technician, then the licensed electrical technician may provide onsite supervision of the work in the absence of the listed qualified individual.

Authority G.S. 87-42; 87-50.

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

Rules approved by the Rules Review Commission at its meeting on September 19, 2013.

						REGISTER CITATION TO THE NOTICE OF TEXT
PRIVATE PROTECTIVE SERVICES BOARD						
Definitions	12	NCAC	07D	.0104*		27:17 NCR
Involvement in Administrative Hearing	12	NCAC	07D	.0115*		27:17 NCR
Renewal or Re-issue of Licenses and Trainee Permits	12	NCAC	07D	.0203*		27:17 NCR
Experience Requirements/Security Guard and Patrol License	12	NCAC	07D	.0301*		27:17 NCR
Experience Requirements for Guard Dog Service License	12	NCAC	07D	.0302*		27:17 NCR
Experience Requirements for a Private Investigator License	12	NCAC	07D	.0401*		27:17 NCR
Experience Requirements for a Polygraph License	12	NCAC	07D	.0501*		27:17 NCR
Experience Requirements for a Psychological Stress Evalua...	12	NCAC	07D	.0601*		27:17 NCR
Training Requirements for Armed Security Guards	12	NCAC	07D	.0807*		27:17 NCR
Requirements for a Firearms Trainer Certificate	12	NCAC	07D	.0901*		27:17 NCR
Unarmed Guard Trainer Certificate	12	NCAC	07D	.0909*		27:17 NCR
RADIATION PROTECTION COMMISSION						
Definitions	15A	NCAC	11	.0104*		27:22 NCR
Other Definitions	15A	NCAC	11	.0105*		27:22 NCR
Incorporation By Reference	15A	NCAC	11	.0117*		27:22 NCR
Purpose and Scope	15A	NCAC	11	.0301*		27:22 NCR
Exempt Concentrations: Other Than Source	15A	NCAC	11	.0303*		27:22 NCR
Exempt Quantities: Other Than Source Material	15A	NCAC	11	.0304*		27:22 NCR
Exempt Item Containing Other Than Source	15A	NCAC	11	.0305*		27:22 NCR
General Licenses: Measuring Gauging: Controlling Devices	15A	NCAC	11	.0309*		27:22 NCR
Specific Licenses: Filing Application and General Require...	15A	NCAC	11	.0317*		27:22 NCR
Specific Licenses: General Requirements for Human Use	15A	NCAC	11	.0318*		27:22 NCR
Specific Licenses: General Requirements for Human Use of ...	15A	NCAC	11	.0321*		27:22 NCR
Specific Licenses: Human Use of Sealed Sources	15A	NCAC	11	.0322*		27:22 NCR
Specific Licenses: Products with Exempt Concentrations	15A	NCAC	11	.0325		27:22 NCR
Specific Licenses: Exempt Distribution	15A	NCAC	11	.0326		27:22 NCR
Specific Licenses: Manufacture Devices to Persons Licensed	15A	NCAC	11	.0328*		27:22 NCR

Specific Licenses-Manufacture of In Vitro Test Kits	15A	NCAC	11	.0331*	27:22 NCR
Specific Licenses: Manufacture of Radiopharmaceuticals	15A	NCAC	11	.0333*	27:22 NCR
Specific Licenses: Generators and Reagent Kits	15A	NCAC	11	.0334*	27:22 NCR
Specific Terms and Conditions of Licenses	15A	NCAC	11	.0338*	27:22 NCR
Emergency Plans	15A	NCAC	11	.0352*	27:22 NCR
Release of Patients Containing Radiopharmaceuticals or Pe...	15A	NCAC	11	.0358*	27:22 NCR
Medical Use of Unsealed Radioactive Material	15A	NCAC	11	.0361*	27:22 NCR
Decay in Storage	15A	NCAC	11	.0362*	27:22 NCR
Notifications and Reports to Individuals	15A	NCAC	11	.1004*	27:22 NCR
Occupational Dose Limits for Adults	15A	NCAC	11	.1604*	27:22 NCR
Labeling Requirements and Exemptions	15A	NCAC	11	.1626*	27:22 NCR
Transfer for Disposal and Manifests	15A	NCAC	11	.1633*	27:22 NCR
Reports of Planned Special Exposures	15A	NCAC	11	.1648*	27:22 NCR
TRANSPORTATION, DEPARTMENT OF					
Inspection of Traffic Ordinances	19A	NCAC	01B	.0502*	n/a G.S. 150B-21.5(a)(2)
HEARING AID DEALERS AND FITTERS BOARD					
Review of Examination	21	NCAC	22F	.0108*	27:19 NCR

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 07D .0104 DEFINITIONS

In addition to the definitions set forth in G.S. 74C, the following definitions shall apply throughout this Subchapter:

(1) "Agency Head" means the Chairman of the Board.

(2) "Applicant" means any person, firm or corporation applying to the Board for a license, trainee permit, registration or firearms trainer certificate.

(3) "Armed Private Security Officer" means an individual employed, full time or part time, by a contract security company or a proprietary security organization:

(a) who at any time wears, carries, or possesses a firearm in the performance of his duties; and

(b) whose principal duty is that of:

(i) an armed security guard, officer, patrol, or watchman;

(ii) an armed armored car service guard;

(iii) a private detective; or

(iv) an armed courier service guard.

(4) "Board" means the Private Protective Services Board established by G.S. 74C.

(5) "Branch Manager or Operator" means the individual endowed with the responsibility and liability for a branch office.

(6) "Branch Office" means a separate but dependent part of a central organization engaged in the business of providing private protective services established for the purpose of extending the activities of the central organization. The establishment of a telephone number or mailing address in the company name constitutes prima facie evidence of a branch office. If an out-of-state person, firm, association, or corporation opens an office in North Carolina, the North Carolina office shall be deemed the principal place of business and shall have a resident licensed qualifying agent.

(7) "Chairman" means the Chairman of the Private Protective Services Board.

(8) "Contract Security Company" means any person, firm, association, or corporation engaging in a private protective services business as defined in G.S. 74C-3 that provides said services on a contractual basis for a fee or other valuable consideration to any other person, firm, association, or corporation.

(9) "Direct Supervision" means personal, face-to-face contact and direction of the trainee's activities on a frequent and reasonable basis.

(10) "Investigative Capacity" means any law enforcement agency position for which the duties include conducting investigations and interviews, completing reports, and testifying in courts, administrative hearings or military tribunals.

(11) "Law Enforcement Officer" means a sworn peace officer who has the power of arrest, and who is an employee of the United States, any state, or any political subdivision of a state.

(12) "Licensee" means any person licensed to perform private protective services in North Carolina in accordance with G.S. 74C.

(13) "Proprietary Security Organization" means any person, firm, association, corporation or department thereof:

(a) that employs any of the following:

(i) watchmen;

(ii) security guards or officers;

(iii) patrol personnel;

(iv) armored car personnel; or

(v) couriers; and

(b) that employs these persons regularly and exclusively as an employee in connection with the business affairs of such employer.

(14) "Qualifying Agent" means the individual licensee who is responsible for the private protective services business.

(15) "Restored" means that an individual is no longer in need of psychiatric care as determined by a physician.

(16) "Temporary unarmed security guard" means an individual who is hired for a period of 30 days or less within a calendar year and who is designated as a temporary security guard at the start of employment.

History Note: Authority G.S. 74C-3; 74C-5;
Eff. June 1, 1984;
Amended Eff. October 1, 2013; August 1, 1998; May 1, 1988; July 1, 1987.

12 NCAC 07D .0115 INVOLVEMENT IN ADMINISTRATIVE HEARING

All licensees, registrants and trainers shall report to the Board any administrative proceeding commenced against him or her that involves any potential revocation or suspension of, or other disciplinary action against, any private protective service license, permit, certification or registration that he or she holds in another state. The Board must receive written notice of any such administrative proceeding within 30 days of the date the licensee, registrant or trainer is notified of the administrative proceeding.

History Note: Authority G.S. 74C-5; 74C-12;
Eff. October 1, 2013.

12 NCAC 07D .0203 RENEWAL OR RE-ISSUE OF LICENSES AND TRAINEE PERMITS

(a) Each applicant for a license or trainee permit renewal shall submit an original and one copy of the renewal form. This form shall be submitted to the Director not less than 30 days prior to expiration of the applicant's current license or trainee permit and shall be accompanied by:

(1) a head and shoulders digital color photograph of the applicant in JPG format of a quality sufficient for identification, taken within six months of the application and submitted by e-mail to PPSASL-Photos@ncdoj.gov or by compact disc;

(2) statements of the result of a local criminal history records search by the city-county identification bureau or clerk of superior court in each county where the applicant has resided within the immediately preceding 24 months or a criminal record check from a third party criminal record check provider;

(3) the applicant's renewal fee; and

(4) proof of liability insurance as set out in G.S. 74C-10(e).

(b) If a licensee has maintained a license at least two years and then allows the license to expire, the license may be re-issued if application is made within three years of the expiration date and the following documentation is submitted to the Board:

(1) an Application For Reinstatement of an Expired License;

(2) one set of classifiable fingerprints on an applicant fingerprint card;

(3) one head and shoulders digital color photograph of the applicant in JPG format of a quality sufficient for identification, taken within six months of the application and submitted by e-mail to PPSASL-Photos@ncdoj.gov or by compact disc;

(4) statements of the result of a local criminal history records search by the city-county identification bureau or clerk of superior court in each county where the applicant has resided within the immediately preceding 60 months or a criminal record check from a third party criminal record check provider;

(5) the applicant's non-refundable application fee;

(6) proof of liability insurance as set out in G.S. 74C-10(e); and

(7) a separate check or money order made payable to the State Bureau of Investigations to cover criminal record checks performed by the State Bureau of Investigations.

(c) A member of the armed forces whose license is in good standing and to whom G.S. 105-249.2 grants an extension of time to file a tax return shall receive that same extension of time to pay the license renewal fee and complete any continuing education requirements prescribed by the Board. A copy of the military order or the extension approval by the Internal Revenue Service or by the North Carolina Department of Revenue must be furnished to the Board.

History Note: Authority G.S. 74C-5; 74C-8; 74C-8.1; 74C-9; Eff. June 1, 1984;
Amended Eff. October 1, 2013; May 1, 2012; October 1, 2010; November 1, 2007; January 4, 1994; July 1, 1987; December 1, 1985.

12 NCAC 07D .0301 EXPERIENCE REQUIREMENTS/SECURITY GUARD AND PATROL LICENSE

(a) In addition to the requirements of 12 NCAC 07D .0200, applicants for a security guard and patrol license shall:

(1) establish to the Board's satisfaction three years of experience as a manager, supervisor, or administrator with a contract security company or a proprietary security organization performing guard and patrol functions;

(2) establish to the Board's satisfaction three years of experience as a manager, supervisor, or administrator in security with any federal, state, county, or municipal law enforcement agency performing guard and patrol functions; or

(3) establish to the Board's satisfaction a military occupational specialty and two years of experience within the past five years in the U.S. Armed Forces as a manager, supervisor, or administrator performing guard and patrol functions.

(b) In addition to the requirements of 12 NCAC 07D .0200, an applicant for a security guard and patrol license that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

(1) the spouse holds a current license, certification or registration from another jurisdiction and the other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements; and

(2) the spouse has two years verifiable experience within the past five years as a manager, supervisor, or administrator performing guard and patrol functions.

(c) The Board shall give credit toward the experience requirements set forth in Subparagraphs (a)(1) and (2) and Subparagraph (b)(2)of this Rule as follows:

(1) An applicant shall receive a minimum of 400 hours of experience credit for an associate's degree. The Director or the Board shall grant up to 100 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the associate's degree.

(2) An applicant shall receive 800 hours of experience credit for a bachelor's degree. The Director or the Board shall grant up to 200 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the bachelor's degree.

(3) An applicant shall receive 1,200 hours of experience credit for a graduate degree. The Director or the Board shall grant an additional 300 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the graduate degree.

(d) Persons licensed under Chapter 74D of the General Statutes of North Carolina may be issued a limited guard and patrol license exclusively for providing armed alarm responders.

History Note: Authority G.S. 74C-5; 74C-8; 74C-13; 93B-15.1;
Eff. June 1, 1984;
Amended Eff. October 1, 2013; February 1, 2009; December 1, 1995; January 4, 1994; January 1, 1990; August 1, 1988.

12 NCAC 07D .0302 EXPERIENCE REQUIREMENTS FOR GUARD DOG SERVICE LICENSE

(a) In addition to the requirements of 12 NCAC 07D .0200, applicants for a guard dog service license shall:

(1) establish to the Board's satisfaction two years of experience as a manager, supervisor, administrator, or dog handler with a contract security company or proprietary security organization performing guard dog functions;

(2) establish to the Board's satisfaction two years of experience as a manager, supervisor, administrator, or dog handler with any federal, state, county, or municipal agency performing guard dog functions; or

(3) establish to the Board's satisfaction a military occupational specialty and two years of experience within the past five years in the U.S. Armed Forces as a manager, supervisor, or administrator or dog handler performing guard dog functions.

(b) In addition to the requirements of 12 NCAC 07D .0200, an applicant for a guard dog service license that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

(1) the spouse holds a current license, certification or registration from another jurisdiction and the other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements; and

(2) the spouse has two years of verifiable of experience within the past five years as a manager, supervisor, or administrator or dog handler performing guard dog functions.

History Note: Authority G.S. 74C-5; 74C-8; 93B-15.1;
Eff. June 1, 1984;
Amended Eff. October 1, 2013; February 1, 2009; January 4, 1994.

12 NCAC 07D .0401 EXPERIENCE REQUIREMENTS FOR A PRIVATE INVESTIGATOR LICENSE

(a) In addition to the requirements of G.S. 74C-8 and 12 NCAC 07D .0200, applicants for a private investigator license shall:

(1) establish to the Board's satisfaction three years of experience while conducting investigations as defined in G.S. 74C-3(a)(8) with a contract security company or with a private person, firm, association or corporation;

(2) establish to the Board's satisfaction three years of verifiable experience while conducting investigations as set forth in G.S. 74C-3(a)(8) while serving in an investigative capacity as defined in 12 NCAC 07D .0104(9) with any Federal, state, county, municipal law enforcement agency or other governmental agency; or

(3) establish to the Board's satisfaction a military occupational specialty and two years of verifiable experience within the past five years in the U.S. Armed Forces while conducting investigations as set forth in G.S. 74C-3(a)(8) while serving in an investigative capacity as defined in 12 NCAC 07D .0104(9).

(b) In addition to the requirements of 12 NCAC 07D .0200, an applicant for a private investigator license that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

(1) the spouse holds a current license, certification or registration from another jurisdiction and the other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements; and

(2) the spouse has two years verifiable experience within the past five years while conducting investigations as set forth in in G.S. 74C-3(a)(8) while serving in an investigative capacity as defined in 12 NCAC 07D .0104(9).

(c) The Board shall give credit toward the experience requirements set forth in Subparagraphs (a) and (b) of this Rule as follows:

(1) An applicant shall receive of 400 hours of experience credit for an associate's degree. The Director or the Board shall grant up to 100 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the associate's degree.

(2) An applicant shall receive 800 hours of experience credit for a bachelor's degree. The Director or the Board shall grant up to 200 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the bachelor's degree.

(3) An applicant shall receive 1,200 hours of experience credit for a graduate degree. The Director or the Board shall grant an additional 300 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the graduate degree.

History Note: Authority G.S. 74C-5(2); 93D-15.1;
Eff. June 1, 1984;
Amended Eff. December 1, 1987;
Temporary Amendment Eff. October 1, 1989 For a Period of 180 Days to Expire on March 31, 1990;
Amended Eff. October 1, 2013; February 1, 2009; December 1, 1995; January 4, 1994; February 1, 1990.

12 NCAC 07D .0501 EXPERIENCE REQUIREMENTS FOR A POLYGRAPH LICENSE

In addition to the requirements of 12 NCAC 07D .0200, applicants for a polygraph license shall:

(1) pass an examination and a performance test administered by a panel of polygraph examiners designated by the Board;

(2) successfully complete a course of instruction at any polygraph school approved by the American Polygraph Association, the American Association of Police Polygraphist or the Board; and

(3) have either:

(A) one year of polygraph experience; or

(B) complete at least six months of training as a holder of a polygraph trainee permit, and have administered no less than 50 polygraph examinations; or

(4) establish to the Board's satisfaction a military occupational specialty and two years of verifiable experience within the past five years in the U.S. Armed Forces performing polygraph examinations.

(b) In addition to the requirements of 12 NCAC 07D .0200, an applicant for a polygraph license that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

(1) the spouse holds a current license, certification or registration from another jurisdiction and the other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements; and

(2) the spouse has two years verifiable experience within the past five years performing polygraph examinations.

(c) Applicants for a polygraph license may take the examination required in Subparagraph (a)(1) of this Rule no more than twice in any calendar year. Any applicant who fails the polygraph examination four times shall retake the polygraph school required in Subparagraph (a)(2) of this Rule before taking the polygraph examination again.

(d) Polygraph operators who are duly licensed in another state may perform up to three examinations in this state without being

licensed, provided that those examinations are for the purpose of an evaluation of that examiner and provided that the Director has given authorization for this evaluation in advance.

History Note: Authority G.S. 74C-5; 93B-15.1;
Eff. June 1, 1984;
Amended Eff. October 1, 2013; July 1, 2009; December 1, 1985.

12 NCAC 07D .0601 EXPERIENCE REQUIREMENTS FOR A PSYCHOLOGICAL STRESS EVALUATOR LICENSE

(a) In addition to the requirements of 12 NCAC 07D .0200, applicants for a Psychological Stress Evaluator (P.S.E.) license shall:

(1) successfully complete a course of instruction at any P.S.E. school approved by the Board; or

(2) establish to the Board's satisfaction a military occupational specialty and two years of verifiable experience within the past five years in the U.S. Armed Forces conducting psychological stress evaluations.

(b) In addition to the requirements of 12 NCAC 07D .0200, an applicant for a P.S.E. license that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

(1) the spouse holds a current license, certification or registration from another jurisdiction and the other jurisdictions requirements are substantially equivalent to or exceed the Board's requirements; and

(2) the spouse has two years of verifiable experience within the past five years conducting psychological stress evaluations.

(c) A P.S.E. school shall consist of not less than 40 hours of live classroom instruction in psychological stress evaluation.

History Note: Authority G.S. 74C-5; 93B-15.1;
Eff. June 1, 1984;
Amended Eff. October 1, 2013; March 1, 2008.

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

(a) Applicants for an armed security guard firearm registration permit shall first complete the basic unarmed security guard training course set forth in 12 NCAC 07D .0707.

(b)Private investigator licensees applying for an armed security guard firearm registration permit shall first complete a four hour training course consisting of the courses set forth in 12 NCAC 07D .0707(a)(1) and (2) and all additional training requirements set forth in that Rule.

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

(1) legal limitations on the use of handguns and on the powers and authority of an armed security guard, including familiarity with rules and regulations relating to armed security guards (minimum of four hours);

(2) handgun safety, including range firing procedures (minimum of one hour);

(3) handgun operation and maintenance (minimum of three hours);

(4) handgun fundamentals (minimum of eight hours); and

(5) night firing (minimum of four hours).

(d) Applicants for an armed security guard firearm registration permit shall attain a score of at least 80 percent accuracy on a firearms range qualification course adopted by the Board and the Attorney General, a copy of which is on file in the Director's office. Should a student fail to attain a score of 80 percent accuracy, the student will be given three additional attempts to qualify on the course of fire they did not pass. Failure to meet the qualification after three attempts shall require the student to repeat the entire Basic Training Course for Armed Security Guards. All additional attempts must take place within 20 days of the completion of the initial 20 hour course.

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

(f) All applicants for an armed security guard firearm registration permit must obtain training under the provisions of this Section using their duty weapon and their duty ammunition or ballistic equivalent ammunition, to include lead-free ammunition that meets the same point of aim, point of impact, and felt recoil of the duty ammunition, for all weapons.

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

(h) Applicants for re-certification of an armed security guard firearm registration permit shall complete a basic recertification training course for armed security guards which consists of at least four hours of classroom instruction and is a review of the requirements set forth in Subparagraphs (c)(1) through (c)(5) of this Rule. The recertification course is valid for 180 days after completion of the course. Applicants for recertification of an armed security guard firearm registration permit shall also complete the requirements of Paragraph (d) of this Rule.

(i) An armed guard currently registered with one company may be registered with a second company. Such registration shall be considered "dual." The registration with the second company shall expire at the same time that the registration expires with the first company. An updated application shall be required, along with the digital photograph, updated criminal records checks and a forty dollar ($40.00) registration fee. If the guard will be carrying a weapon of the same make and model, then no additional firearms training is required. The licensee shall submit a letter stating the guard will be carrying the same make and model weapon. If the guard will be carrying a weapon of a different make and model, the licensee shall submit a letter to the Board advising of the make and model of the weapon the guard will be carrying and the guard shall be required to qualify at the firing range on both the day and night qualification course. The qualification score is valid for 180 days after completion of the course.

(j) To be authorized to carry a standard 12 gauge shotgun in the performance of his or her duties as an armed security guard, an

applicant shall complete, in addition to the requirements of Paragraphs (a), (c) and (d) of this Rule, four hours of classroom training which shall include the following:

(1) legal limitations on the use of shotguns;
(2) shotgun safety, including range firing procedures;
(3) shotgun operation and maintenance; and
(4) shotgun fundamentals.

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

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

(l) Applicants for shotgun recertification shall complete an additional one hour of classroom training as set forth in Paragraph (j) of this Rule and shall also complete the requirements of Paragraph (k) of this Rule.

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

(n) The armed security officer is required to qualify annually both day and night. If the security officer fails to qualify on either course of fire, the security officer cannot carry a firearm until such time as he or she meets the qualification requirements. Upon failure to qualify the firearm instructor must notify the security officer that he or she is no longer authorized to carry a firearm and the firearm instructor must notify the employer and the Private Protective Services Board staff on the next business day.

History Note: Authority G.S. 74C-5; 74C-13;
Eff. June 1, 1984;
Amended Eff. November 1, 1991; February 1, 1990; July 1, 1987;
Temporary Amendment Eff. January 14, 2002;
Amended Eff. October 1, 2013; October 1, 2010; June 1, 2009; February 1, 2006; August 1, 2002.

12 NCAC 07D .0901 REQUIREMENTS FOR A FIREARMS TRAINER CERTIFICATE

(a) Firearms trainer applicants shall:

(1) meet the minimum standards established by Rule .0703 of this Subchapter;
(2) have a minimum of one year of supervisory experience in security with a contract security company or proprietary security organization, or one year of experience with any federal, state, county or municipal law enforcement agency;
(3) attain a 90 percent score on a firearm's prequalification course approved by the Board and the Attorney General, with a copy of the firearm's course certificate to be kept on file in the administrator's office;
(4) complete a training course approved by the Board and the Attorney General which shall consist of a minimum of 40 hours of classroom and practical range training in handgun and shotgun safety and maintenance, range operations, night firearm training, control and safety procedures, and methods of handgun and shotgun firing;
(5) pay the certified trainer application fee established in 12 NCAC 07D .0903(a)(1); and
(6) successfully complete the requirements of the Unarmed Trainer Certificate set forth in Rule .0909 of this Subchapter.

(b) The applicant's score on the prequalification course set forth in Subparagraph (a)(3) of this Rule is valid for 180 days after completion of the course.

(c) In lieu of completing the training course set forth in Subparagraph (a)(4) of this Rule, an applicant may submit to the Board a current Criminal Justice Specialized Law Enforcement Firearms Instructor Certificate from the North Carolina Criminal Justice Education and Training Standards Commission.

(d) In lieu of Subparagraphs (a)(2) and (4) of this Rule, an applicant may establish to the Board's satisfaction a military occupational specialty and two years of verifiable experience within the past five years in the U.S. Armed Forces as a firearms instructor.

(e) All applicants subject to this Paragraphs (c) and (d) of this Rule shall comply with the provisions of Subparagraph (a)(3), pay one-half the course fee amount, and complete the eight hour course given by the Board on rules and regulations.

(f) In addition to the requirement of 12 NCAC 07D .0200, an applicant for a firearms trainer certificate that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

(1) the spouse holds a current license, certification or registration from another jurisdiction and the other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements; and
(2) the spouse has two years of verifiable experience within the past five years as a firearms instructor.

(g) A Firearms Trainer Certificate expires two years after the date of issuance.

History Note: Authority G.S. 74C-5; 74C-13; 93B-15.1;
Eff. June 1, 1984;
Amended Eff. October 1, 2013; December 1, 2008; January 1, 2008; August 1, 2004; November 1, 1991.

12 NCAC 07D .0909 UNARMED TRAINER CERTIFICATE

(a) To receive an unarmed trainer certificate, an applicant shall meet the following requirements:

(1) comply with the requirements of Rule .0703 of this Subchapter;

(2) have a minimum of one year of experience in security with a contract security company or proprietary security organization, or one year of experience with any federal, state, county or municipal law enforcement agency;

(3) successfully complete a training course approved by the Board and the Attorney General which shall consist of a minimum of 24 hours classroom instruction to include the following topic areas:

(A) civil liability for the security trainer – two hours;

(B) interpersonal communications in instruction – three hours;

(C) teaching adults – four hours;

(D) principles of instruction – one hour;

(E) methods and strategies of instruction – one hour;

(F) principles of instruction: audio-visual aids – three hours; and

(G) student performance – 45 minute presentation;.

(4) receive a favorable recommendation from the employing or contracting licensee; and

(5) submit the application required by Rule .0910 of this Section.

(b) In lieu of completing the training course set forth in Subparagraph (a)(3) of this Rule, an applicant may submit to the Board:

(1) a Criminal Justice General Instructor Certificate from the North Carolina Criminal Justice Education and Training Standards Commission; or

(2) any training certification that meets or exceeds the requirements of Subparagraph (a)(3) of this Rule and is approved by the Director of PPS.

(c) In lieu of the experience requirement of Subparagraph (a)(2) of this Rule and completing the training course set forth in Subparagraph (a)(3) of this Rule, an applicant may establish to the Board's satisfaction a military occupational specialty and two years of verifiable experience within the past five years in the U.S. Armed forces as an unarmed guard trainer.

(d) In addition to the requirements of 12 NCAC 07D .0200, an applicant for an unarmed guard trainer certificate that is the spouse of an active duty member of the U.S. Armed Forces shall establish to the Board's satisfaction:

(1) the spouse holds a current license, certification or registration from another jurisdiction and the other jurisdiction's requirements are substantially equivalent to or exceed the Board's requirements; and

(2) the spouse has two years of verifiable experience within the past five years as an unarmed guard trainer.

(e) An Unarmed Trainer Certificate shall expire two years after the date of issuance.

History Note: Authority G.S. 74C-8; 74C-9; 74C-11; 74C-13; 93B-15.1; Eff. October 1, 2004; Amended Eff. October 1, 2013; January 1, 2013; January 1, 2008.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 11 .0104 DEFINITIONS

As used in these Rules, the following definitions apply.

(1) "Absorbed dose" means the energy imparted by ionizing radiation per unit mass of irradiated material. The units of absorbed dose are the rad and the gray (Gy).

(2) "Accelerator produced material" means any material made radioactive by use of a particle accelerator.

(3) "Act" means North Carolina Radiation Protection Act as defined in G.S. 104E-1.

(4) "Activity" is the rate of disintegration (transformation) or decay of radioactive material. The units of activity are the curie (Ci) and the becquerel (Bq).

(5) "Adult" means an individual 18 or more years of age.

(6) "Agency" means the, North Carolina Department of Health and Human Services, Division of Health Service Regulation, Radiation Protection Section.

(7) "Agreement state" has the meaning as defined in G.S. 104E-5(2).

(8) "Air-purifying respirator" means a respirator with an air-purifying filter, cartridge, or canister that removes specific air contaminants by passing ambient air through the air-purifying element.

(9) "Airborne radioactive material" means any radioactive material dispersed in the air in the form of dusts, fumes, particulates, mists, vapors, or gases.

(10) "Airborne radioactivity area" means a room, enclosure, or area in which airborne radioactive materials, composed wholly or partly of licensed radioactive material, exist in concentrations:

(a) in excess of the derived air concentrations specified in Appendix B to 10 CFR 20.1001 - 20.2401; or

(b) to such a degree that an individual present in the area without respiratory protective equipment could exceed, during the hours an individual is present in a week, an intake of 0.6 percent of the annual limit on intake or 12 DAC-hours.

(11) "ALARA" (acronym for "as low as is reasonably achievable") means making every reasonable effort to maintain exposures to

radiation as far below the dose limits in the rules of this Chapter as is practical consistent with the purpose for which the licensed or registered activity is undertaken, taking into account the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of sources of radiation in the public interest.

(12) "Annual limit on intake" (ALI) means the derived limit for the amount of radioactive material taken into the body of an adult worker by inhalation or ingestion in a year. ALI is the smaller value of intake of a given radionuclide in an effective dose equivalent of five rems (0.05 Sv) or a committed dose equivalent of 50 rems (0.5 Sv) to any individual organ or tissue. The ALI values for intake by ingestion and by inhalation of selected radionuclides are given in Table 1, Columns 1 and 2, of Appendix B to 10 CFR 20.1001 - 20.2401.

(13) "Annually" means either:
- (a) at intervals not to exceed 12 consecutive months; or
- (b) once per year at the same time each year (completed during the same month each year over a period of multiple years).

(14) "Assigned protection factor (APF)" means the expected workplace level of respiratory protection that would be provided by a properly functioning respirator or a class of respirators to properly fitted and trained users. APF can be divided into the ambient airborne concentrations to estimate inhaled air concentrations.

(15) "Atmosphere-supplying respirator" means a respirator that supplies the respirator user with breathing air from a source independent of the ambient atmosphere and includes supplied-air respirators and self-contained breathing apparatus units.

(16) "Authorized representative" means an employee of the agency, or an individual outside the agency when the individual is so designated by the agency under Rule .0112 of this Section.

(17) "Authorized user" means an individual who is authorized by license or registration condition to use a source of radiation.

(18) "Background radiation" means radiation from cosmic sources; naturally occurring radioactive materials, including radon (except as a decay product of source or special nuclear material); and global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that are not under the control of the licensee or registrant. "Background radiation" does not include sources of radiation regulated by the agency.

(19) "Becquerel" is the SI unit of radioactivity. One becquerel is equal to one disintegration per second (s-1).

(20) "Bioassay" or "radiobioassay" means the determination of kinds, quantities or concentrations, and, in some cases, the locations of radioactive material in the human body, whether by direct measurement (*in vivo* counting) or by analysis and evaluation of materials excreted or removed from the human body.

(21) "Brachytherapy" means a method of radiation therapy in which sources are used to deliver a radiation dose at a distance of up to a few centimeters by surface, intracavitary, intraluminal or interstitial application.

(22) "Brachytherapy source" means a radioactive source or a manufacturer assembled source train or a combination of these sources that is designed to deliver a therapeutic dose within a distance of a few centimeters.

(23) "Byproduct material" has the meaning as defined in G.S. 104E-5(4), and in addition includes:
- (a) The tailings or wastes produced by the extraction or concentration of uranium or thorium from ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by these solution extraction operations do not constitute "byproduct material" within this definition;
- (b) Any discrete source of Radium-226 that is produced, extracted, or converted after extraction, for use for a commercial, medical, or research activity;
- (c) Any material that:
  - (i) has been made radioactive by use of a particle accelerator; or
  - (ii) is produced, extracted, or converted after extraction, for use for a commercial, medical, or research activity; and
- (d) Any discrete source of naturally occurring radioactive material, other than source material, that:
  - (i) the US Nuclear Regulatory Commission, in consultation with the Administrator of the

Environmental Protection, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate federal agency, determines would poses a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security; and

(ii) is extracted or converted after extraction for use in a commercial, medical, or research activity.

(24) "Class", "lung class" or "inhalation class" means a classification scheme for inhaled material according to its rate of clearance from the pulmonary region of the lung. Materials are classified as D, W, or Y, which applies to a range of clearance half-times as follows:

CLASSIFICATION OF INHALED MATERIAL

Class	Clearance half-time
Class D (Day)	less than 10 days
Class W (Weeks)	10 days to 100 days
Class Y (Years)	greater than 100 days

(25) "Clinical procedures manual" means a collection of procedures governing the medical use of radioactive material not requiring a written directive that describes each method by which the licensee performs clinical procedures and includes other instructions and precautions. Each clinical procedure, including the radiopharmaceutical dosage and route of administration, shall be approved in writing by an authorized user prior to inclusion in the manual. The radiation safety officer shall ensure that the manual includes the approved procedure(s) for all clinical procedures using radioactive material not requiring a written directive performed at the facility.

(26) "Collective dose" is the sum of the individual doses received in a given period of time by a specified population from exposure to a specified source of radiation.

(27) "Commission" has the meaning as defined in G.S. 104E-5(5).

(28) "Committed dose equivalent" ($H_{T,50}$) means the dose equivalent to organs or tissues of reference (T) that will be received from an intake of radioactive material by an individual during the 50-year period following the intake.

(29) "Committed effective dose equivalent" ($H_{E,50}$) is the sum of the products of the weighting factors applicable to each of the body organs or tissues that are irradiated and the committed dose equivalent to these organs or tissues ($H_{E,50} = \Sigma w_T H_{T,50}$).

(30) "Consortium" means an association of medical use licensees and a PET radionuclide production facility that jointly own or share in the operation and maintenance costs of the PET radionuclide production facility that produces PET radionuclides for use in producing radioactive drugs within the consortium for noncommercial distributions among its associated members for medical use. The consortium's PET radionuclide production facility must be located at an educational institution, federal or medical facility.

(31) "Constraint" or "dose constraint" means a value above which specified licensee actions are required.

(32) "Controlled area" means an area, outside of a restricted area but inside the site boundary, access to which can be limited by the licensee or registrant for any reason.

(33) "Critical group" means the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.

(34) "Curie" is the special unit of radioactivity. One curie is equal to 3.7×10^{10} disintegrations per second = 3.7×10^{10} becquerels = 2.22×10^{12} disintegrations per minute.

(35) "Declared pregnant woman" means a woman who has voluntarily informed the licensee or registrant, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman withdraws the declaration in writing or is no longer pregnant.

(36) "Decommission" means to remove (as a facility) safely from service and reduce residual radioactivity to a level that permits release of the property for either unrestricted use and termination of the license or for restricted use and termination of the license.

(37) "Deep-dose equivalent" (H_d), which applies to external whole-body exposure, is the dose equivalent at a tissue depth of one cm (1000 mg/cm^2).

(38) "Demand respirator" means an atmosphere-supplying respirator that admits breathing air to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

(39) "Department" has the meaning as defined in G.S. 104E-5(6).

(40) "Depleted uranium" means the source material uranium in which the isotope uranium-235 is less than 0.711 weight percent of the total uranium present. Depleted uranium does not include special nuclear material.

(41) "Derived air concentration" (DAC) means the concentration of a given radionuclide in air which, if breathed by the reference man for a working year of 2,000 hours under conditions of light work (inhalation rate 1.2 cubic meters of air per hour), results in an intake of ALI. DAC values are given in Table 1, Column 3, of Appendix B to 10 CFR 20.1001 - 20.2401).

(42) "Derived air concentration-hour" (DAC-hour) is the product of the concentration of radioactive material in air (expressed as a fraction or multiple of the derived air concentration for each radionuclide) and the time of exposure to that radionuclide, in hours. A licensee may take 2,000 DAC-hours to represent one ALI, equivalent to a committed effective dose equivalent of five rems (0.05 Sv).

(43) "Discrete source" means a radionuclide that has been processed so that its concentration within a material has been purposely increased for use for commercial, medical, or research activities.

(44) "Disposable respirator" means a respirator for which maintenance is not intended and that is designed to be discarded after excessive breathing resistance, sorbent exhaustion, physical damage, or end-of-service-life renders it unsuitable for use. Examples of this type of respirator are a disposable half-mask respirator or a disposable escape-only self-contained breathing apparatus (SCBA).

(45) "Distinguishable from background" means that the detectable concentration of a radionuclide is statistically different from the background concentration of that radionuclide in the vicinity of the site or, in the case of structures, in similar materials using measurement technology, survey and statistical techniques as defined in 10 CFR 20.1003.

(46) "Dose" or "radiation dose" is a generic term that means absorbed dose, dose equivalent, effective dose equivalent, committed dose equivalent, committed effective dose equivalent, or total effective dose equivalent, as defined in other Items of this Rule.

(47) "Dose equivalent" (H_T) means the product of the absorbed dose in tissue, quality factor, and all other necessary modifying factors at the location of interest. The units of dose equivalent are the rem and sievert (Sv).

(48) "Dose limits" (see "Limits" defined in this Rule).

(49) "Dosimetry processor" means an individual or organization that processes and evaluates individual monitoring equipment in order to determine the radiation dose delivered to the equipment.

(50) "Effective dose equivalent" (H_E) is the sum of the products of the dose equivalent to the organ or tissue (H_T) and the weighting factors (w_T) applicable to each of the body organs or tissues that are irradiated ($H_E = \Sigma w_T H_T$).

(51) "Embryo/fetus" means the developing human organism from conception until the time of birth.

(52) "Entrance or access point" means any location through which an individual could gain access to radiation areas or to a source of radiation. This includes entry or exit portals of sufficient size to permit human entry, irrespective of their intended use.

(53) "Equipment services" means the selling, installation, rebuilding, conversion, repair, inspection, testing, survey or calibration of equipment which can affect compliance with these Rules by a licensee or registrant.

(54) "Exposure" means being exposed to ionizing radiation or to radioactive material.

(55) "Exposure rate" means the exposure per unit of time, such as R/min and mR/h.

(56) "External dose" means that portion of the dose equivalent received from radiation sources outside the body.

(57) "Extremity" means hand, elbow, arm below the elbow, foot, knee, or leg below the knee.

(58) "Eye dose equivalent" (See "Lens dose equivalent" as defined in this Rule).

(59) "Filtering facepiece" or "dust mask" means a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium, not equipped with elastomeric sealing surfaces and adjustable straps.

(60) "Fit factor" means a quantitative estimate of the fit of a particular respirator to a specific individual, and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.

(61) "Fit test" means the use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.

(62) "Generally applicable environmental radiation standards" means standards issued by the U.S. Environmental Protection Agency (EPA) under the authority of the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), as amended, that impose limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using sources of radiation.

(63) "Gray" (Gy) is the SI unit of absorbed dose. One gray is equal to an absorbed dose of one joule/kilogram (100 rads).

(64) "Helmet" means a rigid respiratory inlet covering that also provides head protection against impact and penetration.

(65) "High dose-rate remote afterloader" (HDR) means a brachytherapy device that remotely delivers a dose rate in excess of 12 gray (1200 rads) per hour at the point or surface where the dose is prescribed.

(66) "High radiation area" means an area, accessible to individuals, in which radiation levels from sources external to the body could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 mSv) in one hour at 30 centimeters from the radiation source or from any surface that the radiation penetrates.

(67) "Hood" means a respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

(68) "Hospital" means a facility that provides as its primary functions diagnostic services and intensive medical and nursing care in the treatment of acute stages of illness.

(69) "Human use" means the internal or external administration of radiation or radioactive materials to human beings.

(70) "Individual" means any human being.

(71) "Individual monitoring" means:

(a) the assessment of dose equivalent by the use of devices designed to be worn by an individual;

(b) the assessment of committed effective dose equivalent by bioassay or by determination of the time-weighted air concentrations to which an individual has been exposed, *i.e.*, DAC-hours; or

(c) the assessment of dose equivalent by the use of survey data.

(72) "Individual monitoring devices" or "individual monitoring equipment" means devices designed to be worn by a single individual for the assessment of dose equivalent such as film badges, thermoluminescence dosimeters (TLDs), pocket ionization chambers, and personal ("lapel") air sampling devices.

(73) "Inhalation class" (see "Class" defined in this Rule).

(74) "Inspection" means an examination or observation by the agency to determine compliance with rules, orders, requirements and conditions of the agency or the Commission.

(75) "Internal dose" means that portion of the dose equivalent received from radioactive material taken into the body.

(76) "Lens dose equivalent" (LDE) applies to the external exposure of the lens of the eye and is taken as the dose equivalent at a tissue depth of 0.3 cm (300 mg/cm^2).

(77) "License," except where otherwise specified, means a license issued pursuant to Section .0300 of this Chapter.

(78) "Licensee" means any person who is licensed by the agency pursuant to Section .0300 of this Chapter.

(79) "Licensing state" means any state designated as such by the Conference of Radiation Control Program Directors, Inc. Unless the context indicates otherwise, use of the term Agreement State in this Chapter includes licensing state with respect to naturally occurring and accelerator produced radioactive material (NARM).

(80) "Limits" or "dose limits" means the permissible upper bounds of radiation doses.

(81) "Loose-fitting facepiece" means a respiratory inlet covering that is designed to form a partial seal with the face.

(82) "Lost or missing licensed radioactive material" means licensed radioactive material whose location is unknown. It includes material that has been shipped but has not reached its destination and whose location cannot be readily traced in the transportation system.

(83) "Low dose-rate remote afterloader" (LDR) means a brachytherapy device that remotely delivers a dose rate of less than or equal to 2 gray (200 rads) per hour at the point or surface where the dose is prescribed.

(84) "Lung class" (see "Class" as defined in this Rule).

(85) "Manual brachytherapy" means a type of brachytherapy in which the brachytherapy seeds, ribbons) are manually placed topically on or inserted either into the body cavities that are in close proximity to a treatment site or directly into the tissue volume.

(86) "Medical event" means an event that meets the criteria in Rule .0364 of this Chapter.

(87) "Medical use" means the intentional internal or external administration of radioactive material or the radiation therefrom to patients or human research subjects under the supervision of an authorized user.

(88) "Medium dose-rate remote afterloader" means a brachytherapy device that remotely delivers a dose rate of greater than 2 gray (200 rads), but less than 12 gray (1200 rads) per hour at the point or surface where the dose is prescribed.

(89) "Member of the public" means any individual except when that individual is receiving an occupational dose.

(90) "Minor" means an individual less than 18 years of age.

(91) "Mobile nuclear medicine service" means the transportation and medical use of radioactive material.

(92) "Monitoring," "radiation monitoring" or "radiation protection monitoring" means the measurement of radiation levels, concentrations, surface area concentrations or quantities of radioactive material and the use of the results of these measurements to evaluate potential exposures and doses.

(93) "Natural radioactivity" means radioactivity of naturally occurring nuclides.

(94) "Negative pressure respirator" means a tight-fitting respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside of the respirator.

(95) "Nonstochastic effect" or "deterministic effect" means health effects, the severity of which vary with the dose and for which a threshold is believed to exist. Radiation-induced cataract formation is an example of a nonstochastic effect.

(96) "NRC" means the United States Nuclear Regulatory Commission or its authorized representatives.

(97) "Occupational dose" means the dose received by an individual in the course of employment in which the individual's assigned duties involve exposure to radiation or radioactive material from licensed and unlicensed sources of radiation, whether in the possession of the licensee or registrant or other person. Occupational dose does not include doses received from background radiation, as a patient from medical practices, from exposure to individuals administered radioactive material and released in accordance with Rule .0358 of this Chapter, from voluntary participation in medical research programs, or as a member of the public.

(98) "Particle accelerator" means any machine capable of accelerating electrons, protons, deuterons, or other charged particles, in a vacuum and of discharging the resultant particulate or other radiation into a medium at energies usually in excess of one megaelectron volt. For purposes of this definition, "accelerator" is an equivalent term.

(99) "Patient intervention" means actions by the patient or human research subject, whether intentional or unintentional, such as dislodging or removing treatment devices or prematurely terminating the administration.

(100) "Person" has the meaning as defined in G.S. 104E-5(11).

(101) "Personnel monitoring equipment" means devices, such as film badges, pocket dosimeters, and thermoluminescent dosimeters, designed to be worn or carried by an individual for the purpose of estimating the dose of radiation received by the individual.

(102) "Pharmacist" means a person licensed to practice pharmacy in North Carolina pursuant to G.S. Chapter 90, Article 4A.

(103) "Physician" means a person licensed to practice medicine in North Carolina pursuant to G.S. Chapter 90, Article 1.

(104) "Planned special exposure" means an infrequent exposure to radiation, separate from and in addition to the annual dose limits as defined in Rule .1608 of this Chapter.

(105) "Positive pressure respirator" means a respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.

(106) "Positron Emission Tomography (PET) radionuclide production facility" means a facility operating an accelerator or a cyclotron for the purpose of producing PET radionuclides.

(107) "Powered air-purifying respirator (PAPR)" means an air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.

(108) "Prescribed dosage" means the specified activity or range of activity of unsealed radioactive material as documented:
- (a) In a written directive; or
- (b) In accordance with the directions of an authorized user.

(109) "Prescribed dose" means:
- (a) for teletherapy or accelerator radiation:
  - (i) the total dose; and
  - (ii) the dose per fraction as documented in the written directive;
- (b) for brachytherapy:
  - (i) the total source strength and exposure time; or
  - (ii) the total dose, as documented in the written directive;
- (c) for gamma stereotactic radiosurgery, the total dose as documented in the written directive; or
- (d) for remote brachytherapy afterloaders, the total dose and dose per fraction as documented in a written directive.

(110) "Pressure demand respirator" means a positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the

positive pressure is reduced inside the facepiece by inhalation.

(111) "Public dose" means the dose received by a member of the public from exposure to radiation or radioactive material released by a licensee or registrant, or another source of radiation within a licensee's or registrant's control. It does not include occupational dose or doses received from background radiation, as a patient from medical practices, from exposure to individuals administered radioactive material and released in accordance with Rule .0358 of this Chapter, or from voluntary participation in medical research programs.

(112) "Pulsed dose-rate remote afterloader" means a type of remote afterloading brachytherapy device that uses a single source capable of delivering dose rates in the "high dose-rate" range, but:

(a) Is approximately one-tenth of the activity of typical high dose-rate remote afterloader sources; and

(b) Is used to simulate the radiobiology of a low dose-rate treatment by inserting the source for a given fraction of each hour.

(113) "Qualitative fit test" (QLFT) means a pass/fail fit test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

(114) "Quality factor" (Q) means the modifying factor that is used to derive dose equivalent from absorbed dose. Quality factors are provided in the definition of rem in this Rule.

(115) "Quantitative fit test" (QNFT) means an assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

(116) "Quarter" means a period of time equal to one-fourth of the year observed by the licensee or registrant (approximately 13 consecutive weeks), providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(117) "Quarterly" means either:

(a) at intervals not to exceed 13 weeks; or

(b) once per 13 weeks at about the same time during each 13 week period (completed during the same month of the quarter (first month, second month or third month) each quarter over a time period of several quarters.

(118) "Rad" is the special unit of absorbed dose. One rad is equal to an absorbed dose of 100 ergs/gram or 0.01 joule/kilogram (0.01 gray).

(119) "Radiation", except as otherwise defined in Section .1400 of this Chapter, has the meaning as defined in G.S. 104E-5(12).

(120) "Radiation area" means an area, accessible to individuals, in which radiation levels could result in an individual receiving a dose equivalent in excess of 0.005 rem (0.05 mSv) in one hour at 30 centimeters from the radiation source or from any surface that the radiation penetrates.

(121) "Radiation dose" means dose.

(122) "Radiation machine" has the meaning as defined in G.S. 104E-5(13).

(123) "Radiation safety officer" means one who has the knowledge and responsibility to apply appropriate radiation protection rules.

(124) "Radioactive material" has the meaning as defined in G.S. 104E-5(14).

(125) "Radioactive waste disposal facility" means any low-level radioactive waste disposal facility, as defined in G.S. 104E-5(9c), established for the purpose of receiving low-level radioactive waste, as defined in Rule .1202 of this Chapter, generated by another licensee for the purpose of disposal.

(126) "Radioactive waste processing facility" means any low-level radioactive waste facility, as defined in G.S. 104E-5(9b), established for the purpose of receiving waste, as defined in this Rule, generated by another licensee to be stored, compacted, incinerated or treated.

(127) "Radioactivity" means the disintegration of unstable atomic nuclei by emission of radiation.

(128) "Radiobioassay" means bioassay.

(129) "Reference man" means a hypothetical aggregation of human physical and physiological characteristics arrived at by international consensus as published by the International Commission on Radiological Protection. These characteristics may be used by researchers and public health workers to standardize results of experiments and to relate biological insult to a common base.

(130) "Registrant" means any person who is registered with the agency as required by provisions of these Rules or the Act.

(131) "Registration" means registration with the agency in accordance with these Rules.

(132) "Regulations of the U.S. Department of Transportation" means the regulations in 49 CFR Parts 100-189.

(133) "Rem" is the special unit of any of the quantities expressed as dose equivalent. The dose equivalent in rems is equal to the absorbed dose in rads multiplied by the quality factor (1 rem = 0.01 sievert). As used in this Chapter, the quality factors for converting

absorbed dose to dose equivalent are as follows:

QUALITY FACTORS AND ABSORBED DOSE EQUIVALENCIES

TYPE OF RADIATION	Quality Factor (Q)	Absorbed Dose Equal to a Unit Dose Equivalent[a]
X-, gamma, or beta radiation	1	1
Alpha particles, multiple-charged particles, fission fragments and heavy particles of unknown charge	20	0.05
Neutrons of unknown energy	10	0.1
High-energy protons	10	0.1

[a] Absorbed dose in rad equal to one rem or the absorbed dose in gray equal to one sievert.

If it is more convenient to measure the neutron fluence rate than to determine the neutron dose equivalent rate in rems per hour or sieverts per hour, one rem (0.01 Sv) of neutron radiation of unknown energies may, for purposes of the rules of this Chapter, be assumed to result from a total fluence of 25 million neutrons per square centimeter incident upon the body.
If sufficient information exists to estimate the approximate energy distribution of the neutrons, the licensee or registrant may use the fluence rate per unit dose equivalent or the appropriate Q value from the following table to convert a measured tissue dose in rads to dose equivalent in rems:

MEAN QUALITY FACTORS, Q, AND FLUENCE PER UNIT DOSE EQUIVALENT FOR MONOENERGETIC NEUTRONS

	Neutron Energy (MeV)	Quality Factor[a] (Q)	Fluence per Unit Dose Equivalent[b] (neutrons cm^{-2} rem^{-1})
(thermal)	2.5×10^{-8}	2	980×10^{6}
	1×10^{-7}	2	980×10^{6}
	1×10^{-6}	2	810×10^{6}
	1×10^{-5}	2	810×10^{6}
	1×10^{-4}	2	840×10^{6}
	1×10^{-3}	2	980×10^{6}
	1×10^{-2}	2.5	1010×10^{6}
	1×10^{-1}	7.5	170×10^{6}
	5×10^{-1}	11	39×10^{6}
	1	11	27×10^{6}
	2.5	9	29×10^{6}
	5	8	23×10^{6}
	7	7	24×10^{6}
	10	6.5	24×10^{6}
	14	7.5	17×10^{6}
	20	8	16×10^{6}
	40	7	14×10^{6}
	60	5.5	16×10^{6}
	1×10^{2}	4	20×10^{6}
	2×10^{2}	3.5	19×10^{6}
	3×10^{2}	3.5	16×10^{6}
	4×10^{2}	3.5	14×10^{6}

[a] Value of quality factor (Q) at the point where the dose equivalent is maximum in a 30-cm diameter cylinder tissue-equivalent phantom.
[b] Monoenergetic neutrons incident normally on a 30-cm diameter cylinder tissue-equivalent phantom.

(134) "Research and development" means:
- (a) theoretical analysis, exploration, or experimentation; or
- (b) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

Research and development does not include the internal or external administration of radiation or radioactive material to human beings.

(135) "Residual radioactivity" means radioactivity in structures, materials, soils, groundwater, and other media at a site resulting from activities under the licensee's control. This includes radioactivity from all licensed and unlicensed sources used by the licensee, but excludes background radiation. It also includes radioactive materials remaining at the site as a result of routine or accidental releases of radioactive material at the site and previous burials of radioactive materials at the site, even if the burials were made in accordance with the provisions of Section .1600 of this Chapter.

(136) "Respiratory protective device" means an apparatus, such as a respirator, used to reduce the individual's intake of airborne radioactive materials.

(137) "Restricted area" means an area, access to which is controlled by the licensee or registrant for purposes of protecting individuals against undue risks from exposure to radiation and radioactive materials. Restricted area does not include areas used as residential quarters, but separate rooms in a residential building may be set apart as a restricted area.

(138) "Roentgen" (R) means the special unit of exposure. One roentgen equals 2.58×10^{-4} coulombs/kilogram of air.

(139) "Sanitary sewerage" means a system of public sewers for carrying off waste water and refuse, but excluding sewage treatment facilities, septic tanks, and leach fields owned or operated by the licensee.

(140) "Sealed source" means radioactive material that is encased in a capsule designed to prevent leakage or escape of the radioactive material.

(141) "Sealed source and device registry" means the national registry that contains all the registration certificates, generated by both NRC and the Agreement States, that summarize the radiation safety information for the sealed sources and devices and describe the licensing and use conditions approved for the product.

(142) "Self-contained breathing apparatus (SCBA)" means an atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

(143) "Semiannually" means either:
- (a) at intervals not to exceed six months; or
- (b) once per six months at about the same time during each six month period (completed during the sixth month of each six month period over multiple six month periods).

(144) "Shallow-dose equivalent" (H_S), which applies to the external exposure of the skin of the whole body or the skin of an extremity, is taken as the dose equivalent at a tissue depth of 0.007 centimeter (7 mg/cm^2).

(145) "SI unit" means a unit of measure from the International System of Units as established by the General Conference of Weights and Measures.

(146) "Sievert" is the SI unit of any of the quantities expressed as dose equivalent. The dose equivalent in sieverts is equal to the absorbed dose in grays multiplied by the quality factor (1 Sv = 100 rems).

(147) "Site boundary" means that line beyond which the land or property is not owned, leased, or otherwise controlled by the licensee or registrant.

(148) "Source material" has the meaning as defined in G.S. 104E-5(15).

(149) "Source of radiation" means any radioactive material, or any device or equipment emitting or capable of producing radiation.

(150) "Special form radioactive material" means radioactive material which satisfies the following conditions:
- (a) It is either a single solid piece or is contained in a sealed capsule that can be opened only by destroying the capsule;
- (b) The piece or capsule has at least one dimension not less than five millimeters (0.197 inch); and
- (c) It satisfies the test requirements specified by the U.S. Nuclear Regulatory Commission, Subpart F of 10 CFR Part 71, and the tests prescribed in Rule .0114 of this Section. A special form encapsulation designed in accordance with the U.S. Nuclear Regulatory Commission requirements, Subpart F of 10 CFR Part 71, in effect on June 30, 1984,

and constructed prior to July 1, 1985, may continue to be used. A special form encapsulation either designed or constructed after June 30, 1985, must meet requirements of this definition applicable at the time of its design or construction.

(151) "Special nuclear material" has the meaning as defined in G.S. 104E-5(16).

(152) "Special nuclear material in quantities not sufficient to form a critical mass" means uranium enriched in the isotope uranium-235 in quantities not exceeding 350 grams of contained uranium-235; uranium-233 in quantities not exceeding 200 grams; plutonium in quantities not exceeding 200 grams; or any combination of uranium-235, uranium enriched in uranium-235 and plutonium in accordance with the following formula: For each kind of special nuclear material, determine the ratio between the quantity of that special nuclear material and the quantity specified in this Rule for the same kind of special nuclear material. The sum of these ratios for all the kinds of special nuclear material in combination shall not exceed one. For example, the following quantities in combination would not exceed the limitations and are within the formula, as follows:

$$\frac{175 \text{ (gram contained U-235)}}{350} + \frac{50 \text{ (grams U-233)}}{200} + \frac{50 \text{ (grams Pu)}}{200} \text{ is } < \text{or} = 1$$

(153) "State" means the State of North Carolina.

(154) "Stereotactic radiosurgery" means the use of external radiation in conjunction with a stereotactic guidance device to precisely deliver a therapeutic dose to a tissue volume.

(155) "Stochastic effects" means health effects that occur randomly and for which the probability of the effect occurring, rather than its severity, is assumed to be a linear function of dose without threshold. Hereditary effects and cancer incidence are examples of stochastic effects.

(156) "Supplied-air respirator" (SAR) or "airline respirator" means an atmosphere-supplying respirator for which the source of breathing air is not designed to be carried by the user.

(157) "Survey" means an evaluation of the radiological conditions and potential hazards incident to the production, use, transfer, release, disposal, or presence of sources of radiation. When appropriate, such an evaluation includes a physical survey of the location of sources of radiation and measurements or calculations of levels of radiation, or concentrations or quantities of radioactive material present.

(158) "Therapeutic dosage" means a dosage of unsealed radioactive material that is intended to deliver a radiation dose to a patient or human research subject for palliative or curative treatment.

(159) "These Rules" means Chapter 11 of this Title.

(160) "Tight-fitting facepiece" means a respiratory inlet covering that forms a complete seal with the face.

(161) "To the extent practicable" means to the extent feasible or capable of being done or carried out with reasonable effort, taking into account the state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations.

(162) "Total effective dose equivalent" (TEDE) means the sum of the effective dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures).

(163) "Toxic or hazardous constituent of the waste" means the nonradioactive content of waste which, notwithstanding the radioactive content, would be classified as "hazardous waste" as defined in G.S. 130A-290(8).

(164) "Treatment site" means the anatomical description of the tissue intended to receive a radiation dose, as described in a written directive.

(165) "Type A quantity" means a quantity of radioactive material, the aggregate radioactivity of which does not exceed A_1 for special form radioactive material or A_2 for normal form radioactive material, where A_1 and A_2 are given in Rule .0113 of this Section or may be determined by procedures described in that Rule. All quantities of radioactive material greater than a Type A quantity are Type B.

(166) "Unit dosage" means a dosage intended for medical use in an individual that has been obtained from a manufacturer or preparer licensed pursuant to 10 CFR 32.72 or equivalent agreement state requirements.

(167) "Unrefined and unprocessed ore" means ore in its natural form prior to any processing, such as grinding, roasting, beneficiating, or refining.

(168) "Unrestricted area" means an area, access to which is neither limited nor controlled by the licensee or registrant.

(169) "User seal check" or "fit check" means an action conducted by the respirator user to determine if the respirator is properly seated to the face. Examples include negative pressure check, positive pressure check, irritant smoke check, or isoamyl acetate check.

(170) "Very high radiation area" means an area, accessible to individuals, in which radiation levels from sources external to the body could result in an individual receiving an absorbed dose in excess of 500 rads (5 grays) in one hour at one meter from a radiation source or from any surface that the radiation penetrates. At very high doses received at high dose rates, units of absorbed dose (*e.g.*, rads and grays) are appropriate, rather than units of dose equivalent (*e.g.*, rems and sieverts).

(171) "Waste" means low-level radioactive waste as defined in G.S. 104E-5(9a) and includes those low-level radioactive wastes containing source, special nuclear, or radioactive material that are acceptable for disposal in a land disposal facility. For purposes of this definition, low-level waste means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in this Rule, and licensed naturally occurring and accelerator produced radioactive material which is not subject to regulation by the U.S. Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended, except as defined differently in Rule .1202 of this Chapter.

(172) "Week" means seven consecutive days.

(173) "Weighting factor", w_T, for an organ or tissue (T) is the proportion of the risk of stochastic effects resulting from irradiation of that organ or tissue to the total risk of stochastic effects when the whole body is irradiated uniformly. For calculating the effective dose equivalent, the values of w_T are:

ORGAN DOSE WEIGHTING FACTORS

Organ or Tissue	w_T
Gonads	0.25
Breast	0.15
Red bone marrow	0.12
Lung	0.12
Thyroid	0.03
Bone surfaces	0.03
Remainder	0.30[a]
Whole body	1.00[b]

[a] 0.30 results from 0.06 for each of 5 "remainder" organs (excluding the skin and the lens of the eye) that receive the highest doses.

[b] For the purpose of weighting the external whole body dose (for adding it to the internal dose), a single weighting factor, w_T = 1.0, has been specified.

(174) "Whole body" means, for purposes of external exposure, head, trunk (including male gonads), arms above the elbow, or legs above the knee.

(175) "Worker" means an individual engaged in work under a license or registration issued by the agency and controlled by a licensee or registrant, but does not include the licensee or registrant.

(176) "Working level" (WL) is any combination of short-lived radon daughters (for radon-222: polonium-218, lead-214, bismuth-214, and polonium-214; and for radon-220: polonium-216, lead-212, bismuth-212, and polonium-212) in one liter of air that will result in the ultimate emission of 1.3 x 105 MeV of potential alpha particle energy.

(177) "Working level month" (WLM) means an exposure to one working level for 170 hours.

(178) "Written directive" means an order in writing for a specific patient or human research subject dated and signed by an authorized user prior to the administration of a radiopharmaceutical or radiation from a licensed source, except as specified in Sub-item (e) of this definition, containing the patient or human research subject's name and the following information:

(a) for the administration of greater than 30 microcuries (1.11 Megabecquerels (MBq)) of sodium iodide I-131, the dosage;

(b) for the therapeutic administration of a radiopharmaceutical other than sodium iodide I-131:
  (i) radionuclide;
  (ii) dosage; and
  (iii) route of administration;

(c) for teletherapy or accelerator radiation therapy:
  (i) total dose;
  (ii) dose per fraction;
  (iii) treatment site; and
  (iv) number of fractions;

(d) for high-dose-rate remote afterloading brachytherapy:
  (i) radionuclide;
  (ii) treatment site;
  (iii) dose per fraction
  (iv) number of fractions; and
  (v) total dose;

(e) for all other brachytherapy:
  (i) prior to implantation:

(A) radionuclide;
(B) treatment site; and
(C) dose; and

(ii) after implantation:
(A) radionuclide;
(B) treatment site;
(C) number of sources;
(D) total source strength and exposure time; and
(E) total dose; and

(f) for gamma stereotactic radiosurgery:
(i) the total dose;
(ii) treatment site; and
(iii) values for the target coordinate settings per treatment for each anatomically distinct treatment site.

(179) "Year" means the period of time beginning in January used to determine compliance with the provisions of Section .1600 of this Chapter. The licensee or registrant may change the starting date of the year used to determine compliance by the licensee or registrant provided that the change is made at the beginning of the year and that no day is omitted or duplicated in consecutive years.

History Note: Authority G.S. 104E-7(a)(2); 10 CFR 20.1003; Eff. February 1, 1980;
Amended Eff. November 1, 1989; June 1, 1989; October 1, 1984;
Transferred and Recodified from 10 NCAC 03G .2204 Eff. January 4, 1990;
Amended Eff. January 1, 1994; May 1, 1992;
Temporary Amendment Eff. August 20, 1994, for a Period of 180 Days or until the permanent rule becomes effective, whichever is sooner;
Amended Eff. October 1, 2013; November 1, 2007; May 1, 2006; January 1, 2005; August 1, 2002; April 1, 1999; August 1, 1998; May 1, 1995.

15A NCAC 11 .0105 OTHER DEFINITIONS

Definitions of certain other words and phrases as used in these Rules are set forth in Sections .0300, .0500, .0600, .0800, .1200, .1300, .1400, and .1500 of this Chapter. Waste class is defined in Rule .1650 of this Chapter.

History Note: Authority G.S. 104E-7;
Eff. February 1, 1980;
Amended Eff. June 1, 1989;
Transferred and Recodified from 10 NCAC 03G .2205 Eff. January 4, 1990;
Amended Eff. October 1, 2013; May 1, 1993.

15A NCAC 11 .0117 INCORPORATION BY REFERENCE

(a) For the purpose of the rules in this Chapter, the following rules, standards and other requirements are hereby incorporated by reference including any subsequent amendments and editions:

(1) Appendix A, Appendix B, Appendix C, and Appendix G to 10 CFR Parts 20.1001 - 20.2401;

(2) The following parts of 10 CFR:
(A) Part 21;
(B) Parts 30.1, 30.4 and 30.10;
(C) Part 31, except 31.5;
(D) Parts 32.2, 32.13, 32.24, 32.110, 32.201, 32.210;
(E) Subpart J of 10 CFR Part 35, Parts 35.50, 35.51, 35.55, 35.57, 35.59, 35.190, 35.290, 35.390, 35.392, 35.394, 35.396, 35.432, 35.433, 35.457, 35.490, 35.491, 35.500, 35.590, Subpart H of 10 CFR Part 35, 35.1000;
(F) Part 36;
(G) Part 40, except 40.12(b), 40.23, 40.27, 40.28, 40.31 (j through m), 40.32(d) and portions of (e) pertaining to uranium enrichment, and 40.32(g), 40.33, 40.38, 40.41(d), 40.41(e)(1), 40.41(e)(3), 40.41(g), 40.41(h), 40.51(b)(6), 40.64, 40.66, 40.67;
(H) Part 61 except 61.16, 61.23(i) and (j);
(I) Part 70, except 70.1 (c), (d), (e), 70.13, 70.14, 70.20(a), (b), 70.21(a)(1), (c), (f through h), 70.22(b), (c), (f through n), 70.23 (a)(6 through 12), (b), 70.23a, 70.24, 70.25(a)(1), 70.31(c through e), 70.32(a)(1), (a)(4 through 7), (b)(1), (b)(3), (b)(4)(c through k), 70.37, 70.40, 70.42(b)(6), 70.44, 70.51(c), 70.52, 70.55(c), 70.59-62, 70.64, 70.65, 70.66, 70.72, 70.73, 70.74, 70.76, 70.82;
(J) Parts 71.0, 71.1, 71.2, 71.3, 71.13, 71.4, 71.5, 71.8, 71.14(a), 71.15, 71.17(a) through (e), 71.20, 71.21, 71.22, 71.23, 71.47, Subpart G of 10 CFR Part 71, 10 CFR 71.101(a) through (c)(1), 71.101(f), 71.101(g), 71.103, 71.105, 71.127, 71.129, 71.131, 71.133, 71.135, 71.137, Appendix A to 10 CFR Part 71; and
(K) Part 150 except 150.3 Definition: Foreign Obligations, 150.7, 150.10, 150.14, 150.15, 150.15a, 150.16-17, 150.17a, 150.19, 150.21.

(3) 21 CFR Part 1010, 21 CFR Part 1020 and 21 CFR Part 1040;

(4) 39 CFR Part 14 and 39 CFR Part 15;

(5) Postal Service Manual (Domestic Mail Manual) Section 124.3 [incorporated by reference in 39 CFR Section 111.11];
(6) 40 CFR Part 261;
(7) 49 CFR Parts 100-189;
(8) "Agreement Between the United States Atomic Energy Commission and the State of North Carolina for Discontinuance of Certain Commission Regulatory Authority and Responsibility within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended," signed July 21, 1964;
(9) "Standards and Specifications for Geodetic Control Networks" (September 1984);
(10) "Geometric Geodetic Survey Accuracy Standards and Specifications for Geodetic Surveys Using GPS Relative Positioning Techniques";
(11) "Reference Man: Anatomical, Physiological and Metabolic Characteristics" (ICRP Publication No. 23) of the International Commission on Radiological Protection;
(12) "10 CFR, Chapter 1, Commission Notices, Policy Statements, Agreement States, 46 FR 7540"; and
(13) American National Standard N43.9 "Radiological Safety for the Design and Construction of Apparatus for Gamma Radiography".

(b) The rules, standards and other requirements incorporated by reference in Paragraph (a) of this Rule are available for inspection at the Agency at the address listed in Rule .0111 of this Section. Except as noted in the Subparagraphs of this Paragraph, copies of the rules, standards and other requirements incorporated by reference in Paragraph (a) of this Rule may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at a cost as follows:

(1) Three dollars ($3.00) for the appendixes listed in Subparagraph (a)(1) of this Rule, available from the Agency;
(2) Sixty-Seven dollars ($67.00) for the regulations listed in Subparagraph (a)(2) of this Rule in a volume containing 10 CFR Parts 1-50;
(3) Sixty-Four dollars ($64.00) for the regulations listed in Subparagraph (a)(3) of this Rule in a volume containing 10 CFR Parts 51-199;
(4) Sixty-Six dollars ($66.00) for the regulations listed in Subparagraph (a)(4) of this Rule in a volume containing 21 CFR Parts 800-1299;
(5) Forty-Seven dollars ($47.00) for the regulations listed in Subparagraph (a)(5) of this Rule in a volume containing 39 CFR;
(6) Thirty-six dollars ($36.00) for the manual listed in Subparagraph (a)(6) of this Rule; http://pe.usps.gov/text/dmm300/dmm300_landing.htm;
(7) Fifty-Six dollars ($56.00) for the regulations listed in Subparagraph (a)(7) of this Rule in a volume containing 40 CFR Parts 260-299;
(8) For the regulations listed in Subparagraph (a)(8) of this Rule:
  (A) Seventy dollars ($70.00) for a volume containing 49 CFR Parts 100-177; and
  (B) Seventy dollars ($70.00) for a volume containing 49 CFR Parts 178-199;
(9) One dollar ($1.00) for the agreement in Subparagraph (a)(9) of this Rule, available from the Agency;
(10) Two dollars and eighty-five cents ($2.85) for the standards and specifications in Subparagraph (a)(10) of this Rule, available from the National Geodetic Information Center, N/CG174, Rockwall Building, Room 24, National Geodetic Survey, NOAA, Rockville, MD 20852;
(11) Two dollars and eighty-five cents ($2.85) for the standards and specifications in Subparagraph (a)(11) of this Rule, available from the National Geodetic Information Center, NCG174, Rockwall Building, Room 24, National Geodetic Survey, NOAA, Rockville, MD 20852;
(12) Two Hundred Eighteen dollars ($218.00) for the ICRP Publication No. 23 in Subparagraph (a)(12) of this Rule, available from Pergamon Press, Inc., Maxwell House, Fairview Park, Elmsford, NY 10523;
(13) Two dollars ($2.00) for the document in Subparagraph (a)(13) of this Rule, available from the Agency; and
(14) Twenty-Five dollars plus five dollars shipping and handling ($30.00) for the American National Standard N43.9 in Subparagraph (a)(14) of this Rule, available from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, telephone number (212) 642-4900.
(15) The Code of Federal Regulations is available free of charge on the internet at http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR.

(c) Nothing in this incorporation by reference of 10 CFR Part 61 in Subparagraph (a)(3) of this Rule shall limit or affect the continued applicability of G.S. 104E-25(a) and (b).

History Note: Authority G.S. 104E-7; 104E-15(a); 104E-25(b); 150B-19(5)(b); 150B-21.6;
Eff. June 1, 1993;
Temporary Amendment Eff. August 20, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Amended Eff. October 1, 2013; November 1, 2007; August 1, 2002; April 1, 1999; August 1, 1998; May 1, 1995.

15A NCAC 11 .0301 PURPOSE AND SCOPE

(a) This Section provides for the licensing of radioactive material. No person shall receive, possess, use, transfer, own, transport, manufacture and produce, or acquire radioactive material except as authorized in a specific or general license issued pursuant to, or as otherwise provided in, this Section.

(b) In addition to the requirements of this Section:

(1) All licensees are subject to the requirements of Sections .1000, .1100 and .1600 of this Chapter, except as otherwise provided in the rules of this Section;

(2) Licensees engaged in industrial radiographic operations are subject to the requirements of Section .0500 of this Chapter;

(3) Licensees using sealed sources in the healing arts are subject to the requirements of Section .0700 of this Chapter;

(4) Licensees engaged in the operation of radioactive waste disposal facilities are subject to the requirements of Section .1200 of this Chapter; and

(5) Licensees engaged in well-logging operations are subject to the requirements of Section .1300 of this Chapter.

(c) The rules in this Section do not apply to persons licensed pursuant to the rules in Section .1200 of this Chapter except as specifically provided otherwise in Section .1200.

History Note: Authority G.S. 104E-7; 104E-9(8); 104E-10(b);
Eff. February 1, 1980;
Amended Eff. October 1, 2013; August 1, 1998; January 1, 1994; May 1, 1992; June 1, 1989; July 1, 1982.

15A NCAC 11 .0303 EXEMPT CONCENTRATIONS: OTHER THAN SOURCE MATERIAL

(a) No person shall introduce radioactive material into a product or material knowing or having reason to believe that it will be transferred to persons exempt under Paragraph (d) of this Rule or equivalent regulations of the U.S. Nuclear Regulatory Commission or any agreement state, except in accordance with a specific license issued by the Nuclear Regulatory Commission pursuant to 10 CFR 32.11.

(b) A manufacturer, processor, or producer of a product or material is exempt from the requirements for a license set forth in the rules of this Section to the extent that this person transfers radioactive material contained in a product or material in concentrations not in excess of those specified in Paragraph (d) of this Rule, and introduced into the product or material by a licensee holding a specific license issued by the U.S. Nuclear Regulatory Commission expressly authorizing such introduction. This exemption does not apply to the transfer of byproduct material contained in any food, beverage, cosmetic, drug, or other commodity designed for ingestion or inhalation by, or application to, a human being.

(c) This Rule shall not be deemed to authorize the import of radioactive material or products containing radioactive material.

(d) Except as provided in Paragraph (a) and (b) of this Rule, any person is exempt from these Rules to the extent that such person receives, possesses, uses, transfers, owns, or acquires products or materials containing radioactive material in concentrations not in excess of those listed in the following table:

EXEMPT CONCENTRATIONS

Element (atomic number)	Isotope	Column I Gas concentration microcurie/ml	Column II Liquid and solid concentration microcurie/ml
Antimony (51)	Sb 122		$3X10^{-4}$
	Sb 124		$2X10^{-4}$
	Sb 125		$1X10^{-3}$
Argon (18)	Ar 37	$1X10^{-3}$	
	Ar 41	$4X10^{-7}$	
Arsenic (33)	As 73		$5X10^{-3}$
	As 74		$5X10^{-4}$
	As 76		$2X10^{-4}$
	As 77		$8X10^{-4}$
Barium (56)	Ba 131		$2X10^{-3}$
	Ba 140		$3X10^{-4}$
Beryllium (4)	Be 7		$2X10^{-2}$
Bismuth (83)	Bi 206		$4X10^{-4}$
Bromine (35)	Br 82	$4X10^{-7}$	$3X10^{-3}$
Cadmium (48)	Cd 109		$2X10^{-3}$
	Cd 115m		$3X10^{-4}$
	Cd 115		$3X10^{-4}$
Calcium (20)	Ca 45		$9X10^{-5}$
	Ca 47		$5X10^{-4}$

Carbon (6)	C 14	$1X10^{-6}$	$8X10^{-3}$
Cerium (58)	Ce 141		$9X10^{-4}$
	Ce 143		$4X10^{-4}$
	Ce 144		$1X10^{-4}$
Cesium (55)	Cs 131		$2X10^{-2}$
	Cs 134m		$6X10^{-2}$
	Cs 134		$9X10^{-5}$
Chlorine (17)	Cl 38	$9X10^{-7}$	$4X10^{-3}$
Chromium (24)	Cr 51		$2X10^{-2}$
Cobalt (27)	Co 57		$5X10^{-3}$
	Co 58		$1X10^{-3}$
	Co 60		$5X10^{-4}$
Copper (29)	Cu 64		$3X10^{-3}$
Dysprosium (66)	Dy 165		$4X10^{-3}$
	Dy 166		$4X10^{-4}$
Erbium (68)	Er 169		$9X10^{-4}$
	Er 171		$1X10^{-3}$
Europium (63)	Eu 152		$6X10^{-4}$
	(Half-life =9.2 Hrs.)		
	Eu 155		$2X10^{-3}$
Fluorine (9)	F 18	$2X10^{-6}$	$8X10^{-3}$
Gadolinium (64)	Gd 153		$2X10^{-3}$
	Gd 159		$8X10^{-4}$
Gallium (31)	Ga 72		$4X10^{-4}$
Germanium (32)	Ge 71		$2X10^{-2}$
Gold (79)	Au 196		$2X10^{-3}$
	Au 198		$5X10^{-4}$
	Au 199		$2X10^{-3}$
Hafnium (72)	Hf 181		$7X10^{-4}$
Hydrogen (1)	H 3	$5X10^{-6}$	$3X10^{-2}$
Indium (49)	In 113m		$1X10^{-2}$
	In 114m		$2X10^{-4}$
Iodine (53)	I 126	$3X10^{-9}$	$2X10^{-5}$
	I 131	$3X10^{-9}$	$2X10^{-5}$
	I 132	$8X10^{-8}$	$6X10^{-4}$
	I 133	$1X10^{-8}$	$7X10^{-5}$
	I 134	$2X10^{-7}$	$1X10^{-3}$
Iridium (77)	Ir 190		$2X10^{-3}$
	Ir 192		$4X10^{-4}$
	Ir 194		$3X10^{-4}$
Iron (26)	Fe 55		$8X10^{-3}$
	Fe 59		$6X10^{-4}$
Krypton (36)	Kr 85m	$1X10^{-6}$	
	Kr 85	$3X10^{-6}$	
Lanthanum (57)	La 140		$2X10^{-4}$
Lead (82)	Pb 203		$4X10^{-3}$
Lutetium (71)	Lu 177		$1X10^{-3}$
Manganese (25)	Mn 52		$3X10^{-4}$
	Mn 54		$1X10^{-3}$
	Mn 56		$1X10^{-3}$
Mercury (80)	Hg 197m		$2X10^{-3}$
	Hg 197		$3X10^{-3}$
	Hg 203		$2X10^{-4}$
Molybdenum (42)	Mo 99		$2X10^{-3}$
Neodymium (60)	Nd 147		$6X10^{-4}$
	Nd 149		$3X10^{-3}$
Nickel (28)	Ni 65		$1X10^{-3}$
Niobium (Columbium)(41)	Nb 95		$1X10^{-3}$
	Nb 97		$9X10^{-3}$

Osmium (76)	Os 185		$7X10^{-4}$
	Os 191m		$3X10^{-2}$
	Os 191		$2X10^{-3}$
	Os 193		$6X10^{-4}$
Palladium (46)	Pd 103		$3X10^{-3}$
	Pd 109		$9X10^{-4}$
Phosphorus (15)	P 32		$2X10^{-4}$
Platinum (78)	Pt 191		$1X10^{-3}$
	Pt 193m		$1X10^{-2}$
	Pt 197m		$1X10^{-2}$
	Pt 197		$1X10^{-3}$
Potassium (19)	K 42		$3X10^{-3}$
Praseodymium (59)	Pr 142		$3X10^{-4}$
	Pr 143		$5X10^{-4}$
Promethium (61)	Pm 147		$2X10^{-3}$
	Pm 149		$4X10^{-4}$
Rhenium (75)	Re 183		$6X10^{-3}$
	Re 186		$9X10^{-4}$
	Re 188		$6X10^{-4}$
Rhodium (45)	Rh 103m		$1X10^{-1}$
	Rh 105		$1X10^{-3}$
Rubidium (37)	Rb 86		$7X10^{-4}$
Ruthenium (44)	Ru 97		$4X10^{-4}$
	Ru 103		$8X10^{-4}$
	Ru 105		$1X10^{-3}$
	Ru 106		$1X10^{-4}$
Samarium (62)	Sm 153		$8X10^{-4}$
Scandium (21)	Sc 46		$4X10^{-4}$
	Sc 47		$9X10^{-4}$
	Sc 48		$3X10^{-4}$
Selenium (34)	Se 75		$3X10^{-3}$
Silicon (14)	Si 31		$9X10^{-3}$
Silver (47)	Ag 105		$1X10^{-3}$
	Ag 110m		$3X10^{-4}$
	Ag 111		$4X10^{-4}$
Sodium (11)	Na 24		$2X10^{-3}$
Strontium (38)	Sr 85		$1X10^{-4}$
	Sr 89		$1X10^{-4}$
	Sr 91		$7X10^{-4}$
	Sr 92		$7X10^{-4}$
Sulfur (16)	S 35	$9X10^{-8}$	$6X10^{-4}$
Tantalum (73)	Ta 182		$4X10^{-4}$
Technetium (43)	Tc 96m		$1X10^{-1}$
	Tc 96		$1X10^{-3}$
Tellurium (52)	Te 125m		$2X10^{-3}$
	Te 127m		$6X10^{-4}$
	Te 127		$3X10^{-3}$
	Te 129m		$3X10^{-4}$
	Te 131m		$6X10^{-4}$
	Te 132		$3X10^{-4}$
Terbium (65)	Tb 160		$4X10^{-4}$
Thallium (81)	Tl 200		$4X10^{-3}$
	Tl 201		$3X10^{-3}$
	Tl 202		$1X10^{-3}$
	Tl 204		$1X10^{-3}$
Thulium (69)	Tm 170		$5X10^{-4}$
	Tm 171		$5X10^{-3}$
Tin (50)	Sn 113		$9X10^{-4}$
	Sn 125		$2X10^{-4}$

Tungsten (Wolfram) (74)	W 181		$4X10^{-3}$
	W 187		$7X10^{-4}$
Vanadium (23)	V 48		$3X10^{-4}$
Xenon (54)	Xe 131m	$4X10^{-6}$	
	Xe 133	$3X10^{-6}$	
	Xe 135	$1X10^{-6}$	
Ytterbium (70)	Yb 175		$1X10^{-3}$
Yttrium (39)	Y 90		$2X10^{-4}$
	Y 91m		$3X10^{-2}$
	Y 91		$3X10^{-4}$
	Y 92		$6X10^{-4}$
	Y 93		$3X10^{-4}$
Zinc (30)	Zn 65		$1X10^{-3}$
	Zn 69m		$7X10^{-4}$
	Zn 69		$2X10^{-2}$
Zirconium (40)	Zr 95		$6X10^{-4}$
	Zr 97		$2X10^{-4}$
Beta or gamma emitting radioactive material not listed above with half-life less than 3 years		$1X10^{-10}$	$1X10^{-6}$

(e) In Column I of the table, in Paragraph (d) of this Rule, values are given only for those materials normally used as gases.
(f) In Column II of the table, in Paragraph (d) of this Rule, the units, microcuries per gram, are used for solids.
(g) Many radioisotopes disintegrate into isotopes which are also radioactive. In expressing the concentrations in Paragraph (d) of this Rule, the activity stated is that of the parent isotope and takes into account the daughters.
(h) For purposes of this Rule, where a combination of isotopes is involved, the limit for the combination shall be derived as follows: Determine for each isotope in the product the ratio between the concentration present in the product and the exempt concentration established in Paragraph (d) of this Rule for the specific isotope when not in combination. The sum of the ratios shall not exceed unity. An example of this is:

$$\frac{\text{Concentration of Isotope A in Product}}{\text{Exempt concentration of Isotope A}} + \frac{\text{Concentration of Isotope B in Product}}{\text{Exempt concentration of Isotope B}} \text{ less than or equal to } 1$$

History Note: Authority G.S. 104E-7; 104E-10; 104E-20; 10 CFR 30.70;
Eff. February 1, 1980;
Amended Eff. October 1, 2013; May 1, 1993; June 1, 1989.

15A NCAC 11 .0304 EXEMPT QUANTITIES: OTHER THAN SOURCE MATERIAL

(a) Any person who possesses radioactive material received or acquired under the general license formerly provided in Rule .0303(b) of this Section is exempt from the requirements for a license set forth in this Section to the extent that such person possesses, uses, transfers or owns such radioactive material.
(b) This Rule does not authorize the production, packaging or repackaging of radioactive material for purposes of commercial distribution, or the incorporation of radioactive material into products intended for commercial distribution.
(c) No person shall, for the purposes of commercial distribution, transfer individual quantities of radioactive materials to persons exempt from regulation in Paragraph (a) of this Rule except in accordance with a specific license issued by the U.S. Nuclear Regulatory Commission pursuant to Section 32.18 of 10 CFR Part 32 for source and byproduct material.
(d) Licensees for commercial distribution shall not transfer the quantities of radioactive material to persons exempt under Paragraph (f) of this Rule if the licensee knows or has reason to believe that the recipient will redistribute the quantities to persons exempt under Paragraph (f) of this Rule.
(e) No person may, for purposes of producing an increased radiation level, combine quantities of radioactive material covered by this exemption so that the aggregate quantity exceeds the limits in Paragraph (f) of this Rule, except for radioactive material combined within a device placed in use before May 3, 1999, or as otherwise permitted by the rules in this Section.
(f) Except as provided in Paragraphs (b) and (c) of this Rule, any person is exempt from the rules of this Chapter to the extent that such person receives, possesses, uses, transfers, owns or acquires radioactive material in individual quantities each of which does not exceed the applicable quantity set forth in the following table:

EXEMPT QUANTITIES

Radioactive Material	Microcuries
Antimony-122 (Sb 122)	100
Antimony-124 (Sb 124)	10
Antimony-125 (Sb 125)	10
Arsenic-73 (As 73)	100
Arsenic-74 (As 74)	10
Arsenic-76 (As 76)	10
Arsenic-77 (As 77)	100
Barium-131 (Ba 131)	10
Barium-133 (Ba 133)	10
Barium-140 (Ba 140)	10
Bismuth-210 (Bi 210)	1
Bromine-82 (Br 82)	10
Cadmium-109 (Cd 109)	10
Cadmium-115m (Cd 115m)	10
Cadmium-115 (Cd 115)	100
Calcium-45 (Ca 45)	10
Calcium-47 (Ca 47)	10
Carbon-14 (C 14)	100
Cerium-141 (Ce 141)	100
Cerium-143 (Ce 143)	100
Cerium-144 (Ce 144)	1
Cesium-129 (Cs 129)	100
Cesium-131 (Cs 131)	1,000
Cesium-134m (Cs 134m)	100
Cesium-134 (Cs 134)	1
Cesium-135 (Cs 135)	10
Cesium-136 (Cs 136)	10
Cesium-137 (Cs 137)	10
Chlorine-36 (Cl 36)	10
Chlorine-38 (Cl 38)	10
Chromium-51 (Cr 51)	1,000
Cobalt-57 (Co 57)	100
Cobalt-58m (Co 58m)	10
Cobalt-58 (Co 58)	10
Cobalt-60 (Co 60)	1
Copper-64 (Cu 64)	100
Dysprosium-165 (Dy 165)	10
Dysprosium-166 (Dy 166)	100
Erbium-169 (Er 169)	100
Erbium-171 (Er 171)	100
Europium-152 (Eu 152) 9.2h	100
Europium-152 (Eu 152) 13 yr	1
Europium-154 (Eu 154)	1
Europium-155 (Eu 155)	10
Fluorine-18 (F 18)	1,000
Gadolinium-153 (Gd 153)	10
Gadolinium-159 (Gd 159)	100
Gallium-67 (Ga 67)	100
Gallium-72 (Ga 72)	10
Germanium-68 (Ge 68)	10
Germanium-71 (Ge 71)	100
Gold-195 (Au 195)	10
Gold-198 (Au 198)	100
Gold-199 (Au 199)	100
Hafnium-181 (Hf 181)	10

Holmium-166 (Ho 166)	100
Hydrogen-3 (H 3)	1,000
Indium-111 (In 111)	100
Indium-113m (In 113m)	100
Indium-114m (In 114m)	10
Indium-115m (In 115m)	100
Indium-115 (In 115)	10
Iodine-123 (I 123)	100
Iodine-125 (I 125)	1
Iodine-126 (I 126)	1
Iodine-129 (I 129)	0.1
Iodine-131 (I 131)	1
Iodine-132 (I 132)	10
Iodine-133 (I 133)	1
Iodine-134 (I 134)	10
Iodine-135 (I 135)	10
Iridium-192 (Ir 192)	10
Iridium-194 (Ir 194)	100
Iron-52 (Fe 52)	10
Iron-55 (Fe 55)	100
Iron-59 (Fe 59)	10
Krypton-85 (Kr 85)	100
Krypton-87 (Kr 87)	10
Lanthanum-140 (La 140)	10
Lutetium-177 (Lu 177)	100
Manganese-52 (Mn 52)	10
Manganese-54 (Mn 54)	10
Manganese-56 (Mn 56)	10
Mercury-197m (Hg 197m)	100
Mercury-197 (Hg 197)	100
Mercury-203 (Hg 203)	10
Molybdenum-99 (Mo 99)	100
Neodymium-147 (Nd 147)	100
Neodymium-149 (Nd 149)	100
Nickel-59 (Ni 59)	100
Nickel-63(Ni 63)	10
Nickel-65 (Ni 65)	100
Niobium-93m (Nb 93m)	10
Niobium-95 (Nb 95)	10
Niobium-97 (Nb 97)	10
Osmium-185 (Os 185)	10
Osmium-191m (Os 191m)	100
Osmium-191 (Os 191)	100
Osmium-193 (Os 193)	100
Palladium-103 (Pd 103)	100
Palladium-109 (Pd 109)	100
Phosphorus-32 (P 32)	10
Platinum-191 (Pt 191)	100
Platinum-193m (Pt 193m)	100
Platinum-193 (Pt 193)	100
Platinum-197m (Pt 197m)	100
Platinum-197 (Pt 197)	100
Polonium-210 (Po 210)	0.1
Potassium-42 (K 42)	10
Potassium-43 (K 43)	10
Praseodymium-142 (Pr 142)	100
Praseodymium-143 (Pr 143)	100
Promethium-147 (Pm 147)	10
Promethium-149 (Pm 149)	10

Rhenium-186 (Re 186)	100
Rhenium-188 (Re 188)	100
Rhodium-103m (Rh 103m)	100
Rhodium-105 (Rh 105)	100
Rubidium-81 (Rb 81)	10
Rubidium-86 (Rb 86)	10
Rubidium-87 (Rb 87)	10
Ruthenium-97 (Ru 97)	100
Ruthenium-103 (Ru 103)	10
Ruthenium-105 (Ru 105)	10
Ruthenium-106 (Ru 106)	1
Samarium-151 (Sm 151)	10
Samarium-153 (Sm 153)	100
Scandium-46 (Sc 46)	10
Scandium-47 (Sc 47)	100
Scandium-48 (Sc 48)	10
Selenium-75 (Se 75)	10
Silicon-31 (Si 31)	100
Silver-105 (Ag 105)	10
Silver-110m (Ag 110m)	1
Silver-111 (Ag 111)	100
Sodium-22 (Na 22)	10
Sodium-24 (Na 24)	10
Strontium-85 (Sr 85)	10
Strontium-89 (Sr 89)	1
Strontium-90 (Sr 90)	0.1
Strontium-91 (Sr 91)	10
Strontium-92 (Sr 92)	10
Sulfur-35 (S 35)	100
Tantalum-182 (Ta 182)	10
Technetium-96 (Tc 96)	10
Technetium-97m (Tc 97m)	100
Technetium-97 (Tc 97)	100
Technetium-99m (Tc 99m)	100
Technetium-99 (Tc 99)	10
Tellurium-125m (Te 125m)	10
Tellurium-127m (Te 127m)	10
Tellurium-127 (Te 127)	100
Tellurium-129m (Te 129m)	10
Tellurium-129 (Te 129)	100
Tellurium-131m (Te 131m)	10
Tellurium-132 (Te 132)	10
Terbium-160 (Tb 160)	10
Thallium-200 (Tl 200)	100
Thallium-201 (Tl 201)	100
Thallium-202 (Tl 202)	100
Thallium-204 (Tl 204)	10
Thulium-170 (Tm 170)	10
Thulium-171 (Tm 171)	10
Tin-113 (Sn 113)	10
Tin-125 (Sn 125)	10
Tungsten-181 (W 181)	10
Tungsten-185 (W 185)	10
Tungsten-187 (W 187)	100
Vanadium-48 (V 48)	10
Xenon-131m (Xe 131m)	1,000
Xenon-133 (Xe 133)	100
Xenon-135 (Xe 135)	100
Ytterbium-175 (Yb 175)	100

Yttrium-87 (Y 87)	10
Yttrium-88 (Y 88)	10
Yttrium-90 (Y 90)	10
Yttrium-91 (Y 91)	10
Yttrium-92 (Y 92)	100
Yttrium-93 (Y 93)	100
Zinc-65 (Zn 65)	10
Zinc-69m (Zn 69m)	100
Zinc-69 (Zn 69)	1,000
Zirconium-93 (Zr 93)	10
Zirconium-95 (Zr 95)	10
Zirconium-97 (Zr 97)	10
Any radioactive material not listed above other than alpha emitting radioactive material	0.1

History Note: Authority G.S. 104E-7; 104E-10(b); 104E-20; 10 CFR 30.71; Eff. February 1, 1980; Amended Eff. October 1, 2013; May 1, 1993.

15A NCAC 11 .0305 EXEMPT ITEM CONTAINING OTHER THAN SOURCE MATERIAL

(a) Authority must be obtained from the U.S. Nuclear Regulatory Commission to transfer possession or control by the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material whose subsequent possession, use, transfer, and disposal are exempted from the rules of this Chapter.

(b) Except for persons who apply radioactive material to, or persons who incorporate radioactive material into, the following products, or persons who initially transfer for sale or distribution the following products, any person is exempt from the rules of this Chapter to the extent that he receives, possesses, uses, transfers, owns, or acquires the following products:

(1) Timepieces or hands or dials containing not more than the following quantities of radioactive material and not exceeding the following levels of radiation:
  (A) 25 millicuries of tritium per timepiece;
  (B) five millicuries of tritium per hand;
  (C) 15 millicuries of tritium per dial (bezels when used shall be considered as part of the dial);
  (D) 100 microcuries of promethium-147 per watch or 200 microcuries of promethium-147 per any other timepiece;
  (E) 20 microcuries of promethium-147 per watch hand or 40 microcuries of promethium-147 per other timepiece hand;
  (F) 60 microcuries of promethium-147 per watch dial or 120 microcuries of promethium-147 per other timepiece dial (bezels when used shall be considered as part of the dial);
  (G) the levels of radiation from hands and dials containing promethium-147, when measured through 50 milligrams per square centimeter of absorber:
    (i) for wrist watches, 0.1 millirad per hour at 10 centimeters from any surface;
    (ii) for pocket watches, 0.1 millirad per hour at one centimeter from any surface;
    (iii) for any other timepiece, 0.2 millirad per hour at 10 centimeters from any surface; or
    (iv) one microcurie of radium-226 per timepiece in intact timepieces manufactured prior to November 30, 2007.

(2) Balances of precision containing not more than one millicurie of tritium per balance or not more than 0.5 millicurie of tritium per balance part manufactured before December 17, 2007;

(3) Marine compasses containing not more than 750 millicuries of tritium gas and other marine navigational instruments containing not more than 250 millicuries of tritium gas manufactured before December 17, 2007;

(4) Ionization chamber smoke detectors containing not more than one microcurie of americium-241 per detector in the form of a foil and designed to protect life and property from fires.

(5) Electron tubes, provided that each tube does not contain more than one of the following specified quantities of radioactive material and provided further, that the levels of radiation

from each electron tube containing radioactive material does not exceed one millirad per hour at one centimeter from any surface when measured through seven milligrams per square centimeter of absorber. For purposes of this Subparagraph, "electron tubes" include spark gap tubes, power tubes, gas tubes including glow lamps, receiving tubes, microwave tubes, indicator tubes, pickup tubes, radiation detection tubes and any other completely sealed tube that is designed to conduct or control electrical currents:

(A) 150 millicuries of tritium per microwave receiver protector tube or 10 millicuries of tritium per any other electron tube;
(B) one microcurie of cobalt-60;
(C) five microcuries of nickel-63;
(D) 30 microcuries of krypton-85;
(E) five microcuries of cesium-137; and
(F) 30 microcuries of promethium-147; and

(6) Ionizing radiation measuring instruments containing for purposes of internal calibration or standardization, sources of radioactive material each not exceeding the applicable quantity set forth in Rule .0304(f) of this Section, and each instrument contains no more than 10 exempt quantities.

(c) For purposes of Subparagraph (b)(5) of this Rule, where there is involved a combination of radionuclides, the limit for the combination shall be derived as follows:

(1) Determine for each radionuclide in an ionizing radiation measuring instrument the ratio between the quantity present in the instrument and the exempt quantity established in Rule .0304 (f) of this Section for the specific radionuclide when not in combination;
(2) No ratio shall exceed one and the sum of such ratios shall not exceed 10; and
(3) For the purpose of Part (b)(8), 0.05 microcurie of americium-241 is considered an exempt quantity under Rule .0304 of this Section.

(d) Self-luminous products are exempt as provided in this Paragraph.

(1) Except for persons who manufacture, process, or produce self-luminous products containing tritium, krypton-85, or promethium-147, any person is exempt from the rules of this Chapter to the extent that the person receives, possesses, uses, transfers, owns, or acquires tritium, krypton-85 or promethium-147 in self-luminous products manufactured, processed, produced, imported, or transferred in accordance with a specific license issued by the U.S. Nuclear Regulatory Commission pursuant to Section 32.22 of 10 CFR Part 32, which license authorizes the transfer of the product to persons who are exempt from regulatory requirements.
(2) The exemption in Subparagraph (d)(1) of this Rule does not apply to tritium, krypton-85, or promethium-147 used in products for frivolous purposes or in toys or adornments.

(e) Gas and aerosol detectors are exempt as provided in this Paragraph.

(1) Except for persons who manufacture, process, produce, or initially transfer for sale or distribution gas and aerosol detectors containing radioactive material, any person is exempt from the rules of this Chapter to the extent that the person receives, possesses, uses, transfers, owns or acquires radioactive material in gas and aerosol detectors designed to protect life or property from fires and airborne hazards provided that detectors containing radioactive material shall be manufactured, processed, produced, or initially transferred in accordance with a specific license issued by the U.S. Nuclear Regulatory Commission pursuant to Section 32.26 of 10 CFR 32, which authorizes the transfer of the detectors to persons who are exempt from regulatory requirements.
(2) Gas and aerosol detectors previously manufactured and distributed to general licensees before November 30, 2007 in accordance with a specific license issued by an agreement state are exempt from the rules in this Chapter, provided that the devices are labeled in accordance with the specific license authorizing distribution of the general licensed device, and providing further that the devices meet the requirements of Rule .0327 of this Section.

(f) Except as follows, any person is exempt from the requirements for a license set forth in this Section provided that such person receives, possesses, uses, transfers, owns or acquires capsules containing approximately one microcurie (37kBq) Carbon-14 urea each for "in-vivo" diagnostic use for humans:

(1) Any person who desires to use the capsules for research involving human subjects shall apply for and receive a specific license from the agency; and
(2) Any person who desires to manufacture, prepare, process, produce, package, repackage, or transfer for commercial distribution such capsules shall apply for and receive a specific license from the U.S. Nuclear Regulatory Commission.

(g) Nothing in this Rule relieves persons from complying with applicable FDA and other federal regulations, and North Carolina requirements governing the receipt, administration, and use of drugs.

History Note: Authority G.S. 104E-7; 104E-10(b); 104E-20; 10 CFR 30.15; 10 CFR 30.19; 10 CFR 30.20;

Eff. February 1, 1980;
Amended Eff. October 1, 2013; April 1, 1999; June 1, 1993; October 1, 1982; September 1, 1981.

15A NCAC 11 .0309 GENERAL LICENSES: MEASURING GAUGING: CONTROLLING DEVICES

(a) A general license shall be issued to acquire, receive, possess, use, or transfer in accordance with Paragraphs (b), (c), and (d) of this Rule, radioactive material contained in devices designed and manufactured for the purpose of detecting, measuring, gauging, or controlling thickness, density, level, interface location, radiation leakage, or qualitative or quantitative chemical composition, or for producing light or an ionized atmosphere to:

(1) commercial and industrial firms;
(2) research, educational and medical institutions;
(3) individuals in the conduct of their business; and
(4) federal, state, or local government agencies.

(b) The general license in Paragraph (a) of this Rule applies only to radioactive material contained in devices which have been:

(1) manufactured or initially transferred and labeled in accordance with the specifications contained in a specific license issued pursuant to Rule .0328 of this Section or in accordance with the specifications contained in a specific license issued by the U.S. Nuclear Regulatory Commission or an agreement state which authorizes distribution of the devices to persons generally licensed pursuant to equivalent regulations; and
(2) received from one of the specific licensees referenced in Subparagraph (b)(1) of this Rule or through a transfer completed in accordance with Subparagraph (c)(8) or (c)(9) of this Rule.

(c) Any person who acquires, receives, possesses, uses or transfers radioactive material in a device pursuant to the general license issued under Paragraph (a) of this Rule shall:

(1) assure that all labels, affixed to the device at the time of receipt and bearing a statement that removal of the label is prohibited, are maintained thereon and shall comply with all instructions and precautions provided by the labels;
(2) assure that the device is tested for leakage of radioactive material and proper operation of the on-off mechanism and indicator, if any, at six-month intervals or at alternative intervals as are specified in the label, except as follows:
(A) Devices containing only krypton need not be tested for leakage of radioactive material; and
(B) Devices containing only tritium or not more than 100 microcuries of other beta, gamma, or beta and gamma emitting material or 10 microcuries of alpha emitting material and devices held in storage in the original shipping container prior to initial installation need not be tested for any purpose;
(3) assure that the tests required by Subparagraph (c)(2) of this Rule and other testing, installation, servicing and removal from installation involving the radioactive materials, its shielding or containment are performed:
(A) in accordance with the instructions provided on labels affixed to the device, except that tests for leakage or contamination may be performed by the general licensee using leak test kits provided and analyzed by a specific licensee who is authorized to provide leak test kit services; or
(B) by a person holding a specific license or registration which authorizes the providing of services required by this Rule and which is issued pursuant to Rules .0205 and .0306 of this Chapter or equivalent regulations of the U.S. Nuclear Regulatory Commission or an agreement state;
(4) maintain records, showing compliance with the requirements in Subparagraphs (c)(2) and (3) of this Rule, including:
(A) the name of the person(s) performing the test(s) and the date(s) of the test(s);
(B) the name of the person(s) performing installation, servicing and removal of any radioactive material, shielding or containment;
(C) the retention of leakage or contamination, on-off mechanism and on-off indicator test records shall be retained for three years after the required test is performed or until the sealed source is disposed of or transferred; and
(D) the retention of other records of tests required in Subparagraph (c)(3) of this Rule shall be retained for three years from the date of the recorded test or until the device is disposed of or transferred.
(5) upon the occurrence of a failure of or damage to, or any indication of a possible failure of or damage to, the shielding of the radioactive material or the on-off mechanism or indicator, or upon the detection of 0.005 microcurie or more removable radioactive material, immediately suspend operation of the device until it has been:
(A) repaired by the manufacturer or other person authorized to repair the device(s) by a specific license issued by the agency, the U.S. Nuclear

Regulatory Commission, or an agreement state; or

(B) disposed of by transfer to a person authorized by a specific license to receive the radioactive material contained in the device; and within 30 days, the transferor will furnish to the agency at the address in Rule .0111 of this Chapter a report containing a description of the event and the remedial action taken. If 0.005 microcurie or more of removable radioactive contamination is detected, or if the failure of or damage to a source of radiation is likely to result in the contamination of the facility or the environment, a plan for ensuring that the facility and the environment are acceptable for unrestricted use shall be submitted to the agency at the address in Rule .0111 of this Chapter.

(6) not abandon the device containing radioactive material;

(7) except as provided in Subparagraph (c)(8) or (c)(9) of this Rule, transfer or dispose of the device containing radioactive material only by export in accordance with 10 CFR Part 110 or by transfer to a person holding a specific license authorizing receipt of the device; and, within 30 days after transfer of a device to a specific licensee or export of a device, shall furnish to the agency at the address in Rule .0111 of this Chapter, a report that contains:

(A) the identification of the device by manufacturer's or initial transferor's name, model number, and serial number;

(B) the name, address and specific license number of the person receiving the device (the license number not applicable if exported); and

(C) the date of the transfer; and

(8) obtain written approval by the Agency before transferring the device to any other specific licensee not identified in this Rule. However, a holder of a specific license may transfer a device for possession and use under its own specific license without prior approval, if the holder:

(A) verifies that the specific license authorizes the possession and use, or applies for and obtains an amendment to the license authorizing the possession and use;

(B) removes, alters, covers, or clearly and unambiguously augments as defined in 10 CFR 31.5 the existing label otherwise required by Paragraph (c)(1) of this Rule so that the device is labeled in compliance with Rule .0328(a)(3) of this Chapter; however, the manufacturer, model number, and serial number must be retained;

(C) obtains the manufacturer's or initial transferor's information concerning maintenance that are applicable under the specific license (such as leak testing procedures); and

(D) reports the transfer under Subparagraph (c)(7) of this Rule.

(9) transfer or dispose of the device by export as provided by Subparagraph (c)(7) of this Rule, or by transfer to another general licensee only where the device:

(A) remains in use at a particular location. The transferor shall give the transferee a copy of this Rule and any safety documents identified in the label of the device. The transferor shall, within 30 days of the transfer, report to the agency at the address in Rule .0111 of this Chapter the manufacturer's or initial transferor's name, serial number, and model number of device transferred; the name and mailing address of the transferee; and the name, title, and telephone number of the individual identified by the transferee pursuant to Subparagraph (c)(11) of this Rule; or

(B) is held in storage by the licensee or an intermediate person in the original shipping container at its intended location of use prior to initial use by a general licensee;

(10) comply with the provisions of Sections .0100 and .1600 of this Chapter for reporting radiation incidents, theft or loss of licensed material, but is exempt from the other requirements of Section .1600 of this Chapter;

(11) appoint an individual responsible for having knowledge of the requirements contained in these Rules and the authority for taking the actions required to comply with these Rules. The general licensee, through this individual, shall ensure the day-to-day compliance with these Rules. The appointment of such an individual does not relieve the general licensee of any of its responsibility in this regard;

(12) register, when required by the agency, any source of radiation subject to a general license in accordance with the rules in this Section. Each address for a location of use represents a separate general license and requires a separate registration action;

(13) register, on an annual basis, all devices containing, based on the activity indicated on the label, at least 10 mCi (370 MBq) of cesium-137, 0.1 mCi (3.7 MBq) of strontium-90, 1 mCi (37MBq) of cobalt-60, 1 mCi (37 MBq) of americium-241, 0.1 mCi (3.7 MBq) of radium-226, or any other transuranic isotope. Each address for a location of use represents a separate general license and requires a separate registration action. Annual registration consists of verifying, correcting, or adding to the information provided in a request for annual registration within 30 days of a request from the agency. The general licensee shall furnish the following information for annual registration:

(A) the name and mailing address of the general licensee;

(B) information about each device to include the manufacturer or initial transferor, model number, serial number, the radioisotope, and the activity indicated on the label;

(C) the name, title, and telephone number of the responsible person designated as a representative of the general licensee in accordance with Subparagraph (c)(11) of this Rule;

(D) the address or location at which the device(s) are to be used or stored. For portable devices that are granted a general license by the agency, the address of the primary place of storage;

(E) certification by the responsible person designated by the general licensee that the information concerning the device(s) has been verified through a physical inventory and a check of label information; and

(F) certification by the responsible person designated by the general licensee that they are aware of the requirements of the general license;

(14) report changes to the mailing address to the agency within 30 days of the effective date of the change;

(15) report changes to the name of the general licensee to the agency within 30 days of the effective date of the change;

(16) respond to written requests from the agency to provide information relating to the general license within 30 calendar days of the date of the request, or other time specified in the request. If the general licensee cannot provide the requested information within the allotted time, it shall, within that same time period, request a longer period to supply the information by providing the agency a written justification for the request;

(17) not hold devices that are not in use for longer than two years. If devices that have shutters are not in use, the shutter shall be locked in the closed position. Leak testing is not required during the period of storage; however, when devices are returned to service or transferred to another person, the devices must be tested for leakage and shutter operation. Devices kept in standby for future use shall be excluded from the two year time limit if quarterly physical inventories of these devices are performed while in standby.

(d) The general license in Paragraph (a) of this Rule does not authorize the manufacture or import of devices containing radioactive material.

(e) The general license in Paragraph (a) of this Rule is subject to the provisions of Rules .0107 to .0111, .0303(a), .0338, .0342, .0343 and .0345 of this Chapter and to labeling requirements in Section .1600 of this Chapter.

History Note: Authority G.S. 104E-7; 104E-10(b);
Eff. February 1, 1980;
Amended Eff. October 1, 2013; January 1, 2005; January 1, 1994; June 1, 1989.

15A NCAC 11 .0317 SPECIFIC LICENSES: FILING APPLICATION AND GENERAL REQUIREMENT

(a) Applications for specific licenses shall be filed on an agency form. Completed applications shall include the following information and other information necessary for the agency to determine if the applicant meets the requirements for that license:

(1) name, address and use location of the applicant;

(2) training and experience of radioactive material users and of the person responsible for radiation protection;

(3) types, quantities and uses of radioactive materials;

(4) description of facilities, equipment and safety program;

(5) procedures for disposal of radioactive material; and

(6) how facility design and procedures for operation will minimize, to the extent practicable, contamination of the facility and the environment, facilitate eventual decommissioning, and minimize, to the extent practical, the generation of radioactive waste.

(b) The agency may at any time after the filing of the original application, and before the expiration of the license, require further statements in order to enable the agency to determine whether the application should be granted or denied or whether a license should be modified or revoked.

(c) Each application shall be signed by the applicant or licensee or a person authorized to act on his behalf.

(d) An application for a license may include a request for a license authorizing one or more activities.

(e) An application for a specific license to use byproduct material in the form of a sealed source or in a device that contains the sealed source must:

(1) identify the source or device by manufacturer and model number as registered with the US Nuclear Regulatory Commission under10 CFR 32.210, with an Agreement State. A source or device containing radium-226 or accelerator-produced radioactive material must identify the manufacturer and model number if registered with a state under provisions comparable to 10 CFR 32.210;

(2) contain the information identified in 10 CFR 32.210(c); or

(3) for sources or devices containing naturally occurring or accelerator-produced radioactive material manufactured prior to November 30, 2007 that are not registered with the U.S. Nuclear Regulatory Commission under 10 CFR 32.210 or with an Agreement State, and for which the applicant is unable to provide all categories of information specified in 10 CFR 32.210(c), the applicant must provide:

(A) all available information identified in 10 CFR 32.210(c) concerning the source, and, if applicable, the device; and

(B) sufficient additional information to demonstrate that there is reasonable assurance that the radiation safety properties of the source or device are adequate to protect health and minimize danger to life and property. Such information must include a description of the source or device, a description of radiation safety features, the intended use and associated operating experience, and the results of a recent leak test.

(f) Applications and documents submitted to the agency shall be made available for public inspection except as are determined otherwise by the agency pursuant to the provisions of G.S. 104E-9(4).

(g) A license application shall be approved if the agency determines that:

(1) the applicant is qualified by reason of training and experience to use the material in question for the purpose requested in accordance with these Rules in such a manner as to minimize danger to public health and safety or property;

(2) the applicant's proposed equipment, facilities, and procedures are adequate to protect public health from radiation hazards and minimize radiological danger to life or property;

(3) the issuance of the license will not be inimical to the health and safety of the public; and

(4) the applicant satisfies any applicable special requirements in Rules .0318 to .0336 of this Section.

(h) If required by Rule .0353 of this Section, applications for specific licenses filed under this Section must contain a proposed decommissioning funding plan or a certification of financial assurance for decommissioning.

History Note: Authority G.S. 104E-7; 104E-10(b); 104E-12; 104E-18;
Eff. February 1, 1980;
Amended Eff. October 1, 2013; April 1, 1999; May 1, 1992; November 1, 1989.

15A NCAC 11 .0318 SPECIFIC LICENSES: GENERAL REQUIREMENTS FOR HUMAN USE

(a) For the purposes of this Rule, "Authorized medical physicist" means an individual who:

(1) Meets the requirements in 10 CFR 35.51(a) and 35.59; or

(2) Is identified as an authorized medical physicist or teletherapy physicist on:

(A) A specific medical use license issued by the U.S. Nuclear Regulatory Commission or Agreement State;

(B) A medical use permit issued by the U.S. Nuclear Regulatory Commission master material licensee;

(C) A permit issued by a U.S. Nuclear Regulatory Commission or Agreement State broad scope medical use licensee; or

(D) A permit issued by a U.S. Nuclear Regulatory Commission master material license broad scope medical use permittee.

(b) For the purposes of this Rule, "Authorized nuclear pharmacist" means a pharmacist who:

(1) Meets the requirements in 10 CFR 35.55(a) and 35.59; or

(2) Is identified as an authorized nuclear pharmacist on:

(A) A specific license issued by the U.S. Nuclear Regulatory Commission or Agreement State that authorizes medical use or the practice of nuclear pharmacy;

(B) A permit issued by the U.S. Nuclear Regulatory Commission master material licensee that authorizes medical use or the practice of nuclear pharmacy;

(C) A permit issued by a U.S. Nuclear Regulatory Commission or Agreement State broad scope medical use license that authorizes medical use or the practice of nuclear pharmacy; or

(D) A permit issued by a U.S. Nuclear Regulatory Commission master material license broad scope medical use permittee that authorizes medical use or the practice of nuclear pharmacy;

(3) Is identified as an authorized nuclear pharmacist by a commercial nuclear pharmacy that has been authorized by the U.S. Nuclear Regulatory Commission or Agreement State to identify authorized nuclear pharmacists; or

(4) Is designated as an authorized nuclear pharmacist in accordance with 10 CFR 32.72(b)(4).

(c) For the purposes of this Rule, "Authorized user" means a physician, dentist, or podiatrist who:

(1) Meets the requirements in 10 CFR 35.59 and either 35.190(a), 35.290(a), 35.390(a), 35.392(a), 35.394(a), 35.396(a), 35.490(a), 35.590(a), or 35.690(a); or

(2) Is identified as an authorized user on:

(A) A U.S. Nuclear Regulatory Commission or Agreement State license that authorizes medical use of radioactive material;

(B) A permit issued by a U.S. Nuclear Regulatory Commission master material licensee that is authorized to permit the medical use of radioactive material;

(C) A permit issued by a U.S. Nuclear Regulatory Commission or Agreement State specific licensee of broad scope that is authorized to permit the medical use of radioactive material; or

(D) A permit issued by a U.S. Nuclear Regulatory Commission master material license broad scope permittee that is authorized to permit the medical use of byproduct material.

(d) For the purposes of this Section, "Radiation safety officer" means an individual who:

(1) Meets the requirements in 10 CFR 35.50(a) or (c)(1) and 10 CFR 35.59; or

(2) Is identified as a Radiation Safety Officer on:

(A) A specific medical use license issued by the U.S. Nuclear Regulatory Commission, or an Agreement State; or

(B) A medical use permit issued by a U.S. Nuclear Regulatory Commission master material licensee.

(e) License required:

(1) A person shall not manufacture, produce, acquire, receive, possess, use or transfer radioactive material for medical use except in accordance with a specific license issued by the agency or as allowed pursuant to Subparagraphs (e)(2) and (e)(3) of this Rule.

(2) An individual may receive, possess, use, or transfer radioactive material in accordance with the rules of this Section under the supervision of an authorized user as provided in this Section unless prohibited by license condition.

(3) An individual may prepare unsealed radioactive material for medical use in accordance with the rules of this Section under the supervision of a pharmacist who is an authorized nuclear pharmacist or physician who is an authorized user as provided in this Section unless prohibited by license condition.

(f) A license application for human use of radioactive material shall be approved if the agency determines that:

(1) The applicant is qualified by reason of training and experience to use the material in question for the purpose requested in accordance with these Rules;

(2) The applicant's proposed equipment, facilities, and procedures are adequate to protect public health from radiation hazards and minimize radiological danger to life or property;

(3) The issuance of the license will not be inimical to the health and safety of the public;

(4) The following training and supervisory relationship are adhered to:

(A) The user of radioisotopes applied to humans for diagnostic, therapeutic, or investigational purposes shall be a physician authorized by a condition of a specific license, including a specific license of broad scope.

(B) An authorized physician may delegate the following only to persons who are physicians under the supervision of the authorized physician:

(i) The approval of procedures involving the administration to patients of radiopharmaceuticals or the application to patients of radiation from radioisotope sources;

(ii) The prescription of the radiopharmaceutical or source of radiation and the dose or exposure to be administered;

(iii) The determination of the route of administration; and

(iv) The interpretation of the results of diagnostic procedures in which radiopharmaceuticals are administered.

(C) The authorized physician shall review the work of the supervised individual as it pertains to the delegated work in Subparagraph (f)(4) of this Rule and the records kept reflecting that work; and

(5) the applicant satisfies any applicable requirements in Rules .0319 to .0322 of this Section.

(g) Subject to the provisions of Subparagraph (f)(4) and Paragraphs (h) through (k) of this Rule, an authorized physician may permit technicians and other paramedic personnel to perform the following activities:

(1) Preparation and quality control testing of radiopharmaceuticals and sources of radiation;

(2) Measurement of radiopharmaceutical doses prior to administration;

(3) Use of instrumentation for the collection of data to be used by the physician;

(4) Administration of radiopharmaceuticals and radiation from radioisotope sources to patients.

(h) Authorized physicians who permit activities to be performed by technicians and other paramedical personnel pursuant to Paragraph (g) of this Rule shall:

(1) Prior to giving permission, determine that the technicians and other paramedical personnel have been properly trained to perform their duties with training in the following subjects, as applicable to the duties assigned:

(A) General characteristics of radiation and radioactive materials;

(B) Physical, chemical, and pharmaceutical characteristics of each radiopharmaceutical to be used;

(C) Mathematics and calculations basic to the use and measurement of radioactivity, Radioactivity, including units of radiation dose and radiation exposure;

(D) Use of radiation instrumentation for measurements and monitoring including operating procedures, calibration of instruments, and limitations of instruments;

(E) Principles and practices of radiation protection; and

(F) Additional training in the above subjects, as appropriate, when new duties are added;

(2) Assure that the technicians and other paramedical personnel receive retraining in the subjects listed in Subparagraph (h)(1) of this Rule to maintain proficiency and to keep abreast of developments in the field of nuclear medical technology;

(3) Keep records showing the bases for the determinations of proper training;

(4) Retain responsibility as licensee or authorized user for the satisfactory performance of the activities; and

(5) Review the work of the supervised individual and the records kept reflecting that work.

(i) Certification in nuclear medicine technology by the American Registry of Radiologic Technologists or in nuclear medicine technology by the Nuclear Medicine Technologist Certification Board or the Society of Nuclear Medicine shall be deemed to satisfy the training requirements in Subparagraphs (h)(1) and (2) of this Rule.

(j) An applicant for an initial, amended or renewed license shall state whether he desires to permit technicians or other paramedical personnel to perform activities pursuant to Paragraph (g) of this Rule. If the applicant intends to do so, the application shall include a statement of the activities to be so performed and a description of an adequate program for training the personnel, including retraining as required to keep abreast of developments in technology, or for otherwise determining that the personnel are properly trained to perform their duties.

(k) Whenever a technician or other paramedical person administers a radiopharmaceutical to a patient by injection, a physician shall be accessible. That physician is not required to be authorized by the agency to be a user of radioisotopes.

(l) A licensee that permits the receipt, possession, use, or transfer of radioactive material by an individual under the supervision of an authorized user shall:

(1) In addition to the requirements in Rule .1003 of this Chapter, instruct the supervised individual in the licensee's written radiation protection procedures, written directive procedures, this Chapter, and license conditions with respect to the use of radioactive material; and

(2) Require the supervised individual to follow the instructions of the supervising authorized user for medical uses of radioactive material, written radiation protection procedures established by the licensee, written directive procedures, rules of this Chapter, and license conditions with respect to the medical use of radioactive material.

(m) A licensee that permits the preparation of radioactive material for medical use by an individual under the supervision of an authorized nuclear pharmacist or physician who is an authorized user shall:

(1) In addition to the requirements in Paragraph (h) of this Rule and Rule .1003 of this Chapter, instruct the supervised individual in the preparation of radioactive material for medical use, as appropriate to that individual's involvement with radioactive material; and

(2) Require the supervised individual to follow the instructions of the supervising authorized user or authorized nuclear pharmacist regarding the preparation of radioactive material for medical use, written radiation protection procedures established by the licensee, the rules of this Chapter, and license conditions.

(n) A licensee that permits supervised activities under Paragraphs (g) and (h) of this Rule is responsible for the acts and omissions of the supervised individual.

(o) A licensee's management shall appoint a Radiation Safety Officer (RSO) who agrees in writing to be responsible for implementing the radiation safety program. The licensee, through the RSO, shall ensure that radiation safety activities are being performed in accordance with approved procedures and regulatory requirements in the daily operation of the licensee's radioactive material program.

(p) A licensee shall establish in writing the authority, duties and responsibilities of the Radiation Safety Officer.

(q) A licensee shall provide the Radiation Safety Officer sufficient authority, organizational freedom, and management prerogative to:

(1) Identify radiation safety problems;

(2) Investigate radiation safety problems such as overexposures, accidents, spills, losses, thefts, unauthorized receipts, uses, transfers, disposals, medical events, and other deviations from approved radiation safety procedures and implement corrective actions as necessary;

(3) Initiate, recommend or provide corrective actions for radiation safety problems;

(4) Verify implementation of corrective actions; and

(5) Retain records of items required by this Paragraph.

(r) In addition to the requirements in Rule .1003 of this Chapter, the licensee shall provide radiation safety instruction, initially and at least annually, to personnel caring for patients or human research subjects who cannot be released in accordance with the requirements of Rule .0358 of this Section. To satisfy this requirement, the instruction must be commensurate with the duties of the personnel and include:

(1) Patient or human research subject control;

(2) Visitor control, including:

(A) Routine visitation to hospitalized individuals in accordance with the provisions of Rule .1611(a)(1) of this Chapter; and

(B) Visitation authorized by Rule .1611(e) of this Chapter;

(3) Contamination control;

(4) Waste control; and

(5) Notification of the Radiation Safety Officer, or his designee, and an authorized user if the patient or the human research subject has a medical emergency or dies.

(s) The licensee shall retain records of the radiation safety instructions required by Paragraphs (l), (m), and (r) for three years. The record must include:

(1) A list of topics covered;

(2) The date of the instruction;

(3) The name(s) of the attendee(s); and

(4) The name(s) of the individual(s) who provided the instruction.

History Note: Authority G.S. 104E-7; 104E-10(b); 10 CFR 35.2;
Eff. February 1, 1980;
Amended Eff. October 1, 2013; November 1, 2007; April 1, 1999; May 1, 1993; November 1, 1989.

15A NCAC 11 .0321 SPECIFIC LICENSES: GENERAL REQUIREMENTS FOR HUMAN USE OF UNSEALED RADIOACTIVE MATERIALS

(a) An application for a specific license pursuant to Rule .0318 of this Section for any diagnostic or therapeutic use of unsealed radioactive material shall be approved if:

(1) the applicant satisfies the requirements in Rule .0319 or Rule .0320 of this Section;

(2) the applicant's proposed radiation detection instrumentation is adequate for conducting the diagnostic or therapeutic procedure(s) requested;

(3) the physicians designated in the application as individual users have clinical experience as required by Rule .0117(a)(2) of this Chapter;

(4) the physicians and all other personnel who will be involved in the preparation and use of radioactive material have training and experience in the handling of unsealed radioactive material appropriate to their use of radioactive material and as required by Rule .0117(a)(2) of this Chapter;

(5) the applicant has radiation safety operating procedures for handling and disposal of the radioactive material that provide protection to the workers, the public and the environment from radiation exposure and radioactive contamination; and

(6) the applicant has a clinical procedures manual appropriate for the licensed activities.

(b) Any person authorized by Rules .0318, .0319, .0320, .0322, or .0324 of this Section for medical use of radioactive material may receive, possess and use any of the following radioactive material for check, calibration, transmission and reference use:

(1) Sealed sources not exceeding 30 millicuries (mCi)(1.11 Gigabecquerel (GBq)) each, manufactured and distributed by a person licensed under 10 CFR 32.74 or equivalent Agreement State regulations;

(2) Sealed sources, not exceeding 30 mCi (1.11 GBq) each, redistributed by a licensee authorized to redistribute the sealed sources manufactured and distributed by a person licensed under 10 CFR 32.74, providing the redistributed sealed sources are in the original packaging and shielding and are accompanied by the manufacturer's approved instructions;

(3) Any radioactive material with a half-life not longer than 120 days in individual amounts not to exceed 15 mCi (0.56 GBq);

(4) Any radioactive material with a half-life greater than 120 days in individual amounts not to exceed the smaller of 200 microcuries

(μCi) (7.4 Megabecquerel (MBq)) or 1000 times the quantities in Appendix C of 10 CFR Part 20; and

(5) Technetium-99m in amounts as needed.

(c) Any licensee who possesses sealed sources as calibration and reference sources pursuant to Paragraph (b) of this Rule shall test each source for leakage and contamination prior to initial use and at intervals not to exceed six months or at longer intervals as approved by the U.S. Nuclear Regulatory Commission or an Agreement State in the source specific Sealed Source and Device Registry sheet. If there is reason for the licensee to suspect that a sealed source may have been damaged, or might be leaking, it shall be tested for leakage before further use.

(d) Leak test results shall be recorded in units of microcuries and maintained for inspection by the agency.

(e) Any licensee who possesses and uses calibration and reference sources pursuant to Paragraph (b) of this Rule shall:

(1) follow the radiation safety and handling instructions that are required by the licensing agency to be furnished by the manufacturer on the label attached to the source or permanent container thereof or in the leaflet or brochure that accompanies the source;

(2) maintain such instructions in a legible and conveniently available form; and

(3) conduct a quarterly physical inventory to account for all sources received and possessed under the license. Records of the inventories shall be maintained for inspection by the agency and shall include the quantities and kinds of radioactive material, location of the sources and the date of the inventory.

(f) Any licensee who is licensed pursuant to Rules .0318, .0319, .0320, or .0324 of this Section for medical use of unsealed radioactive material also is authorized to use radioactive material under the general license in Rule .0314 of this Chapter for the specified *in vitro* uses without filing agency forms as required by Rule .0314(b) of the Chapter, provided that the licensee is subject to the other provisions of that Rule.

(g) For each individual receiving radiopharmaceutical therapy and hospitalized because the individual cannot be released in accordance with Rule .0358 of this Section, a licensee shall:

(1) provide a private room with a private sanitary facility;

(2) post on the individual's door a "Radioactive Materials" sign and note on the door or the individual's chart, where and how long visitors may stay in the individual's room;

(3) either monitor material or items removed from the individual's room to determine that their radioactivity cannot be distinguished from the natural background radiation level with a radiation detection survey instrument set on its most sensitive scale and with no interposed shielding, or handle them as radioactive waste; and

(4) notify the Radiation Safety Officer and authorized user as soon as feasible if the individual has a medical emergency and immediately after the determination that the patient died.

History Note: Authority G.S. 104E-7; 104E-10(b);
Eff. February 1, 1980;
Amended Eff. October 1, 2013; November 1, 2007; August 1, 2002; April 1, 1999; May 1, 1993.

15A NCAC 11 .0322 SPECIFIC LICENSES: HUMAN USE OF SEALED SOURCES

(a) In addition to the requirements set forth in Rule .0318, .0319, or .0320 of this Section, a specific license for human use of sealed sources shall be issued only if the applicant, or if the application is made by an institution, the individual user:

(1) Has training and experience as required by 10 CFR 35.490 or 10 CFR 35.690; and

(2) Is a physician.

(b) The licensee shall comply with the provisions of Section .0700 of this Chapter and the requirements of Subpart H of 10 CFR Part 35.

(c) For medical use, a licensee may only use:

(1) Sealed sources or devices manufactured, labeled, packaged and distributed in accordance with a license issued under 10 CFR Part 30 and 10 CFR 32.74 or equivalent requirements of an Agreement State;

(2) Sealed sources or devices noncommercially transferred from a licensee licensed pursuant to Section .0300 of this Chapter, 10 CFR Part 35, or an Agreement State medical use licensee;

(3) Teletherapy sources manufactured and distributed in accordance with 10 CFR Part 30 or the equivalent requirements of an Agreement State; or

(4) Brachytherapy sources, photon emitting remote afterloader units, teletherapy units or gamma stereotactic radiosurgery units for therapeutic medical uses;

(A) As approved in the Sealed Source and Device Registry; or

(B) In research in accordance with an active Investigational Device Exemption (IDE) application accepted by the FDA provided the requirements of 10 CFR 35.49(a) are met.

(d) In addition to the requirements in Rule .1003 of this Chapter, the licensee shall provide radiation safety instruction prior to assignment and at least annually, to personnel caring for patients or human research subjects who are receiving brachytherapy and cannot be released in accordance with Rule .0358 of this Section. To satisfy this requirement the instruction must be commensurate with the duties of the personnel and include:

(1) Size and appearance of the brachytherapy sources;

(2) Safe handling and shielding instructions;

(3) Patient or human research subject control;
(4) Visitor control, including both:
(A) Routine visitation to hospitalized individuals in accordance with the provisions of Rule .1611(a)(1) of this Chapter;
(B) Visitation authorized by Rule .1611(e) of this Chapter; and
(5) Notification of the Radiation Safety Officer, or his designee, and an authorized user if the patient or the human research subject has a medical emergency or dies.

(e) The licensee shall retain records of the radiation safety instruction required in Paragraph (d) of this Rule for three years. The record must include:
(1) A list of topics covered;
(2) The date of the instruction;
(3) The name(s) of the attendee(s); and
(4) The name(s) of the individual(s) who provided the instruction.

History Note: Authority G.S. 104E-7; 104E-10(b);
Eff. February 1, 1980;
Amended Eff. October 1, 2013; November 1, 2007.

15A NCAC 11 .0325 SPECIFIC LICENSES: PRODUCTS WITH EXEMPT CONCENTRATIONS
15A NCAC 11 .0326 SPECIFIC LICENSES: EXEMPT DISTRIBUTION

History Note: Authority G.S. 104E-7; 104E-10(b);
Eff. February 1, 1980;
Amended Eff. June 1, 1993; May 1, 1993;
Repealed Eff. October 1, 2013.

15A NCAC 11 .0328 SPECIFIC LICENSES: MANUFACTURE DEVICES TO PERSONS LICENSED

(a) An application for a specific license to manufacture or distribute devices containing radioactive material, excluding special nuclear material, to persons generally licensed under Rule .0309 of this Section or equivalent regulations of the U.S. Nuclear Regulatory Commission or an agreement state shall be approved if:
(1) the applicant satisfies the general requirements of Rule .0317 of this Section;
(2) the applicant submits sufficient information relating to the design, manufacture, prototype testing, quality control, labels, proposed uses, installation, servicing, leak testing, operating and safety instructions, and potential hazards of the device to provide reasonable assurance that:
(A) the device can be safely operated by persons not having training in radiological protection;
(B) under ordinary conditions of handling, storage, and use of the device, the radioactive material contained in the device will not be released or inadvertently removed from the device, and it is unlikely that any person will receive in any period of one calendar year a dose in excess of 10 percent of the limits specified in the table of Rule .1604 of this Chapter; and
(C) under accident conditions (such as fire and explosion) associated with handling, storage, and use of the device, it is unlikely that any person would receive an external radiation dose or dose commitment in excess of the following organ doses:
(i) whole body, head and trunk, active blood-forming organs, gonads, or lens of eye: 15 rems;
(ii) hands and forearms, feet and ankles, localized areas of skin averaged over areas no larger than one square centimeter: 200 rems; or
(iii) other organs: 50 rems; and
(3) each device bears a durable, legible, visible label or labels approved by the agency, which contain in a clearly visible and separate statement:
(A) instructions and precautions necessary to assure safe installation, operation, and servicing of the device (documents such as operating and service manuals may be identified in the label and used to provide this information);
(B) the requirement, or lack of requirement, for leak testing, or for testing any on-off mechanism and indicator, including the maximum time interval for such testing, and the identification of radioactive material by isotope, quantity of radioactivity, and date of determination of the quantity; and
(C) the information called for in the following statement in the same or substantially similar form: "The receipt, possession, use, and transfer of this device Model _____, Serial No. _____, are subject to a general license or the equivalent and the regulations of the U.S. Nuclear Regulatory Commission or an agreement state. This label shall be maintained on the device in a legible condition. Removal of this label is prohibited."

"CAUTION - RADIOACTIVE MATERIAL
(name of manufacturer or distributor)"

The model, serial number, and name of manufacturer or distributor may be omitted from this label provided they are elsewhere specified in labeling affixed to the device.

(b) If the applicant desires that the device be tested at intervals longer than six months, either for proper operation of any on-off mechanism and indicator, or for leakage of radioactive material, he or she shall include in his or her application sufficient information to demonstrate that a longer interval is justified by performance characteristics of the device or similar devices and by design features which have a bearing on the probability or consequences of leakage of radioactive material from the device or failure of the on-off mechanism and indicator. In determining the acceptable interval for the test for leakage of radioactive material, the agency shall consider information which includes:

(1) primary containment (source capsule);
(2) protection of primary containment;
(3) method of sealing containment;
(4) containment construction materials;
(5) form of contained radioactive material;
(6) maximum temperature withstood during prototype test;
(7) maximum pressure withstood during prototype tests;
(8) maximum quantity of contained radioactive material;
(9) radiotoxicity of contained radioactive material; and
(10) the applicant's operating experience with identical devices or similarly designed and constructed devices.

(c) If the applicant desires that the general licensee under Rule .0309 of this Section, or under equivalent regulations of the U.S. Nuclear Regulatory Commission or an agreement state, be authorized to install the device, collect the sample for analysis by a specific licensee for leakage of radioactive material, service the device, test the on-off mechanism and indicator, or remove the device from installation, he or she shall include in his or her application:

(1) Written instructions for each activity to be followed by the general licensee;
(2) Estimated calendar year doses associated with the activity or activities by an individual untrained in radiological protection, in addition to other handling, storage and use of devices under the general license; and
(3) information to demonstrate that performance of the activity or activities is unlikely to cause that individual to receive a calendar year dose in excess of 10 percent of the limits specified in Rule .1604 of this Chapter.

(d) Each person licensed under this Rule to distribute devices shall furnish a copy of the general license contained in Section 31.5 of 10 CFR Part 31 to each person to whom he or she directly or through an intermediate person transfers radioactive material in a device for use pursuant to the general license contained in Rule .0309 of this Section, or equivalent regulations of the U.S. Nuclear Regulatory Commission or an agreement state. The copy of Section 31.5 of 10 CFR Part 31 shall be accompanied by a note explaining that the use of the device is regulated by agreement states under requirements substantially the same as those in Section 31.5 of 10 CFR Part 31. Alternatively, when transferring the devices to persons in a specific agreement state, a copy of that agreement state's equivalent regulations shall be furnished by the licensee.

(e) Each person licensed under this Rule to distribute devices shall report to the agencies specified in Subparagraphs (e)(1), (2) and (3) of this Rule all transfers of the devices to persons generally licensed under the rules of those agencies. The reports shall cover each calendar quarter and shall be filed within 30 days thereafter. If no transfers have been made to generally licensed persons during the reporting period, the reports shall so indicate. Such reports shall identify each general licensee by name and address, an individual by name or position who may constitute a contact with the general licensee, the type and model number of the device transferred, and the quantity and type of radioactive material contained in the device. If one or more intermediate persons will possess the device at the intended place of use prior to its possession by the user, the reports shall include identification of each intermediate person by name, address, contact and relationship to the intended user. The reports shall be submitted to:

(1) the agency for devices transferred to persons generally licensed under Rule .0309 of this Section;
(2) each agreement state for devices transferred to persons generally licensed under rules equivalent to Rule .0309 of this Section; and
(3) the U.S. Nuclear Regulatory Commission for devices transferred to persons generally licensed under Section 31.5 of 10 CFR Part 31.

(f) Each person licensed under this Rule to distribute devices shall maintain for agency inspection either copies of all reports required in Paragraph (e) of this Rule or a record containing the same information. Such copies or records of transfer shall be maintained for at least five years after the date of each transfer of a device to a generally licensed person.

History Note: Authority G.S. 104E-7; 104E-10(b);
Eff. February 1, 1980;
Amended Eff. October 1, 2013; January 1, 1994.

15A NCAC 11 .0331 SPECIFIC LICENSES-MANUFACTURE OF IN VITRO TEST KITS

An application for a specific license to manufacture or distribute radioactive material for use under the general license in Rule .0314 of this Section shall be approved if all of the following requirements are satisfied:

(1) The applicant satisfies the general requirements specified in Rule .0317 of this Section.

(2) The radioactive material is to be prepared for distribution in prepackaged units of:
  (a) iodine-125 in units not exceeding 10 microcuries each;
  (b) iodine-131 in units not exceeding 10 microcuries each;
  (c) carbon-14 in units not exceeding 10 microcuries each;
  (d) hydrogen-3 (tritium) in units not exceeding 50 microcuries each;
  (e) iron-59 in units not to exceed 20 microcuries each;
  (f) cobalt-57 in units not to exceed 10 microcuries each;
  (g) selenium-75 in units not exceeding 10 microcuries each; or
  (h) mock iodine-125 in units not exceeding 0.05 microcurie of iodine-129 and 0.005 microcurie of americium-241 each.

(3) Each prepackaged unit bears a durable, visible label:
  (a) identifying the radioactive contents as to chemical form and radionuclide, and indicating that the amount of radioactivity does not exceed the appropriate limit in Item (2) of this Rule; and
  (b) displaying the radiation caution symbol described in Rule .1623 of this Chapter and the words, "CAUTION, RADIOACTIVE MATERIAL," and "NOT FOR INTERNAL OR EXTERNAL USE IN HUMANS OR ANIMALS."

(4) The following statement, or a statement which contains the information called for in the following statement, appears on a label affixed to each prepackaged unit or appears in a leaflet or brochure which accompanies the package:

This radioactive material may be received, acquired, possessed, and used only by physicians, clinical laboratories or hospitals and only for *in vitro* clinical or laboratory tests not involving internal or external administration of the material, or the radiation therefrom, to human beings or animals. Its receipt, acquisition, possession, use, and transfer are subject to the regulations and a general license of the U.S. Nuclear Regulatory Commission or a state with which the Commission has entered into an agreement for the exercise of regulatory authority. (Name of Manufacturer.)

(5) The label affixed to the unit, or the leaflet or brochure which accompanies the package, contains information as to the precautions to be observed in handling and storing such radioactive material. In the case of the mock iodine-125 reference or calibration source, the information accompanying the source must also contain directions to the licensee regarding the waste disposal requirements set out in Rule .1628 of this Chapter.

History Note: *Authority G.S. 104E-7; 104E-10(b);*
Eff. February 1, 1980;
Amended Eff. October 1, 2013; January 1, 1994.

15A NCAC 11 .0333 SPECIFIC LICENSES: MANUFACTURE OF RADIOPHARMACEUTICALS

(a) An application for a specific license to manufacture and distribute radiopharmaceuticals containing radioactive material for use by persons licensed pursuant to Rules .0318, .0319, or .0320 of this Section for medical use shall be approved if the applicant meets the following conditions:

(1) the applicant satisfies the requirements of Rule .0317 of this Section; and

(2) the applicant meets the applicable requirements in Section 32.72 of 10 CFR Part 32, and Section 30.32(j) of 10 CFR Part 30.

(b) Authorization under this Rule to produce Positron Emission Tomography (PET) radioactive drugs for noncommercial transfer to medical use licensees in its consortium does not relieve the licensee from complying with applicable FDA, other Federal, and State requirements governing radioactive drugs.

(c) Each licensee authorized under this Rule to produce PET radioactive drugs for noncommercial transfer to medical use licensees in its consortium shall:

(1) satisfy the labeling requirements in Rule .1626 of this Chapter for each PET radioactive drug transport radiation shield and each syringe, vial, or other container used to hold a PET radioactive drug intended for noncommercial distribution to members of its consortium; and

(2) possess and use instrumentation to measure the radioactivity of the PET radioactive drugs intended for noncommercial distribution to members of its consortium and meet the procedural, radioactivity measurement, instrument test, instrument check, and instrument adjustment requirements in this Rule.

(d) A licensee that is a pharmacy authorized under Rule .0333 of this Section to produce PET radioactive drugs for noncommercial transfer to medical use licensees in its consortium shall require that any individual that prepares PET radioactive drugs be:

(1) an authorized nuclear pharmacist that meets the requirements in Rule .0318 of this Section; or

(2) an individual under the supervision of an authorized nuclear pharmacist as specified in Rule .0318 of this Section.

(e) A pharmacy authorized under this Rule to produce PET radioactive drugs for noncommercial transfer to medical use licensees in its consortium that allows an individual to work as an authorized nuclear pharmacist shall meet the requirements of Rule .0318 of this Section.

History Note: *Authority G.S. 104E-7; 104E-10(b);*

Eff. February 1, 1980;
Amended Eff. October 1, 2013; November 1, 2007.

15A NCAC 11 .0334 SPECIFIC LICENSES: GENERATORS AND REAGENT KITS

An application for a specific license to manufacture and distribute generators and reagent kits containing radioactive material for preparation of radiopharmaceuticals by persons licensed pursuant to Rule .0321 of this Section for the generators, reagent kits and associated medical uses shall be approved if the applicant meets the following conditions:

(1) the applicant satisfies the general requirements of Rule .0317 of this Section; and
(2) the applicant satisfies the applicable requirements in Section 32.73 of 10 CFR Part 32 or their agreement state equivalent.

History Note: Authority G.S. 104E-7; 104E-10(b);
Eff. February 1, 1980;
Amended Eff. October 1, 2013.

15A NCAC 11 .0338 SPECIFIC TERMS AND CONDITIONS OF LICENSES

(a) Each person licensed by the agency pursuant to this Section shall confine his or her use and possession of the radioactive material licensed to the locations and purposes authorized in the license.

(b) Each licensee shall notify the agency in writing immediately following the filing of a voluntary or involuntary petition for bankruptcy under any Chapter of Title 11 (Bankruptcy) of the United States Code by or against:

(1) the licensee;
(2) an entity [as that term is defined in 11 U.S.C. 101(14)] controlling the licensee or listing the license or licensee as property of the estate; or
(3) an affiliate [as that term is defined in 11 U.S.C. 101(2)] of the licensee.

(c) The notification in Paragraph (b) of this Rule shall indicate:

(1) the bankruptcy court in which the petition for bankruptcy was filed; and
(2) the date of the filing of the petition.

(d) Licensees required to submit emergency plans pursuant to Rule .0352 of this Section shall follow the emergency plan approved by the agency. The licensees may change the approved plan without prior agency approval only if the licensee believes the changes do not decrease the effectiveness of the plan and are submitted to the agency no later than 20 calendar days after the changes are made. The licensee shall furnish the change to affected off-site response organizations within six months after the change is made. Proposed changes that the licensee believes are likely to decrease, or may potentially decrease, the effectiveness of the approved emergency plan shall not be implemented without prior application to and approval by the agency.

(e) Each licensee preparing technetium-99m radiopharmaceuticals from molybdenum-99/technetium-99m generators or rubidium-82 from strontium-82/rubidium-82 generators shall test the generator eluates for molybdenum-99 breakthrough or strontium-82 and strontium-85 contamination, respectively, in accordance with Rule .0361 of this Section. The licensee shall record the results of each test and retain each record for three years after the record is made.

(f) Each portable nuclear gauge licensee shall use at least two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal whenever portable gauges are not under the control and constant surveillance of the licensee.

History Note: Authority G.S. 104E-7; 104E-10(b);
Eff. February 1, 1980;
Amended Eff. October 1, 2013; May 1, 1993; May 1, 1992; June 1, 1989.

15A NCAC 11 .0352 EMERGENCY PLANS

(a) Each application to possess radioactive materials in unsealed form, on foils or plated sources, or sealed in glass in excess of the quantities in the table in Subparagraph (e)(1) of this Rule must contain either:

(1) an evaluation showing that the maximum dose to a person off-site due to a release of radioactive materials would not exceed one rem effective dose equivalent or five rems to the thyroid; or
(2) an emergency plan for responding to a release of radioactive material.

(b) The following factors shall be used to support an evaluation submitted under Subparagraph (a)(1) of this Rule:

(1) the radioactive material is physically separated so that only a portion could be involved in an accident;
(2) all or part of the radioactive material is not subject to release during an accident because of the way it is stored or packaged;
(3) the release fraction in the respirable size range would be lower than the release fraction shown in Subparagraph (e)(1) of this Rule due to the chemical or physical form of the material;
(4) the solubility of the radioactive material would reduce the dose received;
(5) the facility design or engineered safety features in the facility would cause the release fraction to be lower than shown in Subparagraph (e)(1) of this Rule; and
(6) the operating restrictions or procedures would prevent a release fraction as large as that shown in Subparagraph (e)(1) of this Rule; or
(7) the factors appropriate for the specific facility.

(c) An emergency plan for responding to a release of radioactive material submitted under Subparagraph (a)(2) of this Rule must include the following information:

(1) a description of the licensee's facility and potentially impacted area;
(2) the identification of each type of radioactive materials accident for which protective actions may be needed;
(3) the classification system for classifying accidents as alerts or site area emergencies;

(4) the identification of the means of detecting each type of accident in a timely manner quickly enough to mitigate off-site consequences;

(5) a description of the means and equipment for mitigating the consequences of each type of accident, including those provided to protect workers on-site, and a description of the program for maintaining the equipment;

(6) a description of the methods and equipment to assess releases of radioactive materials;

(7) a description of the responsibilities of licensee personnel, should an accident occur, including identification of personnel responsible for notifying off-site response organizations and the agency, and responsibilities for developing, maintaining, and updating the plan;

(8) a description of notification and coordination, to include a commitment to and a brief description of the means to notify off-site response organizations and request off-site assistance, including medical assistance for the treatment of contaminated injured on-site workers when needed, provided that:

(A) a control point is established;

(B) the notification and coordination is planned so that unavailability of some personnel, parts of the facility, and some equipment will not prevent the notification and coordination;

(C) the licensee commits to notify the agency after notification of the appropriate off-site response organizations, within one hour after the licensee declares an emergency; and

(D) the reporting requirements in this Subparagraph do not substitute for or relieve the licensee from responsibility for complying with the requirements in the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Public Law 99-499 or other State or federal reporting requirements;

(9) description of the types of information on facility status, radioactive releases, and recommended protective actions, if necessary, to be given to off-site response organizations and to the agency;

(10) description of the frequency, performance objectives and plans for the training that the licensee will provide to workers on how to respond to an emergency, including any instructions and orientation tours the licensee offers to fire, police, medical and other emergency personnel, where such training shall:

(A) familiarize personnel with site-specific emergency procedures; and

(B) prepare site personnel for their responsibilities in the event of accident scenarios postulated as most probable for the specific site, including the use of team training for such scenarios;

(11) description of the means of restoring the facility to a safe condition after an accident;

(12) description of provisions for conducting quarterly communications checks with off-site response organizations and biennial on-site exercises to test response to simulated emergencies where such provisions meet the following requirements:

(A) quarterly communications checks with off-site response organizations include the check and update of all necessary telephone numbers;

(B) while participation of off-site response organizations in biennial exercises is not required, the licensee shall invite off-site response organizations to participate in the biennial exercises;

(C) accident scenarios for biennial exercises are not known to most exercise participants;

(D) critique of each exercise using individuals who do not have direct implementation responsibility for the plan. Critiques of exercises evaluate the appropriateness of the plan, emergency procedures, facilities, equipment, training of personnel, and overall effectiveness of the response; and

(E) deficiencies found by the critiques in Part (c)(12)(D) of this Rule are corrected; and

(13) certification that the applicant has met its responsibilities under the Emergency Planning and Community Right-to-Know Act of 1986, Title III, Public Law 99-499, if applicable to the applicant's activities at the proposed place of use of the radioactive material.

(d) The licensee shall submit the emergency plan to allow the off-site response organizations expected to respond in case of an accident 60 days to comment on the licensee's emergency plan before submitting the plan to the agency. The licensee shall provide any comments received within the 60 day comment period to the agency with the emergency plan.

(e) Quantities of radioactive material requiring an emergency plan for responding to a release as used in this Rule and instructions for use are:

TABLE

RADIOACTIVE MATERIAL	RELEASE FRACTION	QUANTITY (CURIES)
Actinium-228	0.001	4,000
Americium-241	.001	2
Americium-242	.001	2
Americium-243	.001	2
Antimony-124	.01	4,000
Antimony-126	.01	6,000
Barium-133	.01	10,000
Barium-140	.01	30,000
Bismuth-207	.01	5,000
Bismuth-210	.01	600
Cadmium-109	.01	1,000
Cadmium-113	.01	80
Calcium-45	.01	20,000
Californium-252	.001	9 (20 mg)
Carbon-14 (NON CO_2)	.01	50,000
Cerium-141	.01	10,000
Cerium-144	.01	300
Cesium-134	.01	2,000
Cesium-137	.01	3,000
Chlorine-36	.5	100
Chromium-51	.01	300,000
Cobalt-60	.001	5,000
Copper-64	.01	200,000
Curium-242	.001	60
Curium-243	.001	3
Curium-244	.001	4
Curium-245	.001	2
Europium-152	.01	500
Europium-154	.01	400
Europium-155	.01	3,000
Germanium-68	.01	2,000
Gadolinium-153	.01	5,000
Gold-198	.01	30,000
Hafnium-172	.01	400
Hafnium-181	.01	7,000
Holmium-166m	.01	100
Hydrogen-3	.5	20,000
Iodine-125	.5	10
Iodine-131	.5	10
Iodine-114m	.01	1,000
Iridium-192	.001	40,000
Iron-55	.01	40,000
Iron-59	.01	7,000
Krypton-85	1.0	6,000,000
Lead-210	.01	8
Manganese-56	.01	60,000
Mercury-203	.01	10,000
Molybdenum-99	.01	30,000
Neptunium-237	.001	2
Nickel-63	.01	20,000
Niobium-94	.01	300
Phosphorus-32	.5	100
Phosphorus-33	.5	1,000
Polonium-210	.01	10
Potassium-42	.01	9,000

Promethium-145	.01	4,000
Promethium-147	.01	4,000
Radium-226	.001	100
Ruthenium-106	.01	200
Samarium-151	.01	4,000
Scandium-46	.01	3,000
Selenium-75	.01	10,000
Silver-110m	.01	1,000
Sodium-22	.01	9,000
Sodium-24	.01	10,000
Strontium-89	.01	3,000
Strontium-90	.01	90
Sulfur-35	.5	900
Technetium-99	.01	10,000
Technetium-99m	.01	400,000
Tellurium-127m	.01	5,000
Tellurium-129m	.01	5,000
Terbium-160	.01	4,000
Thulium-170	.01	4,000
Tin-113	.01	10,000
Tin-123	.01	3,000
Tin-126	.01	1,000
Titanium-44	.01	100
Vanadium-48	.01	7,000
Xenon-133	1.0	900,000
Yttrium-91	.01	2,000
Zinc-65	.01	5,000
Zirconium-93	.01	400
Zirconium-95	.01	5,000
Any other beta-gamma emitter	.01	10,000
Mixed fission products	.01	1,000
Mixed corrosion products	.01	10,000
Contaminated equipment beta-gamma	.001	10,000
Irradiated material, any form other than solid noncombustible	.01	1,000
Irradiated material, solid noncombustible	.001	10,000
Mixed radioactive waste Beta-gamma	.01	1,000
Packaged mixed waste, beta-gamma	.001	10,000
Any other alpha emitter	.001	2
Contaminated equipment, alpha	.0001	20
Packaged waste, alpha	.0001	20

(f) For combinations of radioactive materials, an emergency plan is required if the sum of the ratios of the quantity of each radioactive material authorized to the quantity listed for that material in the table in Paragraph (e) of this Rule exceeds one.
(g) Waste packaged in Type B containers, as defined in 10 CFR Part 71.4, does not require an emergency plan.

History Note: Authority G.S. 104E-7; 104E-18; 10 CFR 30.72;
Eff. May 1, 1992;
Amended Eff. October 1, 2013; May 1, 1993; October 1, 1992.

15A NCAC 11 .0358 RELEASE OF PATIENTS CONTAINING RADIOPHARMACEUTICALS OR PERMANENT IMPLANTS

(a) A licensee may authorize the release from its control any individual who has been administered radiopharmaceuticals or permanent implants containing radioactive material if the total effective dose equivalent to any other individual from exposure to the released individual is not likely to exceed 500 millirem (5 mSv).
(b) The licensee shall provide the released individual, or the individual's parent or guardian, with oral and written instructions, on actions recommended to maintain doses to other individuals as low as reasonably achievable if the total effective dose equivalent to any other individual is likely to exceed 100 millirem (1 mSv). If the dose to a breast-feeding infant or child

could exceed 100 millirem (1 mSv) if there is no interruption of breast-feeding, the instructions shall include:

(1) Guidance on the interruption or discontinuation of breast-feeding; and

(2) Information on the consequences of failure to follow the guidance.

(c) The licensee shall maintain a record of the basis for authorizing the release of an individual for three years after the date of release, if the total effective dose equivalent is calculated by:

(1) Using the retained activity rather than the activity administered;

(2) Using an occupancy factor less than 0.25 at one meter;

(3) Using the biological or effective half-life; or

(4) Considering the shielding by tissue.

(d) The licensee shall maintain a record for three years after the date of the release that instructions were provided to a breast-feeding woman if the radiation dose to the infant or child from continued breast-feeding could result in a total effective dose equivalent exceeding 100 millirem (1 mSv).

History Note: Authority G.S. 104E-7(a)(8); 104E-12;
Eff. August 1, 1998;
Amended Eff. October 1, 2013.

15A NCAC 11 .0361 MEDICAL USE OF UNSEALED RADIOACTIVE MATERIAL

(a) A licensee may use any unsealed radioactive material prepared for use for uptake, dilution, or excretion studies, imaging and localization studies, and use requiring a written directive as set forth in Rule .0104 of this Chapter that is:

(1) Obtained from a manufacturer or preparer licensed under 10 CFR 32.72 or equivalent Agreement State requirements;

(2) Obtained from a positron emission tomography (PET) radioactive drug producer licensed under 10 CFR 30.32(j), 15A NCAC 11 .0333, or equivalent Agreement State requirements;

(3) Excluding production of PET radionuclides, prepared by:

(A) An authorized nuclear pharmacist;

(B) A physician is an authorized user identified on a North Carolina Radioactive Materials License, an Agreement State Radioactive Materials License, or a license issued by the U.S. Nuclear Regulatory Commission or who meets the requirements in 15A NCAC 11 .0318(c); or

(C) An individual under the supervision, as specified in Rule .0318 of this Section, of the authorized nuclear pharmacist in Part (a)(3)(A) of this Rule or the physician who is an authorized user in Part (a)(3)(B) of this Rule;

(4) Obtained from and prepared by an NRC or Agreement State licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an Investigational New Drug (IND) protocol accepted by the FDA; or

(5) Prepared by the licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an Investigational New Drug (IND) protocol accepted by the FDA.

(b) A licensee shall not administer to humans a radiopharmaceutical that contains;

(1) more than 0.15 microcurie (0.15 kilobecquerel) of molybdenum-99 per millicurie (megabecquerel) of technetium-99m; or

(2) more than 0.02 microcurie (0.02 kilobecquerel) of strontium-82 per millicurie (megabecquerel) of rubidium-82 chloride, or 0.2 microcurie (0.2 kilobecquerel) of strontium-85 per millicurie (megabecquerel) of rubidium-82 chloride.

(c) A licensee that uses molybdenum-99/technetium-99m generators for preparing a technetium-99 radiopharmaceutical shall measure the molybdenum-99 concentration in the first eluate after receipt of a generator to demonstrate compliance with Paragraph (b) of this Rule.

(d) A licensee that uses strontium-82/rubidium-82 generators for preparing a rubidium-82 radiopharmaceutical shall measure the concentrations of strontium-82 and strontium-85 before the first patient use of the day to demonstrate compliance with Paragraph (b) of this Rule.

(e) A licensee that must measure molybdenum-99 or strontium-82 and strontium-85 concentration shall retain a record of each measurement for three years. The record shall include:

(1) for each measured elution of technetium-99m: the ratio of the measures expressed as microcuries of molybdenum-99 per millicurie of technetium-99m (or kilobecquerels of molybdenum-99 per megabecquerel of technetium-99m);

(2) for each measured elution of rubidium-82: the ratio of the measures expressed as microcuries of strontium-82 and strontium-85 per millicurie of rubidium-82 (or kilobecquerel strontium-82 and strontium-85 per megabecquerel rubidium-82); and

(3) the time and date of the measurement; and

(4) the initials of the individual who made the measurement.

History Note: Authority G.S. 104E-7(a)(2); 104E-10(b); 104E-12;
Eff. April 1, 1999;
Amended Eff. October 1, 2013; November 1, 2007.

15A NCAC 11 .0362 DECAY-IN-STORAGE

(a) A licensee may hold radioactive material with a physical half-life of less than 275 days for decay-in-storage before disposal in ordinary trash and is exempt from the requirements of Rule .1628 of this Chapter if the licensee:

(1) holds radioactive material for decay a minimum of 10 half-lives;

(2) monitors radioactive material at the container surface before disposal as ordinary trash and determines that its radioactivity cannot be distinguished from the background radiation level with a radiation detection survey meter capable of detecting a dose rate of 0.1 millirem (1 microsievert) per hour and with no interposed shielding; and

(3) removes or obliterates all radiation labels.

(b) A licensee shall retain a record of each disposal permitted under Paragraph (a) of this Rule for three years. The record shall include:

(1) the date of the disposal;

(2) the date the radioactive material was placed in storage;

(3) the radionuclides disposed;

(4) the survey instrument used;

(5) the background dose rate used; and

(6) the dose rate measured at the surface of each waste container.

History Note: Authority G.S. 104E-7(a)(2); 104E-10(b); 104E-12;
Eff. April 1, 1999;
Amended Eff. October 1, 2013.

15A NCAC 11 .1004 NOTIFICATIONS AND REPORTS TO INDIVIDUALS

(a) Radiation exposure data for an individual and the results of any measurements, analyses, and calculations of radioactive material deposited or retained in the body of any individual shall be reported to the individual as specified in this Rule. The information reported shall include data and results obtained pursuant to rules of this Chapter, orders, or license conditions, as shown in records maintained by the licensee or registrant pursuant to provisions of this Chapter. Each notification and report shall:

(1) be in writing;

(2) include identifying data such as the name of the licensee or registrant, the name of the individual, and the individual's social security number;

(3) include the individual's exposure information; and

(4) contain the following statement: This report is furnished to you under the provisions of Section 15A NCAC 11 .1000: NOTICES: INSTRUCTIONS: REPORTS AND INSPECTIONS. You should preserve this report for further reference.

(b) Each licensee or registrant shall make dose information available to workers as shown in records maintained by the licensee or registrant under the provisions of Rule .1640 of this Chapter. The licensee or registrant shall provide an annual report to each individual monitored under Rule .1614 of this Chapter of the dose received in that monitoring year if:

(1) the individual's occupational dose exceeds 1 mSv (100 mrem) TEDE or 1 mSv (100 mrem) to any individual organ or tissue; or

(2) the individual requests his or her annual dose report.

(c) At the request of a worker formerly engaged in work controlled by the licensee or the registrant, each licensee or registrant shall furnish to the worker a report of the worker's radiation dosage and exposure to radioactive materials. The report shall:

(1) be furnished within 30 days from the time any request is made, or within 30 days after the information has been obtained by the licensee or registrant, whichever is later;

(2) cover, within the period of time specified in the request, each calendar quarter in which the worker's activities involved exposure to radiation from radioactive material licensed by, or radiation machines registered with the agency; and

(3) include the dates and locations of work under the license or registration in which the worker participated during this period.

(d) When a licensee or registrant is required pursuant to Rules .1646, .1647, or .1648 of this Chapter to report to the agency any overexposure of an individual to radiation or radioactive material, the licensee or the registrant shall also provide the individual a report on his or her exposure data included in the report to the agency. The reports shall be transmitted at a time no later than the transmittal to the agency.

History Note: Authority G.S. 104E-7; 104E-10(b); 104E-12;
Eff. February 1, 1980;
Amended Eff. October 1, 2013; January 1, 1994.

15A NCAC 11 .1604 OCCUPATIONAL DOSE LIMITS FOR ADULTS

(a) A licensee or registrant shall limit the occupational dose to individual adults, except for planned special exposures as provided in Rule .1608 of this Section, to the following dose limits:

(1) an annual limit, which is the more limiting of:

(A) the total effective dose equivalent being equal to five rems (0.05Sv); or

(B) the sum of the deep-dose equivalent and the committed dose equivalent to any individual organ or tissue other than the lens of the eye being equal to 50 rems (0.5 Sv); and

(2) the annual limits to the lens of the eye, the skin of the whole body, and the skin of the extremities which are:

(A) an eye dose equivalent of 15 rems (0.15 Sv); and

(B) a shallow-dose equivalent of 50 rems (0.50 Sv) to the skin of the whole body or to the skin of any extremity.

(b) Doses received in excess of the annual limits, including doses received during accidents, emergencies, and planned special exposures, shall be subtracted from the limits for planned special exposures that the individual may receive during the current year and during the individual's lifetime. Dose limits for planned special exposures are provided in Item (5) of Rule .1608 of this Section.

(c) When the external exposure is determined by measurement with an external personal monitoring device, the deep-dose equivalent must be used in place of the effective dose equivalent unless the effective dose equivalent is determined by a dosimetry method approved by the agency as consistent with this Chapter. The assigned deep-dose equivalent must be for the part of the body receiving the highest exposure. The assigned shallow-dose equivalent must be the dose averaged over the contiguous 10 square centimeters of skin receiving the highest exposure. The deep-dose equivalent, lens-dose equivalent, and shallow-dose equivalent may be assessed from surveys or other radiation measurements for the purpose of demonstrating compliance with the occupational dose limits if the individual monitoring device was not in the region of highest potential exposure or the results of individual monitoring are unavailable.

(d) Derived air concentration (DAC) and annual limit on intake (ALI) values are presented in Table 1 of Appendix B to 10 CFR 20.1001 - 20.2401 and may be used to determine the individual's dose and to demonstrate compliance with the occupational dose limits.

(e) In addition to the annual dose limits, the licensee shall limit the soluble uranium intake by an individual to 10 milligrams in a week in consideration of chemical toxicity. Requirements for annual limits on intake for uranium are provided in Appendix B to 10 CFR 20.1001 - 20.2401.

(f) The licensee or registrant shall reduce the dose that an individual may be allowed to receive in the current year by the amount of prior or current occupational dose received while employed by any other person. Requirements for determining prior occupational exposure are provided in Rule .1638(e) of this Section.

History Note: Authority G.S. 104E-7(a)(2);
Eff. January 1, 1994;
Amended Eff. October 1, 2013; May 1, 2006.

15A NCAC 11 .1626 LABELING REQUIREMENTS AND EXEMPTIONS

(a) The licensee shall ensure that:

(1) each container of licensed radioactive material bears a durable, visible label bearing the radiation symbol and the words:

(A) CAUTION
RADIOACTIVE MATERIAL; or

(B) DANGER
RADIOACTIVE MATERIAL

The label shall also provide sufficient information (such as the radionuclide(s) present, an estimate of the quantity of radioactivity, the date for which the activity is estimated, radiation levels, kinds of materials, and mass enrichment) to permit individuals handling or using the containers, or working in the vicinity of the containers, to take precautions to avoid or minimize exposures; and

(2) each syringe and vial that contains unsealed radioactive material for medical use is labeled to identify the radioactive drug. Each syringe shield and vial shield must also be labeled unless the label on the syringe or vial is visible when shielded.

(b) Each licensee shall, prior to removal or disposal of empty uncontaminated containers to unrestricted areas, remove or deface the radioactive material label or otherwise indicate that the container no longer contains radioactive materials.

(c) Except as required in Subparagraph (a)(2) of this Rule, a licensee is not required to label:

(1) containers holding licensed radioactive material in quantities less than the quantities listed in Appendix C to 10 CFR 20.1001 - 20.2401;

(2) containers holding licensed radioactive material in concentrations less than those specified in Table 3 of Appendix B to 10 CFR 20.1001 - 20.2401;

(3) containers attended by an individual who takes the precautions to prevent the exposure of individuals in excess of the limits established by this Section;

(4) containers when they are in transport and packaged and labeled in accordance with the regulations of the U.S. Department of Transportation;

(5) containers that are accessible only to individuals authorized to handle or use them or to work in the vicinity of the containers if the contents are identified to these individuals by a readily available written record (for example, containers in locations such as water-filled canals, storage vaults, or hot cells, provided the record shall be retained as long as the containers are in use for the purpose indicated on the record); or

(6) installed manufacturing or process equipment, such as piping and tanks.

History Note: Authority G.S. 104E-7(a)(2); 104E-15;
Eff. January 1, 1994;
Amended Eff. October 1, 2013.

15A NCAC 11 .1633 TRANSFER FOR DISPOSAL AND MANIFESTS

(a) The requirements of this Rule and Appendix G to 10 CFR Part 20, incorporated by reference in Rule .0117 of this Chapter, are designed to:

(1) control transfers of low-level radioactive waste by any waste generator, waste collector, or

waste processor licensee, as defined in Appendix G to 10 CFR Part 20, who ships low-level waste either directly, or indirectly through a waste collector or waste processor, to a licensed low-level waste disposal facility, as defined in Rule .1202 of this Chapter;

(2) establish a manifest tracking system; and

(3) supplement existing requirements concerning transfers and recordkeeping for those wastes.

(b) Any licensee shipping radioactive waste intended for ultimate disposal at a licensed land disposal facility shall document the information required on the U.S. Nuclear Regulatory Commission's Uniform Low-Level Radioactive Waste Manifest and transfer this recorded manifest information to the intended consignee in accordance with this Rule and Appendix G to 10 CFR Part 20.

(c) Each shipment manifest shall include a certification by the waste generator as specified in Appendix G to 10 CFR Part 20.

(d) Each person involved in the transfer for disposal and disposal of waste, including the waste generator, waste collector, waste processor, and disposal facility operator, shall comply with the requirements specified in this Rule and Appendix G to 10 CFR Part 20.

(e) Reports and notifications required to be made to the nearest regional administrator by Appendix G to 10 CFR Part 20 shall be made to the agency instead.

(f) Any licensee shipping radioactive material as defined in Rule .0104 of this Chapter intended for ultimate disposal at a land disposal facility as defined in Rule .1202 of this Chapter must document the information required on the U.S. Nuclear Regulatory Commission's Uniform Low-Level Radioactive Waste Manifest and transfer this recorded manifest information to the intended consignee in accordance with appendix G to 10 CFR Part 20.

(g) Radioactive material as defined in Rule .0104 of this Chapter may be disposed of in accordance with Rule .1628 of this Section. Any licensed radioactive material being disposed of at a facility, or transferred for ultimate disposal at a facility licensed under 10 CFR Part 61, must meet the requirements of this Rule.

(h) A licensee may dispose of radioactive material as defined in Rule .0104 of this Chapter at a disposal facility authorized to dispose of such material in accordance with any Federal or State solid or hazardous waste law, including the Solid Waste Disposal Act established by the Energy Policy Act of 2005.

History Note: Authority G.S. 104E-7(a)(2),(a)(3); 104E-12(a);
Eff. January 1, 1994;
Amended Eff. October 1, 2013; April 1, 1999.

15A NCAC 11 .1648 REPORTS OF PLANNED SPECIAL EXPOSURES

(a) The licensee or registrant shall submit a written report to the agency within 30 days following any planned special exposure conducted in accordance with Rule .1608 of this Section, informing the agency the date the special planned exposure was conducted and including the information required by Rule .1639 of this Section.

(b) When a licensee or registrant is required by this Rule to report to the agency any exposure of an identified specially exposed individual, the licensee or registrant shall also provide the individual a report on his or her exposure data included in the report to the agency. This report must be transmitted no later than the transmittal to the agency.

History Note: Authority G.S. 104E-7(a)(2); 104E-12(a);
Eff. January 1, 1994;
Amended Eff. October 1, 2013.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

19A NCAC 01B .0502 INSPECTION OF TRAFFIC ORDINANCES

Traffic Ordinances are available for public inspection at:

Transportation Mobility and Safety
(Mail) 1561 Mail Service Center
Raleigh, 27699-1561
(Delivery) 750 N. Greenfield Parkway
Garner, NC 27529

History Note: Authority G.S. 132-6; 143B-350;
Eff. July 1, 1978;
Amended Eff. October 1, 2013; November 1, 1993.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 22 - HEARING AID DEALERS AND FITTERS BOARD

21 NCAC 22F .0108 REVIEW OF EXAMINATION

As set forth in G.S. 93B-8 (c), each registered applicant who takes and does not pass the qualifying examination shall be granted an opportunity to review that portion of the examination that is in the custody and control of the Board in the presence of a representative of the Board, upon written request from the applicant. An applicant shall make a written request by completing the electronic form available on the Board website. The request shall be submitted by the registered applicant no later than 30 days after the date of the Official Notice of Examination Results. The Board shall conduct exam reviews at the Board's office by appointment.

History Note: Authority G.S. 93B-8; 93D-3(c);
Eff. April 23, 1976;
Amended Eff. October 1, 2013; February 1, 1996; January 1, 1992; May 1, 1988.

This Section contains information for the meeting of the Rules Review Commission on October 17 and November 21, 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	**Appointed by House**
Jeff Hyde	Ralph A. Walker
Margaret Currin	Anna Baird Choi
Jay Hemphill	Jeanette Doran
Faylene Whitaker	Garth K. Dunklin
	Stephanie Simpson

COMMISSION COUNSEL

Joe Deluca	(919)431-3081
Amanda Reeder	(919)431-3079

RULES REVIEW COMMISSION MEETING DATES

November 21, 2013	December 19, 2013
January 16, 2014	February 20, 2014

RULES REVIEW COMMISSION MEETING
MINUTES
October 17, 2013

The Rules Review Commission met on Thursday, October 17, 2013, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Margaret Currin, Jeanette Doran, Garth Dunklin, Jay Hemphill, Jeff Hyde, Ralph Walker and Faylene Whitaker.

Staff members present were: Joe DeLuca and Amanda Reeder, Commission Counsel; Molly Masich, Dana Vojtko, Julie Brincefield and Tammara Chalmers.

The meeting was called to order at 10:04 a.m. with Vice-Chairman Currin presiding. She 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

Vice-Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the September 19, 2013 meeting. There were none and the minutes were approved as distributed.

LOG OF FILINGS

Vice-Chairman Currin presided over the review of the log of permanent rules.

Office of the Commissioner of Banks
All rules were unanimously approved.

Sheriffs' Education and Training Standards Commission
12 NCAC 10B .0702 was unanimously approved.

Wildlife Resources Commission
Kate Pipkin from the agency addressed the Commission**.**

All rules were unanimously approved.

Board of Dental Examiners
Carolin Bakewell from the Board addressed the Commission.

21 NCAC 16Q .0202, .0302 and .0501 were approved.

Rule .0304 was approved contingent upon receiving technical change by Monday, October 21. The technical change was subsequently received.

Commissioner Hyde voted against the motion to approve.

Hearing Aid Dealers and Fitters Board
21 NCAC 22I .0103 was unanimously approved.

The Commission objected to 21 NCAC 22L .0101, .0103, .0104, .0105, .0106, .0109, .0110, .0111, .0113, .0115 and .0116 based on failure to comply with the Administrative Procedure Act. Specifically the agency failed to wait the full 60 days for the end of the comment period prior to adopting the rules. The agency may adopt the rules any time after the conclusion of the 60 day period and return them to the RRC by the Friday prior to the meeting to satisfy the objection.

Medical Board
All rules were unanimously approved with the following exception:

The Commission objected to 21 NCAC 32B .1303 based on ambiguity. In sub-paragraph (a)(5) line 15 it is unclear what constitutes acceptable "proof" that the applicant has completed 130 weeks of medical education.

21 NCAC 32B .1350 and .2001 were approved contingent upon receiving technical changes by Tuesday, October 29.

Board of Funeral Service
21 NCAC 34A .0201 was unanimously approved.

The Commission received more than 10 letters of objection to 21 NCAC 34A .0201. Pursuant to G.S. 150B-21.3, this rule is now subject to legislative review and a delayed effective date.

Board of Nursing
David Kalbacker addressed the Commission on behalf of the Board.

All rules were unanimously approved.

Board of Pharmacy
The Commission extended the period of review on 21 NCAC 46 .3401, .3402, .3403, .3404, .3405, .3406, .3407 and .3408 in order to obtain more information and answer Commissioners questions about how the system worked, the safeguards in the system, and whether the rules are clear on those points.

TEMPORARY RULES

Vice-Chairman Currin presided over the review of the log of temporary rules.

Alcoholic Beverage Control Commission
Bob Hamilton from the agency addressed the Commission.

All rules were unanimously approved.

State Board of Elections
George McCue from the Board addressed the Commission.

All rules were unanimously approved.

08 NCAC 13 .0202 was approved contingent upon receiving technical change by Friday, October 18. The technical change was subsequently received.

G.S 150B-19.1(h) RRC CERTIFICATION

Department of Justice – Division of Criminal Information
The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 04H .0101, .0102, .0103, .0201, .0202, .0203, .0301, .0302, .0303, .0304, .0401, .0402, .0404; 04I .0101, .0102, .0103, .0104, .0201, .0202, .0203, .0204, .0301, .0302, .0303, .0401, .0402, .0403, .0404, .0405, .0406, .0407, .0408, .0409, .0410, .0501, .0601, 0602 .0603, .0701 and .0801 and 04J .0101, .0102, .0103, .0201 and .0301.

12 NCAC 04H .0403 was withdrawn by the agency.

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 .0106, .0501, .0502, .0503, .0504 and .1302.

Alarm Systems Licensing Board
Jeff Gray addressed the Commission on behalf of the board.

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 12 NCAC 11 .0105.

COMMISSION BUSINESS

Amanda Reeder discussed the draft of the proposed rules to be adopted by the Commission concerning the implementation of the existing Rules review process. Ms. Reeder also discussed feedback received on the draft report sent to agencies and gave an update on the information discussed at the information sessions held on October 9, 2013.

The meeting adjourned at 12:57 a.m.

The next scheduled meeting of the Commission is Thursday, November 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 Brincefield
Editorial Assistant

Minutes approved by the Rules Review Commission:

_____
Margaret Currin, Vice-Chair

Rules Review Commission
Meeting
Please **Print** Legibly

OCTOBER 17, 2013

Name	Agency
Bob Hamilton	ABC Commission
[illegible]	Banking Commission
Kathleen MR Bode	Banking Commission
David Kalbacker	NC Board of Nursing
Stephen Dirksen	NC Board Funeral Service
Pete Burke	NC Board of Funeral Service
Josh Hickman	Justice - Div Crim Info
Carolin Bakewell	Dental Board
Tim Kent	NC Beer & Wine Wholesalers
Kate Pipkin	NCWRC
Jeff Gray	Jeff Gray
Catherine Jorgensen	HADFB
Daniel Amburn	NCRMA
Sara Weed	NCCOB
Mary Mac D Abbi	SELC
Susan Vue	FSP

LIST OF APPROVED PERMANENT RULES
October 17, 2013 Meeting

BANKS, OFFICE OF THE COMMISSIONER OF

Definitions	04 NCAC 03B .0219
Appointment of Appellate Panel	04 NCAC 03B .0301
Definitions	04 NCAC 03F .0201
Application for a License	04 NCAC 03F .0301
Revocation or Cancellation of Surety Bond	04 NCAC 03F .0506
Impairment of Minimum Net Worth	04 NCAC 03F .0508
Record and Bookkeeping Requirements	04 NCAC 03F .0601
Examination Fee	04 NCAC 03F .0602
Definitions	04 NCAC 03L .0101
Posting of Fees	04 NCAC 03L .0403
Books and Records	04 NCAC 03L .0501
Report of Information to Commissioner for the General Ass...	04 NCAC 03L .0604

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Administration of Justice Officer Schools and Training Pr...	12 NCAC 10B .0702

WILDLIFE RESOURCES COMMISSION

Black Bass	15A NCAC 10C .0305
Crappie	15A NCAC 10C .0306
Flounder, Sea Trout and Red Drum	15A NCAC 10C .0307
Kokanee Salmon	15A NCAC 10C .0308
Muskellunge	15A NCAC 10C .0309
Pickerel	15A NCAC 10C .0310
Roanoke and rock bass	15A NCAC 10C .0311
Sauger	15A NCAC 10C .0312
Shad	15A NCAC 10C .0313
Striped Bass	15A NCAC 10C .0314
Sunfish	15A NCAC 10C .0315
Trout	15A NCAC 10C .0316
Walleye	15A NCAC 10C .0317
White Bass	15A NCAC 10C .0318
White Perch	15A NCAC 10C .0319
Yellow Perch	15A NCAC 10C .0320
Safety Equipment	15A NCAC 10F .0201

DENTAL EXAMINERS, BOARD OF

Equipment	21 NCAC 16Q .0202
Clinical Requirements and Equipment	21 NCAC 16Q .0302
Off Site Use of Sedation Permits	21 NCAC 16Q .0304
Annual Renewal Required	21 NCAC 16Q .0501

HEARING AID DEALERS AND FITTERS BOARD			
Visual Inspection and Hearing Test	21	NCAC 22I	.0103
MEDICAL BOARD			
Reinstatement of Physician License	21	NCAC 32B	.1350
Application of Resident's Training License	21	NCAC 32B	.1402
Application for Medical School Faculty License	21	NCAC 32B	.1502
Special Purpose License	21	NCAC 32B	.1602
Scope of Practice Under Limited Volunteer License and Ret...	21	NCAC 32B	.1701
Application for Limited Volunteer License	21	NCAC 32B	.1702
Application for Retired Limited Volunteer License	21	NCAC 32B	.1704
Expedited Application for Physician License	21	NCAC 32B	.2001
Process for Approval to Practice	21	NCAC 32M	.0104
Inactive Status	21	NCAC 32M	.0108
Exemption from License	21	NCAC 32S	.0209
FUNERAL SERVICE, BOARD OF			
Fees and Other Payments	21	NCAC 34A	.0201
NURSING, BOARD OF			
Issuance of a License by a Compact Party State	21	NCAC 36	.0702
Process for Approval to Practice	21	NCAC 36	.0804
Inactive Status	21	NCAC 36	.0808

LIST OF APPROVED TEMPORARY RULES
October 17, 2013 Meeting

ALCOHOLIC BEVERAGE CONTROL COMMISSION			
Applications for Permits: General Provisions	04	NCAC 02S	.0102
Labels to be Submitted to Commission	04	NCAC 02T	.0302
Label Contents: Malt Beverages	04	NCAC 02T	.0303
Growlers	04	NCAC 02T	.0308
Growlers: Cleaning, Sanitizing, Filling and Sealing	04	NCAC 02T	.0309
ELECTIONS, STATE BOARD OF			
Multipartisan Assistance Teams	08	NCAC 13	.0201
Team Members	08	NCAC 13	.0202
Training and Certification of Team Members	08	NCAC 13	.0203
Visits by Multipartisan Assistance Teams	08	NCAC 13	.0204
Removal of Team Members	08	NCAC 13	.0205

LIST OF CERTIFIED RULES
October 17, 2013 Meeting

JUSTICE, DEPARTMENT OF - DIVISION OF CRIMINAL INFORMATION

Scope	12 NCAC 04H .0101
Definitions	12 NCAC 04H .0102
Function of DCIN	12 NCAC 04H .0103
Eligibility for Access to DCIN	12 NCAC 04H .0201
Management Control Requirements	12 NCAC 04H .0202
Non-Terminal Access	12 NCAC 04H .0203
User Agreement	12 NCAC 04H .0301
Servicing Agreement	12 NCAC 04H .0302
Control Agreements	12 NCAC 04H .0303
Disclosure Agreement	12 NCAC 04H .0304
DCIN Users	12 NCAC 04H .0401
Certification and Recertification of DCIN Users	12 NCAC 04H .0402
Enrollment	12 NCAC 04H .0404
Security of DCIN Devices	12 NCAC 04I .0101
Official Use of DCIN	12 NCAC 04I .0102
Personnel Security	12 NCAC 04I .0103
Security Awareness Training	12 NCAC 04I .0104
Documentation and Accuracy	12 NCAC 04I .0201
Timeliness	12 NCAC 04I .0202
Validations	12 NCAC 04I .0203
Hit Confirmation	12 NCAC 04I .0204
Arrest Fingerprint Card	12 NCAC 04I .0301
Final Disposition Information	12 NCAC 04I .0302
Incarceration Information	12 NCAC 04I .0303
Dissemination and Logging of CHRI and NICS Records	12 NCAC 04I .0401
Accessing of CCH Records	12 NCAC 04I .0402
Use of CHRI for Criminal Justice Employment	12 NCAC 04I .0403
Right to Review	12 NCAC 04I .0404
CCH Use in Licensing and Non-Criminal Justice Employment ...	12 NCAC 04I .0405
Restrictive Use of CCH for Employment Purposes	12 NCAC 04I .0406
Research Use and Access of CCH Records	12 NCAC 04I .0407
Limitation Requirements	12 NCAC 04I .0408
Access to CHRI by Attorneys	12 NCAC 04I .0409
Access to CHRI in Civil Procedures	12 NCAC 04I .0410
Expungements	12 NCAC 04I .0501
Statewide Automated Fingerprint Identification System	12 NCAC 04I .0601
Available Data	12 NCAC 04I .0602
Fingerprinting of Convicted Sex Offenders	12 NCAC 04I .0603
Dissemination of Division of Motor Vehicles Information	12 NCAC 04I .0701
Audits	12 NCAC 04I .0801
Definitions	12 NCAC 04J .0101
Sanctions for Violations by Individuals	12 NCAC 04J .0102
Sanctions for Violations by Agencies	12 NCAC 04J .0103
Notice of Violation	12 NCAC 04J .0201

Informal Hearing Procedure	12 NCAC 04J .0301

PRIVATE PROTECTIVE SERVICES BOARD

Prohibited Acts	12 NCAC 07D .0106
Experience Requirements for a Polygraph License	12 NCAC 07D .0501
Polygraph Trainee Permit Requirements	12 NCAC 07D .0502
Polygraph Examination Requirements	12 NCAC 07D .0503
Polygraph Instruments	12 NCAC 07D .0504
Required Continuing Education Hours	12 NCAC 07D .1302

ALARM SYSTEMS LICENSING BOARD

Prohibited Acts	12 NCAC 11 .0105

AGENDA
RULES REVIEW COMMISSION
Thursday, November 21, 2013 10:00 A.M.
1711 New Hope Church Rd., Raleigh, NC 27609

I. Ethics reminder by the chair as set out in G.S. 138A-15(e)

II. Approval of the minutes from the last meeting

III. Follow up

A. Hearing Aid Dealers and Fitters Board – 21 NCAC 22L .0101, .0103, .0104, .0105, .0106, .0109, .0110, .0111, .0113, .0115, .0116 (DeLuca)

B. Medical Board – 21 NCAC 32B .1303 (DeLuca)

C. Board of Pharmacy – 21 NCAC 46 .3401, .3402, .3403, .3404, .3405, .3406, .3407, .3408 (DeLuca)

IV. Review of Log of Filings (Permanent Rules) for rules filed between September 23, 2013 and October 21, 2013

V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days of the RRC Meeting

VI. G.S. 150B-19.1 Certification

VII. Commission Business

- Next meeting: December 19, 2013

Commission Review
Log of Permanent Rule Filings
September 23, 2013 through October 21, 2013

* Approval Recommended, ** Objection Recommended, *** Other

TRANSPORTATION, DEPARTMENT OF

The rules in Subchapter 02C concern secondary roads (.0100), and the minimum design and construction criteria for subdivision streets (.0200).

Wheel Chair Ramps 19A NCAC 02C .0208
Repeal/*

APPRAISAL BOARD

The rules in Subchapter 57A cover licensing, certification and practice rules for appraisers including application procedures (.0100); licensing and certification (.0200); examination (.0300); general practice requirements (.0400); and appraisal standards (.0500).

Fitness for Registration or Certification	21	NCAC	57A	.0202
Amend/*				

SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF EXAMINERS FOR

The rules in Chapter 64 are from the Board of Examiners for Speech and Language Pathologists and Audiologists and include general provisions (.0100); interpretative rules (.0200); code of ethics (.0300); rulemaking petitions (.0400); notice of rulemaking (.0500); conduct of rulemaking hearings (.0600); declaratory rulings (.0700); contested case hearings (.0800); other matters relating to administrative hearings (.0900); and use of speech/language pathology assistants (.1000).

Name and Address of Agency	21	NCAC	64	.0101
Amend/*				
Examinations	21	NCAC	64	.0103
Amend/*				
Notice Mailing List	21	NCAC	64	.0502
Amend/*				
Additional Information	21	NCAC	64	.0503
Amend/*				
Written Submissions	21	NCAC	64	.0604
Amend/*				
Submission of Request for Ruling	21	NCAC	64	.0702
Amend/*				
Request for Hearing	21	NCAC	64	.0802
Amend/*				
Licensee Requirements	21	NCAC	64	.1003
Amend/*				

SUBSTANCE ABUSE PROFESSIONAL PRACTICE BOARD

The rules in Chapter 68 include general provisions (.0100); certification (.0200); clinical addictions specialist (.0300); education (.0400); ethical principles of conduct (.0500); grounds for discipline and disciplinary procedures (.0600); and appeals process (.0700).

Definitions	21	NCAC	68	.0101
Amend/*				
Process for Prevention Consultant	21	NCAC	68	.0206
Amend/*				
Reciprocity	21	NCAC	68	.0209
Amend/*				
Scope	21	NCAC	68	.0301
Amend/*				
Application for Deemed Status by Professional Discipline	21	NCAC	68	.0303
Amend/*				
Three-Year Standards Review of Deemed Status Standing	21	NCAC	68	.0304
Amend/*				
Licensure Requirements for Individual Applicant	21	NCAC	68	.0305
Amend/*				
Renewal of Individual Licensure as Clinical Addictions S...	21	NCAC	68	.0306

Amend/*	
Responsibility of Supervisor to Supervisee	21 NCAC 68 .0512
Amend/*	

BUILDING CODE COUNCIL

2012 NC Building Code/Corridor Continuity	1018.6
Amend/*	
2012 NC Energy Conservation Code/Building Envelope Requir...	502.1.2, 502.2(1)
Amend/*	
2012 NC Fire Code/Structures and Outdoor Storage Undernea...	316.5
Amend/*	
2012 NC Fire Code/Manual Smoke Removal	909.20.6
Amend/*	
2012 NC Plumbing Code/Picnic Shelters	403.6.3
Amend/*	
2012 NC Plumbing Code/Requirements for Discharge Piping	504.6
Amend/*	
2012 NC Residential Code/Protection of Openings	R301.2.1.2
Amend/*	
2012 NC Residential Code/Elevation Requirements	R322.2.1, R322.3.2
Amend/*	

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby
Randall May
A. B. Elkins II
Joe Webster
Craig Croom

AGENCY	CASE NUMBER	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
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	
ABC Commission v. Wachdi Khamis Awad T/A Brothers in the Hood	12 ABC 09188	03/06/13	
ABC Commission v. Double Zero, LLC, T/A Bad Dog	12 ABC 11398	04/08/13	
ABC Commission v. Soledad Lopez de Avilez T/A Tienda Avilez	13 ABC 00002	06/06/13	
ABC Commission v. Two Brothers Food Market, Inc., T/A Circle Mart	13 ABC 10356	07/11/13	
ABC Commission v. Grandmas Pizza LLC T/A Grandmas Pizza	13 ABC 11401	08/13/13	
Two Brothers Food Market Inc., Circle Mart, Kenneth Kirkman v. ABC Commission	13 ABC 16233	09/30/13	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY			
Maggie Yvonne Graham v. Victims Compensation Commission	09 CPS 05287	04/09/13	
Brian J. Johnson v. Department of Public Safety Victim Services	12 CPS 01664	12/21/12	
George H. Jaggers, 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. NC Crime Victims Compensation Commission	12 CPS 07601	12/07/12	
Harold Eugene Merritt v. State Highway Patrol	12 CPS 07852	05/24/13	
Vanda Lawanda Johnson v. Office of Victim Compensation	12 CPS 09709	04/25/13	
Latoya Nicole Ritter v. Crime Victim Compensation Commission, Janice Carmichael	12 CPS 10572	04/25/13	

Teresa f. Williams v. Crime Victims Compensation Commission	13 CPS 09790	07/11/13	
Angela Clendenin King v. Office of Administrative Hearings NC Crime Victims Comp Commission	13 CPS 11239	08/02/13	
Matthew B. McGee v. NC Victims Compensation Commission	13 CPS 12133	08/26/13	

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Stonesthrow Group Home Medicaid Provider #6603018 Owned by Alberta Professional Services Inc v. DHHS, Division of Mental Health/Development Disabilities/ Substance Abuse, and DMA	09 DHR 05790	01/11/13	
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	
Robert T. Wilson v. DHHS, DHSR	10 DHR 07700	01/29/13	
Daniel J. Harrison v. DHHS Division of Health Service Regulation	10 DHR 07883	04/12/13	28:02 NCR 73
Mary Ann Barnes v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 6488	07/16/12	
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	
Shirley Dowdy v. DHHS	11 DHR 13267	03/25/13	
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
Andrea D. Pritchett v. DHHS Healthcare Personnel Registry Section	11 DHR 14885	01/04/13	28:02 NCR 91
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	
Anthony Moore d/b/a Hearts of Gold II v. DHHS, Division of Health Service Regulation, Adult Care Licensure Section	12 DHR 01346	04/12/13	28:03 NCR 256
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	
Nicole Lynn Hudson v. DHHS, Division of Health Service Regulation	12 DHR 01732	03/11/13	28:09 NCR 921
American Mobility LLC, Norman Mazer v. DHHS	12 DHR 01733	11/20/12	27:21 NCR 1980
American Mobility LLC, Norman Mazer v. DHHS	12 DHR 01733	03/6/13	28:03 NCR 266
Robert Lee Raines v. DHHS	12 DHR 01736	05/30/12	
Ms. Antoinette L. Williams v. DHHS	12 DHR 01739	06/15/12	
Felicia McGee Owner of Carrie's Loving Hand Inc. and Caring Arms Inc v. DHHS, DHSR Mental Health Licensure Certification	12 DHR 01796	01/22/13	
Tricia Watkins v. DHHS, Division of Medical Assistance, Office of Medicaid TLW-Auditing Office	12 DHR 01807	06/01/12	
First Path Home Care Services Gregory Locklear v. DHHS	12 DHR 01878	06/22/12	
Patriotic Health Care Systems, LLC v. DHHS	12 DHR 02105	09/19/12	
John and Christina Shipman v. DHHS	12 DHR 02107	07/24/12	
Team Daniel, LLC v. DHHS, DMA	12 DHR 02162	09/11/13	27:16 NCR 1696
Leslie Taylor, Octavia Carlton, Paula Carlton	12 DHR 02217	08/31/12	
Madeline Brown v. DHHS, Division of Health Service Regulation	12 DHR 02257	06/01/12	
Evelyn Evans v. DHHS, Division of Health Service Regulation	12 DHR 02258	07/02/12	
Shannon Santimore v. DHHS, Division of Public Health, Epidemiology Section	12 DHR 02348	12/20/12	
Precious Haven Inc. Melissa McAllister v. DHHS, Program Integrity	12 DHR 02430	05/18/12	
Michael and Jamie Hart v. Davidson County, Department of Social Services	12 DHR 02542	07/03/12	
Annamae R. Smith v. DHHS, Division of Medical Assistance	12 DHR 02657	11/05/12	
Our Daily Living, Christopher OnWuka, Director v. DHHS	12 DHR 02777	10/17/12	
Right Trax Inc., Maria Lewis v. DHHS, Division of Health Service Regulation, Mental Health Licensure & Certification	12 DHR 02779	05/06/13	
Jessica L Thomas v. Randolph County DSS	12 DHR 02955	07/24/12	
Moses E Shoffner v. DHHS, Division of Child Development	12 DHR 03459	08/15/12	
Marco Evans v. DHHS, Division of Health Service Regulation	12 DHR 04110	07/30/12	
James C. Bartley v. DHHS, DMA	12 DHR 04116	07/25/12	
Estate of Mary P Lipe Medicaid ID #901463645S Alvena C Heggins v. DHHS, DMS (DHHS Medicaid)	12 DHR 04260	01/16/13	
Emelda Bih Che v. Health Care Personnel Registry	12 DHR 04834	01/24/13	
Daycare for all the Nations, Abura B. Jackson v. DHHS, Division of Child Development	12 DHR 04944	01/03/13	28:03 NCR 275
LaBrenda Jane Elliot v. DHHS, Division of Medical Assistance	12 DHR 04993	09/24/12	
Esther H Beal v. Office of Chief Medical Examiner	12 DHR 05094	11/14/12	27:21 NCR 1987
James Johnson v. DHHS, Division of Health Service Regulation	12 DHR 05148	09/11/12	
Youth Opportunities v. DHHS, Division of Medical Assistance	12 DHR 05227	07/11/13	
Tammy Isley v. Division of Child Development and Early Education	12 DHR 05405	05/15/13	
Cathy Crosland v. DHHS, Division of Health Service Regulation	12 DHR 05610	08/06/12	
Dwight William Osborne v. Glana M Surles, DHHS (Medicaid)	12 DHR 05693	09/14/12	

Brenda Triplett Andrews v. DHHS, Division of Health Service Regulation	12 DHR 05745	12/10/12	
Southern Living Home Care Agency Inc., v. DHHS	12 DHR 05864	11/06/12	
Symakla Home Healthcare v. DHHS-Hearing Office	12 DHR 05918	08/02/13	
Beverly Coleman v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	12 DHR 05961	09/05/12	
Gregory Howard v. Health Care Personnel Registry	12 DHR 06157	09/07/12	
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Larry F. Murphy v. Employment Security Commission of North Carolina	10 OSP 03213	06/04/12	
Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division	10 OSP 03551	04/23/12	27:01 NCR 148
Teresa J. Barrett v. DENR	10 OSP 04754	10/22/12	27:16 NCR 1726
Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division	10 OSP 04792	05/30/12	
Steven M Mukumgu v. DAG	10 OSP 05199	08/07/12	
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Brenda D. Triplett v. DOC	11 OSP 4605	03/20/12	27:06 NCR 669
Tommie J. Porter v. DOC	11 OSP 5352	06/05/12	27:06 NCR 678
Fortae McWilliams v. DOC	11 OSP 06236	05/30/12	27:06 NCR 684
Kimberly F. Loflin v. DOT, DMV	11 OSP 06762	07/10/12	
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Maria Isabel Prudencio-Arias v. UNC at Chapel Hill	11 OSP 09374	03/28/13	28:02 NCR 99
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Tammy Cagle v. Swain County, Department of Social Services	11 OSP 10307	09/26/12	27:16 NCR 1747
Doris Wearing v. Polk Correctional Inst. Mr. Soloman Superintendent	11 OSP 11023	10/19/12	
Fredericka Florentina Demmings v. County of Durham	11 OSP 11498	06/12/12	
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David B. Stone v. Department of Cultural Resources	11 OSP 11926	08/10/12	27:12 NCR 1245
Pattie Hollingsworth v. Fayetteville State University	11 OSP 12152	02/27/13	
William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division	11 OSP 12479	04/27/12	
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James M. Slowin, REFS LLC v. Department of Revenue	12 REV 02218	02/11/13	28:06 NCR 583
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Carolyn A. Green v. UNC Hospitals	12 UNC 02259	09/19/12	
Annie E. Jarrett v. UNC Hospitals	12 UNC 03716	10/09/12	
Vikki J Goings v. UNC Hospital	12 UNC 04109	09/18/12	
Elonnie Alston v. UNC Hospitals	12 UNC 04551	09/11/12	
Diara Z Andrews v. UNC Hospitals	12 UNC 04827	08/15/12	
David Ryan Pierce v. UNC Hospitals, Patient Account Services, SODCA	12 UNC 05306	03/20/13	
Shonte Hayes v. UNC P&A	12 UNC 05746	09/10/12	
Tracy A. Spaine (Currier) v. UNC Hospitals	12 UNC 06822	11/06/12	
Candis Miller v. UNC Hospitals	13 UNC 10374	08/19/13	
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People for the Ethical Treatment of Animals, Inc., v. NC Wildlife Resources Commission	12 WRC 07077	11/13/12	27:22 NCR 2165

STATE OF NORTH CAROLINA IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF DURHAM 12DHR01732

Nicole Lynn Hudson, Petitioner, v. North Carolina Department of Health and Human Services Division of Health Service Regulation, Respondent.	**FINAL DECISION**

THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, on December 7 and 14, 2012, in Raleigh, North Carolina. Petitioner filed a Proposed Decision on January 28, 2013. Respondent filed exceptions to Petitioner's Proposed Decision on February 12, 2013.

APPEARANCES

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For Respondent: Thomas E. Kelly
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ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights and failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner neglected a resident of Murdoch Developmental Center in Butner, North Carolina and entered findings of neglect by Petitioner's name in the Health Care Personnel Registry and Nurse Aide Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23

EXHIBITS

Petitioner's exhibit 16 was admitted into the record.

Respondent's exhibits 1 – 24 were admitted into the record.

WITNESSES

Nicole Hudson (Petitioner)
Alberta Waldon
Christine Dykeman
Liza Harris
Stacy Szumigala
Maureen Crews
Solomon Weiner (HCPR Investigator)
Daphne Allen

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility including, but not limited to, the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses and documentary evidence admitted, the Undersigned makes the following:

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.

2. At all times relevant to this matter Petitioner, Nicole Hudson, was a Youth Program Educational Assistant ("YPA I") at Murdoch Developmental Center ("Murdoch") in Butner, North Carolina. Murdoch is a State-operated health care facility and therefore subject to N.C. Gen. Stat. § 131E-256.

3. Respondent is a North Carolina State Agency charged with investigating allegations of abuse or neglect by health care personnel and, if allegations are verified by Respondent, a written account of the findings is entered into the North Carolina North Carolina Health Care Personnel Registry.

4. On May 17, 2012, Respondent informed Petitioner that an investigation of the events on December 20, 2011, had caused Respondent to conclude that Petitioner had neglected K.O., a resident at Murdoch.

5. Respondent found that Petitioner's discontinued involvement in a two-person therapeutic hold, as well as Petitioner's leaving of the immediate area prior to the resident being calm, constituted neglect. Respondent therefore entered Petitioner's name into the State Health Care Personal Registry.

6. Petitioner gave timely Notice of Appeal from the finding of neglect and entry into the State Health Care Personnel Registry.

7. Petitioner's regular duties as a YPA I included the supervision of Murdoch residents, focusing on classroom assistance.

8. On or about December 20, 2011, Petitioner, along with Alberta Waldon and Liza Harris, was assigned to supervise several Murdoch residents.

9. During the course of the afternoon, one of the residents, K.O., began displaying behavior challenges and was escorted to his bedroom area by Alberta Waldon and Liza Harris.

10. Murdoch resident K.O. stopped participating in the activity lead partly by Petitioner and proceeded towards the boys' bedroom area. Alberta Waldon took supervision of K.O. as she returned from assisting Liza Harris in the boys' bedroom area. Alberta Waldon told K.O. not to enter the boys' bedroom area and to return to the large day room.

11. K.O. is a mentally handicapped individual with a history of aggression and a clinical diagnosis of Oppositional Defiant Disorder ("ODD"). K.O.'s Behavioral Intervention Plan ("BIP"), a part of her care plan, contains Psychological/Behavioral Recommendations that one should avoid giving K.O. commands or negative directives of what not to do, such as phrases beginning with the words "no," "don't," or "stop," as it likely will foster an oppositional response. Alberta Waldon told K.O., "you cannot be on the boys' side; you can't be here."

12. Following the commands from Alberta Waldon, K.O. became aggressive, both physically and verbally, towards Alberta Waldon. Alberta Waldon called Petitioner for assistance with K.O. Alberta Waldon testified that she was unfamiliar with K.O.'s file and that she never had seen the BIP document listing negative or command "triggers" for K.O.'s aggressive behavior. Alberta Waldon became more aggressive and authoritative with K.O. as this event started and progressed.

13. As Petitioner approached in order to render assistance, Petitioner observed Alberta Waldon attempting to secure a one-person Therapeutic Hold (hereinafter "T-hold") on K.O. Alberta Waldon was standing with K.O. and holding K.O's wrists while K.O. fought to be released from her grasp.

14. As the struggle continued, Petitioner observed that Alberta Waldon focused on subduing K.O. by attempting a one-person T-hold, despite Petitioner's presence and involvement, as well as the need for a secure two-person T-hold. Alberta Waldon initially testified that she initiated a T-hold by going around behind K.O. after Petitioner came into the room. Upon further questioning, she then testified that she had K.O. in a secure T-hold before Petitioner came into the room.

15. Alberta Waldon called for Liza Harris to come from the boys' bedroom area and assist as well. Liza Harris arrived but did not assist physically.

16. K.O. continued struggling and began to drop to the floor. Petitioner, wishing to avoid a potentially injurious ground-based struggle, believed that it would be safer for everyone involved and more therapeutic for the resident to discontinue any ground-based efforts.

17. Given the lack of communication between Alberta Waldon and Petitioner, Alberta Waldon's insistence on a one-person T-hold, and the perceived lack of objectivity to the situation, Petitioner believed the safest course of action to be to discontinue all attempts at a T-hold while K.O. was on the floor.

18. Petitioner stated out loud that she was going to let go of K.O. and asked Alberta Waldon if she was in a position to let go. Alberta Waldon testified that she heard Petitioner say this but thought Petitioner was talking to K.O. Petitioner waited a moment and release K.O. simultaneously with Alberta Waldon. Liza Harris, also in the room documenting the T-hold, heard Petitioner speak to Alberta Waldon before they released K.O. but could not distinguish exactly what Petitioner said.

19. Immediately after K.O. was released, K.O. remained on the ground and ceased all physical aggression and target behaviors.

20. K.O. neither was interviewed nor spoken to regarding the incident because K.O.'s actions were considered target behaviors, and it was felt that an interview could reinforce the inappropriate behavior. Additionally, K.O. suffered no broken skin, no injuries, and did not require any medical treatment.

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter under Chapters 131E and 150B of the North Carolina General Statutes.

2. All parties correctly have been designated, and there is no question as to misjoinder or nonjoinder.

3. As a Youth Program Educational Assistant I working in a health care facility in North Carolina, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-256.

4. Neglect is defined as the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

5. There is insufficient evidence in this case to find that Petitioner failed to provide the care necessary to avoid physical harm.

6. The greater weight of the evidence produced in this contested case hearing does not support the decision made by Respondent to substantiate neglect of Murdoch Developmental Center resident K.O. by Petitioner on December 20, 2011.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby determines that Respondent's findings of substantiation against Petitioner for neglect of Murdoch Developmental Center resident K.O. are not supported by sufficient evidence and are 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 11 day of March, 2013.

Beecher R. Gray
Administrative Law Judge

On this date mailed to:

Jared W Pierce
2304 S. MIAMI BLVD., STE 123
Durham, NC 27703
Attorney - Petitioner

Thomas E. Kelly
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9001 Mail Service Center
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Attorney - Respondent

This the 11th day of March, 2013.

Anne Hollowell

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STATE OF NORTH CAROLINA	**IN THE OFFICE OF**
COUNTY OF WAKE	**ADMINISTRATIVE HEARINGS**

AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, Petitioner, v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, and HILLCREST CONVALESCENT CENTER, INC.; E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURISNG AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC; AND BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC, Respondent-Intervenors.	**12 DHR 08691**

HILLCREST CONVALESCENT CENTER, INC., Petitioner, v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, and	**12 DHR 08666**

E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC; BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC; AND AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, Respondent-Intervenors.	)	

LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC, Petitioner, v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, and HILLCREST CONVALESCENT CENTER, INC.; E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC; AND AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, Respondent-Intervenors.	)	**12 DHR 08669**

FINAL DECISION

THIS MATTER came for hearing before the undersigned Administrative Law Judge ("ALJ"), Augustus B. Elkins II, on October 1–October 19, 2012, November 27-December 18, 2012, and January 7-11, 2013, in Raleigh, North Carolina. Having heard all of the evidence in this case and having considered the exhibits, arguments, and relevant law, the Undersigned makes the Findings of Fact, by a preponderance of the evidence, enters his Conclusions of Law thereon, and makes the following final decision, pursuant to N.C. Gen. Stat. §§ 150B-34 and 131E-188.

APPEARANCES

For Petitioner AH North Carolina Owner LLC d/b/a The Heritage of Raleigh ("The Heritage"):

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For Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (the "CON Section" or "Agency"):

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For Respondent-Intervenors Britthaven, Inc., and Spruce LTC Group, LLC (collectively, "Britthaven"):

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APPLICABLE LAW

The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-2 *et seq.* and § 131E-188 of the North Carolina Certificate of Need Law.

The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 *et seq.*

The administrative regulations applicable to this contested case are the North Carolina Certificate of Need Program Administrative Regulations, 10A NCAC 14C.0101 *et seq.*

BURDEN OF PROOF

As petitioners, The Heritage, Hillcrest, and Liberty each bears the burden of proof in its contested case. *See* N.C. Gen. Stat. § 150B-23(a); N.C. Gen. Stat. § 150B-29(a);

The petitioner in a contested case hearing in the Office of Administrative Hearings ("OAH") must establish, by a preponderance of the evidence, that the state agency named as respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or

civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the state agency named as respondent has:

(1) Exceeded its authority or jurisdiction;
(2) Acted erroneously;
(3) Failed to use proper procedure;
(4) Acted arbitrarily or capriciously; or
(5) Failed to act as required by law or rule.

N.C. Gen. Stat. §§ 150B-23(a), -29(a), -34(a).

ISSUES

The Heritage's Contested Issues

1. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) when it failed to determine that The Heritage's CON Application conformed with all the relevant statutory and regulatory criteria and thus was entitled to a CON.

2. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) when it failed to determine that Britthaven's CON Application failed to conform with all the relevant statutory and regulatory criteria and thus was entitled to a CON.

3. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) when it failed to determine that BellaRose's CON Application failed to conform with all the relevant statutory and regulatory criteria and thus was entitled to a CON.

4. Whether the Respondent correctly determined that Hillcrest failed to conform with all the relevant statutory and regulatory criteria and thus were not entitled to a CON.

5. Whether the Respondent correctly determined that Liberty failed to conform with all the relevant statutory and regulatory criteria and thus was not entitled to CON.

6. Whether the Respondent violated the standards of N.C. Gen. Stat. § 150B-23(a) by failing to find that The Heritage's CON Application was competitively superior to the Applications submitted by Britthaven, BellaRose Hillcrest and Liberty.

7. Whether the Respondent failed to comply with the requirements of N.C. Gen. Stat. §131E-183(a)(1) by failing to consider whether the applicants met the requirement of Policy NH-8 to propose innovative facility design, care practices, and work place practices.

8. Whether the Respondent failed to comply with the requirements of N.C. Gen. Stat. §§ 131E-182(b) and 183(a)(20) by failing to consider the quality of care information that Britthaven and Liberty submitted or were required to submit with their CON Applications.

9. Whether the Respondent violated N.C. Gen. Stat. § 150B-18 by creating and enforcing a threshold requirement for the projected percentage of Medicaid in determining conformity with statutory criterion 13(c) when the requirement has not been promulgated as a regulation.

10. Whether the Respondent violated N.C. Gen. Stat. § 131E-183(a) by failing to independently review and consider whether the applicants conformed with statutory criteria in N.C. Gen. Stat. §§ 131E-183(a) (4), (6), (18a).

Hillcrest's Contested Issues

1. Whether the Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule, and substantially prejudiced Hillcrest's rights by erroneously finding the Hillcrest Application nonconforming with N.C. Gen. Stat. §§ 131E-183(a)(1), (4), (13)(c), and (18a) and erroneously disapproving the Hillcrest Application.

2. Whether the Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule, and substantially prejudiced Hillcrest's rights by erroneously failing to apply N.C. Gen. Stat. § 131E-183(a)(4), (6), and (18a) as separate and independent criteria.

3. Whether the Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, failed to act as required by law or rule, and substantially prejudiced Hillcrest's rights by erroneously failing to consider the benefits of private rooms on a resident's quality of life.

4. Whether the Respondent erred by erroneously conditionally approving the Britthaven Application to develop a 120 bed nursing facility in the Brier Creek area, Wake County, Project I.D. No. J-8713-11.

5. Whether the Respondent erred by erroneously finding that the Britthaven Application conformed or conditionally conformed with the statutory review criteria in N.C. Gen. Stat. §§ 131E-183(a) and 131E-183(b).

6. Whether the Respondent erred by erroneously finding that the Britthaven Application conformed with N.C. Gen. Stat. §131E-183(a) (20) by finding that Britthaven has provided quality of care in the past.

7. Whether the Respondent erred by erroneously finding that the Britthaven Application was comparatively superior to the Hillcrest Application.

8. Whether the Respondent erred by erroneously conditionally approving the BellaRose Application to develop a 100 bed nursing facility in Southeast Raleigh, Project I.D. No. J-8729-11.

9. Whether the Respondent erred by erroneously finding that the BellaRose Application conformed or conditionally conformed with the statutory review criteria in N.C. Gen. Stat. §§ 131E-183(a) and 131E-183(b).

10. Whether the Respondent erred by erroneously finding that the BellaRose Application was comparatively superior to the Hillcrest Application.

11. Whether the Respondent erred by conducting an erroneous comparative analysis.

12. Whether the Respondent correctly found the Liberty Application nonconforming with N.C. Gen. Stat. §§ 131E-183(a)(1), (4), (18a), and (20), and properly disapproved the Liberty Application.

13. Whether the Respondent correctly found The Heritage Application nonconforming with N.C. Gen. Stat. §131E-183(a)(4) and properly disapproved The Heritage Application.

14. Whether the Respondent erred by failing to find The Heritage Application nonconforming with N.C. Gen. Stat. §131E-183(a)(5).

15. Whether the Respondent erred by otherwise exceeding its authority and jurisdiction, acting erroneously, failing to use proper procedure, acting arbitrarily and capriciously, and failing to act as required by law or rule, which actions substantially prejudiced Hillcrest by approving the Britthaven Application and the BellaRose Application, and by disapproving the Hillcrest Application.

Liberty's Contested Issues

1. Whether, in denying the Liberty Application in Project I.D. No. J-8727-11, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

2. Whether, in approving the Britthaven Application in Project I.D. No. J-8713-11, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

3. Whether, in finding the Liberty Application nonconforming to Criteria 1, 4, 18a and 20, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

4. Whether, in finding the Britthaven Application conforming to Criteria 1, 4, 18a and 20, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or

jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

5. Whether, in failing to find the Liberty Application to be the comparatively superior Application, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

6. Whether, in finding the Britthaven Application to be a comparatively superior Application, the Respondent substantially prejudiced Liberty's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law.

7. Whether, in considering only the applicants' history of providing quality care in Wake County when determining the applicants' conformity with Criterion 20, the Respondent improperly applied an unpromulgated rule.

8. Whether, in considering only the applicants' history of providing quality care in Wake County when determining the applicants' conformity with Criterion 20, the Respondent failed to act as required by N.C. Gen. Stat. § 131E-182(b).

The Agency's Contested Issues

1. Whether the Respondent substantially prejudiced Petitioner Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying its CON Application, Project I.D. No. J-8727-11.

2. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying its CON Application, Project I.D. No. J-8711-11.

3. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying its CON Application, Project I.D. No. J-8717-11.

4. Whether the Respondent substantially prejudiced Petitioner Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the Britthaven Application, Project I.D. No. J-8713-11.

5. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted

arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the Britthaven Application, Project I.D. No. J-8713-11.

6. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the BellaRose Application, Project I.D. No. J-8729-11.

7. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the Britthaven Application, Project I.D. No. J-8713-11.

8. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the BellaRose Application, Project I.D. No. J-8729-11.

Britthaven's Contested Issues

1. Whether the Respondent substantially prejudiced The Heritage's, Hillcrest's, and/or Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the Britthaven Application, Project I.D. No. J-8713-11, conforming with all applicable statutory criteria and regulatory standards.

2. Whether the Respondent substantially prejudiced The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding The Heritage Application, Project I.D. No. J-8717-11, nonconforming to certain applicable statutory criteria and/or regulatory standards.

3. Whether the Respondent substantially prejudiced Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the Hillcrest Application, Project I.D. No. J-8711-11, nonconforming to certain applicable statutory criteria and/or regulatory standards.

4. Whether the Respondent substantially prejudiced Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the Liberty Application, Project I.D. No. J-8727-11, nonconforming to certain applicable statutory criteria and/or regulatory standards.

5. Whether the Respondent substantially prejudiced The Heritage's, Hillcrest's, and/or Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use

proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in finding the any of the Britthaven Application, Project I.D. No. J-8713-11, comparatively superior to the Applications of The Heritage, Hillcrest and Liberty, and by approving the Britthaven Application.

BellaRose's Contested Issues

1. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON Application of The Heritage, Project I.D. No. J-8717-11.

2. Whether the Respondent substantially prejudiced Petitioner The Heritage's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the CON Application of BellaRose, Project I.D. No. J-8729-11.

3. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON Application of Hillcrest, Project I.D. No. J-8711-11.

4. Whether the Respondent substantially prejudiced Petitioner Hillcrest's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in conditionally approving the CON Application of BellaRose, Project I.D. No. J-8729-11.

5. Whether the Respondent substantially prejudiced Petitioner Liberty's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving the CON Application of Liberty, Project I.D. No. J-8727-11. (Pursuant to Paragraph 9 of the Liberty Petition for Contested Case Hearing, Liberty is not appealing or otherwise challenging the CON Section's decision to conditionally approve the BellaRose Application).

WITNESSES

Witnesses for Petitioner Liberty:

Michael McKillip, Project Analyst, CON Section
Martha Frisone, Assistant Chief, CON Section
Craig Smith, Chief, CON Section
Kathryn "Kathy" Platt, CON Consultant, Platt HMC, Inc.
Ms. Platt was accepted as an expert in health care planning and submission of CON Applications. (Platt, p. 870; Joint Ex. 122)

Doug Whitman, Development Director, Liberty Healthcare
Amy Fann, Vice President of Clinical Services, Liberty Healthcare

Witnesses for Petitioner Hillcrest:

David Legarth, CON Consultant, DanEs Planning
Mr. Legarth was accepted as an expert in CON review and analysis and health care planning. (Legarth, p. 4661; Joint Ex. 139)
Thomas "Ted" Smith, CEO and Facility Administrator, Hillcrest Convalescent Center
Leonidas "Harris" Hollingsworth, Pharmacist, Hillcrest Convalescent Center

Witnesses for Petitioner The Heritage:

Daniel Carter, CON Consultant, Health Planning Source
Mr. Carter was accepted as an expert in CON review, analysis and health care planning. (Carter, p. 3309; The Heritage Ex. 12)
Henry Todd Kaestner, Executive V. P. of Corporate Development, Brookdale Senior Living
Mr. Kaestner was accepted as an expert in the design and development of facilities. (Kaestner, p. 2068; Joint Ex. 132)
Linda May, Vice President of Skilled Health Care Services, Brookdale Senior Living
Beverly Speroff, Chief, Licensure and Certification Section

Witnesses for Respondent Agency:

Martha Frisone, Assistant Chief, CON Section

Witnesses for Respondent-Intervenor Britthaven:

Maxwell Mason, Development Coordinator, Principle Long Term Care, Inc.
Mr. Mason was accepted as an expert in the preparation, review and analysis of CON Applications. (Mason, pp. 5233-34; Joint Ex. 68)
Raymond Baker, Vice President of Finance, Principle Long Term Care, Inc.
Douglas Suddreth, Vice President of Development, Autumn Corporation
Mr. Suddreth was accepted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and facility design. (Suddreth, p. 6237; Joint Ex. 152)
Kahlisia Tillery, Facility Consultant, Britthaven and Principle Long Term Care

Witnesses for Respondent-Intervenor BellaRose:

James "Jim" Weigard, CON Consultant, Polaris Properties

Mr. Weigard was accepted as an expert in nursing home CON preparation, review and analysis, health care planning, and financial feasibility. (Weigard, p. 6610; Joint Ex. 94)

Douglas Suddreth, Vice President of Development, Autumn Corporation

Mr. Suddreth was accepted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and facility design. (Suddreth, p. 6237; Joint Ex. 152)

Bill Burroughs, Facility Administrator, Hillside Nursing Center

At the hearing, the testimony was received as follows:

Volume Number & Date	**Witness**	**Affiliation**
Vol. 1 - Oct. 1, 2012	Michael McKillip	Agency
Vol. 2 - Oct. 2, 2012	Michael McKillip	Agency
Vol. 3 - Oct. 3, 2012	Michael McKillip	Agency
Vol. 4 - Oct. 4, 2012	Michael McKillip Kathryn Platt	Agency Liberty
Vol. 5 - Oct. 5, 2012	Kathryn Platt	Liberty
Vol. 6 - Oct. 8, 2012	Martha Frisone	Agency
Vol. 7 - Oct. 9, 2012	Martha Frisone Craig Smith	Agency Agency
Vol. 8 - Oct. 10, 2012	Craig Smith	Agency
Vol. 9 - Oct. 11, 2012	Craig Smith Henry Todd Kaestner	Agency The Heritage
Vol. 10 - Oct. 12, 2012	Thomas "Ted" Smith	Hillcrest
Vol. 11 - Oct. 15, 2012	Doug Whitman	Liberty
Vol. 12 - Oct. 16, 2012	Amy Fann	Liberty
Vol. 13 - Oct. 17, 2012	Beverly Speroff	Agency
Vol. 14 - Oct. 19, 2012	Kathryn Platt	Liberty
Vol. 15 - Nov. 27, 2012	Daniel Carter	The Heritage

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Vol. 16 - Nov. 28, 2012	Daniel Carter	The Heritage
Vol. 17 - Nov. 29, 2012	Daniel Carter	The Heritage
Vol. 18 - Nov. 30, 2012	Linda May Daniel Carter	The Heritage The Heritage
Vol. 19 - Dec. 3, 2012	Daniel Carter	The Heritage
Vol. 20 - Dec. 4, 2012	Thomas "Ted" Smith David Legarth	Hillcrest Hillcrest
Vol. 21 - Dec. 5, 2012	David Legarth	Hillcrest
Vol. 22 - Dec. 6, 2012	David Legarth Leonidas Hollingsworth	Hillcrest Hillcrest
Vol. 23 - Dec. 7, 2012	Maxwell Mason	Britthaven
Vol. 24 - Dec. 10, 2012	Maxwell Mason	Britthaven
Vol. 25 - Dec. 11, 2012	Maxwell Mason Raymond Baker	Britthaven Britthaven
Vol. 26 - Dec. 12, 2012	Raymond Baker Bill Burroughs	Britthaven BellaRose
Vol. 27 - Dec. 13, 2012	Doug Suddreth	Britthaven/BellaRose
Vol. 28 - Dec. 14, 2012	Doug Suddreth	Britthaven/BellaRose
Vol. 29 - Dec. 17, 2012	James Weigard	BellaRose
Vol. 30 - Dec. 18, 2012	James Weigard	BellaRose
Vol. 31 - Jan. 7, 2013	Doug Suddreth	Britthaven/BellaRose
Vol. 32 - Jan. 8, 2013	Kahlisia Tillery	Britthaven
Vol. 33 - Jan. 9, 2013	Martha Frisone	Agency
Vol. 34 - Jan. 10, 2013	Martha Frisone	Agency
Vol. 35 - Jan. 11, 2013	Martha Frisone	Agency

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EXHIBITS ADMITTED INTO EVIDENCE

Joint Exhibits

1.	Agency File, 2011 Wake County Nursing Home Review
2.	Hillcrest Application
3.	Britthaven Application
4.	The Heritage Application
6.	Liberty Application
7.	BellaRose Application

Hillcrest, Liberty, Agency, Britthaven and BellaRose Joint Exhibits

11	N.C. Gen. Stat. § 131E-183
13	Agency's Objections and Responses to Liberty's First Set of Interrogatories and Request for Production of Documents
15	Final Agency Decision, 10 DHR 8008
19	Special Focus Facility Initiative
28	Required State Agency Findings, 2008 Davie County Dialysis Review
29	Required State Agency Findings, 2009 Cumberland County Nursing Home Review
30	Required State Agency Findings, 2010 Richmond County Nursing Home Review
31	Required State Agency Findings, 2010 Catawba County Nursing Home Review
33	Hearing Transcript Excerpt, 11 DHR 3173 & 11 DHR 3476
35	Hearing Transcript Excerpt, 11 DHR 3173 & 11 DHR 3476
46	03/03/2011 CMS Survey, Liberty Commons Nursing & Rehabilitation Johnston
47	09/30/2011 CMS Survey, Liberty Commons Nursing & Rehabilitation Johnston

71	Excerpt from previous application filed by Britthaven, Section I.6(a) (dated 10/19/2010)
72	Excerpt from 07/19/2011 draft of Britthaven Application, Section I.6(a)
73	News articles re: Britthaven of Chapel Hill
74	08/10/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Chapel Hill (with 07/27/2010 CMS Survey attached)
75	09/14/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Edenton (with 09/02/2010 CMS Survey attached)
77	07/28/2011 CMS Survey, Chowan River Nursing and Rehabilitation Center
78	Medicare.gov Nursing Home Profile, Greenhaven Health and Rehabilitation Center
79	03/29/2010 CMS Survey, Britthaven of Guilford
80.	05/13/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford (with 04/30/2010 CMS Survey attached)
81	07/29/2011 CMS Survey, Greenhaven Health and Rehabilitation Center
84	07/19/2011 CMS Survey, Premier Nursing and Rehabilitation Center
88	03/08/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Smithfield (with 02/22/2011 CMS Survey attached)
90	11/30/2011 CMS Survey, Cumberland Nursing and Rehabilitation Center
93	Summary of Max Mason's Opinions
94	C.V. of James Weigard
95	Jim Weigard Deposition Opinions
104	Hillcrest 2011 license (with 2011 Renewal Application attached)
105	Hillcrest 2012 license (with 2012 Renewal Application attached)
106	Excerpt from Required State Agency Findings, 2006 Durham County Nursing Home Review
107	Settlement Agreement in 07 DHR 0764

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115	08/15/2011 E-mail from David Legarth to Ted Smith and Bill Hoover
122	C.V. of Kathryn M.T. Platt
123	Kathryn M.T. Platt Expert Report
124	Kathryn M.T. Platt Expert Report for Project I.D. #F-8747-11
126	Medicare.gov Data Sources
127	Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide
134	The Heritage's Responses to BellaRose's First Set of Interrogatories and First Request for Production of Documents
136	Todd Kaestner's handwritten notes
139	C.V. of David S. Legarth
147	Required State Agency Findings, 2007 Union County Nursing Home Review
148	11/27/2007 letter from Certificate of Need Section to Britthaven, Inc. (with Required State Agency Findings, 2007 New Hanover County Nursing Home Review attached)
149	05/02/2008 letter from Certificate of Need Section to Britthaven, Inc. (with Required State Agency Findings, 2007 Brunswick County Nursing Home Review attached)
151	Required State Agency Findings, 2011 Iredell County Nursing Home Review
152	C.V. of Douglas C. Suddreth
155	N.C. Gen. Stat. § 131E-182
156	Excerpt from Transcript of Deposition of Craig Smith, 12 DHR 518
157	Required State Agency Findings, 2008 Mecklenburg County Acute Care Beds Review
158	Required State Agency Findings, 2010 Hoke County Hospitals and Ambulatory Surgery Center Review
159	Affidavit of Martha J. Frisone
160	05/05/2011 E-mails between NorthChase Administrator and Max Mason (CONFIDENTIAL)

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162	08/12/2011 E-mails between Robert M. Pearce and Max Mason
163	07/27/2011 E-mails between Ray Baker and Max Mason (CONFIDENTIAL)
167	Required State Agency Findings, 2011 Cumberland-Hoke Acute Care Beds Review
168	Kathryn M.T. Platt - Supplemental Opinions
171	Excerpt from Required State Agency Findings, 2008 Linear Accelerator HSA V/Service Area 18 Review
173	Excerpt from Required State Agency Findings, 1996 Carteret County Nursing Home Review
174	Excerpt from Required State Agency Findings, 1996 McDowell County Nursing Home Review
175	Excerpt from Required State Agency Findings, 1997 Brunswick County Nursing Home Review
176	Excerpt from Required State Agency Findings, 1997 Buncombe County Nursing Home Review
177	Excerpt from Required State Agency Findings, 1997 Greene County Nursing Home Review
178	Excerpt from Required State Agency Findings, 1997 Haywood County Nursing Home Review
179	Excerpt from Required State Agency Findings, 1997 Hoke County Nursing Home Review
180	Excerpt from Required State Agency Findings, 1997 Lenoir County Nursing Home Review
181	Excerpt from Required State Agency Findings, 1997 Lincoln County Nursing Home Review
182	Excerpt from Required State Agency Findings, 1997 Nash County Nursing Home Review
183	Excerpt from Required State Agency Findings, 1997 Yancey County Nursing Home Review

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184	Excerpt from Required State Agency Findings, 2001Wayne County Nursing Home Review
185	Excerpt from Required State Agency Findings, 2003 Union County Nursing Home Review
186	Excerpt from Required State Agency Findings, 2005 Brunswick County Nursing Home Review
187	Excerpt from Required State Agency Findings, 2006 Cumberland County Nursing Home Review
188	Excerpt from Required State Agency Findings, 2007 Mecklenburg County Nursing Home Review
189	Excerpt from Required State Agency Findings, 2008 Perquimans County Nursing Home Review
190	Excerpt from Required State Agency Findings, 2008 Union County Nursing Home Review
191	Excerpt from Required State Agency Findings, 2010 Johnston County Nursing Home Review
192	Excerpt from Required State Agency Findings, 2011 Pasquotank County Nursing Home Review
193	Excerpt from Required State Agency Findings, 2001 Forsyth County Nursing Home Review
194	Excerpt from Required State Agency Findings, 2001 Davie County Nursing Home Review
195	Excerpt from Required State Agency Findings, 2000 Orange County Nursing Home Review
196	Excerpt from Required State Agency Findings, 2000 Durham County Nursing Home Review
197	Excerpt from Required State Agency Findings, 2002 Johnston County Nursing Home Review
198	Excerpt from Required State Agency Findings, 2002 Cumberland County Nursing Home Review

199	Excerpt from Required State Agency Findings, 2002 Pitt County Nursing Home Review
200	Excerpt from Required State Agency Findings, 2003 Pasquotank County Nursing Home Review
201	Excerpt from Required State Agency Findings, 2004 Union County Nursing Home Review
202	Excerpt from Required State Agency Findings, 2004 Wilson County Nursing Home Review
203	Excerpt from Required State Agency Findings, 2004 Pitt County Nursing Home Review
204	Excerpt from Required State Agency Findings, 2005 Mecklenburg County Nursing Home Review
205	Excerpt from Required State Agency Findings, 2006 Mecklenburg County Nursing Home Review
207	Excerpt from Required State Agency Findings, 2006 Wake County Nursing Home Review
208	Excerpt from Required State Agency Findings, 2007 Guilford County Nursing Home Review
209	Excerpt from Required State Agency Findings, 2007 Northampton County Nursing Home Review
211	Excerpt from Required State Agency Findings, 2007 Beaufort County Nursing Home Review
212	Excerpt from Required State Agency Findings, 2008 Haywood County Nursing Home Review
213	Excerpt from Required State Agency Findings, 2008 Jackson County Nursing Home Review
214	Excerpt from Required State Agency Findings, 2008 Forsyth County Nursing Home Review
215	Excerpt from Required State Agency Findings, 2010 Wake County Nursing Home Review
216	Excerpt from Required State Agency Findings, 2010 Scotland County Nursing Home Review

217	Excerpt from Required State Agency Findings, 2010 Richmond County Nursing Home Review
218	Excerpt from Required State Agency Findings, 2011 Cleveland County Nursing Home Review
219	Excerpt from Required State Agency Findings, 2011 Mecklenburg County Nursing Home Review
220	Excerpt from Required State Agency Findings, 2011 Iredell County Nursing Home Review
221	Excerpt from Required State Agency Findings, 2011 Forsyth County Nursing Home Review
222	Excerpt from Required State Agency Findings, 2011 Lee County Nursing Home Review
223	Excerpt from Required State Agency Findings, 2011 Henderson County Nursing Home Review
224	03/08/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Smithfield
225	02/22/2011 CMS Survey, Britthaven of Smithfield
226	08/10/10 letter from Nursing Home Licensure and Certification Section to Britthaven of Chapel Hill
227	07/27/2010 CMS Survey, Britthaven of Chapel Hill
228	09/14/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Edenton
229	09/02/2010 CMS Survey, Britthaven of Edenton
230	07/28/2011 CMS Survey, Chowan River Nursing and Rehabilitation Center
231	11/30/2011 CMS Survey, Cumberland Nursing and Rehabilitation Center
232a	05/13/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford
232b	04/30/2010 CMS Survey, Britthaven of Guilford
233	03/31/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford

234	03/29/2010 CMS Survey, Britthaven of Guilford
235	08/11/2011 letter from Nursing Home Licensure and Certification Section to Greenhaven Health and Rehabilitation Center
236	07/29/2011 CMS Survey, Greenhaven Health and Rehabilitation Center
237	12/22/2011 letter from Nursing Home Licensure and Certification Section to Piney Grove Nursing and Rehabilitation Center
238	12/14/2011 CMS Survey, Piney Grove Nursing and Rehabilitation Center
239	08/01/2011 letter from Nursing Home Licensure and Certification Section to Premier Nursing and Rehabilitation Center
240	07/19/2011 CMS Survey, Premier Nursing and Rehabilitation Center
241	03/10/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of New Bern
242	02/25/2011 CMS Survey, Britthaven of New Bern
243	06/10/2010 CMS Survey, Britthaven of Charlotte
244	01/12/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Charlotte
245	12/23/2010 CMS Survey, Britthaven of Charlotte

Liberty's Exhibits

300	Agency's Objections and Responses to Liberty's Second Set of Interrogatories and Second Request for Production of Documents
301	Excerpt from Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide and Scope and Severity Grid
302	Liberty Days of Care Chart
304	State Operations Manual, Chapter 7
305	07/19/2011 E-mails between Martha McMillan, Max Mason and Beverly Johnston (with attachment)

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The Heritage's Exhibits

The Heritage 8	Excerpt from 2011 State Medical Facilities Plan
The Heritage 9	Photographs from The Heritage Application
The Heritage 10	Floor Plans from The Heritage Application
The Heritage 11	Comparison demonstrative exhibits
The Heritage 12	C.V. of Daniel R. Carter
The Heritage 14	Daniel Carter's comparative factor chart
The Heritage 15	Exhibits referenced in The Summary of the Opinions of Daniel Carter
The Heritage 18	Todd Kaestner's handwritten notes
The Heritage 19	Section II.6(a) of CON Nursing Facility application
The Heritage 21	News & Observer news article
The Heritage 22	Special Focus Facility ("SFF") Initiative
The Heritage 23	State Operations Manual, Chapter 7
The Heritage 24	ESRD Information Form for New Facility
The Heritage 26	Excerpts from Transcript of deposition of Michael McKillip
The Heritage 27	Required State Agency Findings, 2007 New Hanover County Nursing Home Review

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The Heritage 28	Required State Agency Findings, 2009 Davie County Dialysis Review
The Heritage 29	Required State Agency Findings, 2009 Cumberland County Nursing Home Review
The Heritage 34	07/08/2011 E-mails between Hunter Diefes and Doug Whitman
The Heritage 35	Excerpt from previous application filed by Britthaven, Section I.6(a) (dated 10/19/2010)
The Heritage 36	Excerpt from 07/19/2011 draft of Britthaven Application, Section I.6(a)
The Heritage 37	Required State Agency Findings, 2006 Durham County Nursing Home Review
The Heritage 38	Settlement Agreement in 07 DHR 0764
The Heritage 39	Required State Agency Findings, 2010 Johnston County Nursing Home Review
The Heritage 42	Required State Agency Findings, 2008 Union County Nursing Home Review
The Heritage 43	Required State Agency Findings, 2011 Iredell County Nursing Home Review
The Heritage 48	07/27/2011 E-mails between Ray Baker and Max Mason (CONFIDENTIAL)
The Heritage 49	Declaratory Ruling for Project I.D. No. F-7911-07
The Heritage 52	Hillside Nursing Center of Wake Forest 2011 license (with 2011 Renewal Application attached)
The Heritage 53	Everest Long Term Care 2011 license (with 2011 Renewal Application attached)
The Heritage 54	Liberty Nursing and Rehabilitation Center of Wake County 2011 license (with 2011 Renewal Application attached)

The Heritage 55	Hillside Nursing Center of Wake Forest 2012 license (with 2012 Renewal Application attached)
The Heritage 56	Everest Long Term Care 2012 license (with 2012 Renewal Application attached)
The Heritage 57	Liberty Nursing and Rehabilitation Center of Wake County 2012 license (with 2012 Renewal Application attached)
The Heritage 58	Britthaven of North Chase CON Application
The Heritage 59	Affidavit of Randy Uzzell
The Heritage 64c	Medicare.gov Nursing Home Profile, Barbour Court Nursing and Rehabilitation Center
The Heritage 65	06/21/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Charlotte (with 07/14/2010 letter from CMS, 06/10/2010 CMS Survey, 01/14/2011 letter from Nursing Home Licensure and Certification Section, and 12/23/2010 CMS Survey attached)
The Heritage 66	07/27/2010 CMS Survey, Britthaven of Chapel Hill
The Heritage 67	05/13/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford (with 04/30/2010 CMS Survey attached)
The Heritage 68	09/14/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Edenton (with 09/27/2010 & 12/14/2010 letters from CMS and 09/02/2010 CMS Survey attached)
The Heritage 69	03/08/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Smithfield (with 03/15/2011 letter from CMS, 05/13/2011 letter from Nursing Home Licensure and Certification Section, and 02/22/2011 CMS Survey attached)
The Heritage 70	08/01/2011 letter from Nursing Home Licensure and Certification Section to Premier Nursing and Rehabilitation Center (with 08/12/2011 & 10/17/2011 letters from CMS and 07/19/2011 CMS Survey attached)
The Heritage 71	08/12/2011 letter from CMS to Chowan River Nursing and Rehabilitation Center (with 10/17/2011 letter from CMS and 07/28/2011 CMS Survey attached)

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The Heritage 72	08/11/2011 letter from Nursing Home Licensure and Certification Section to Greenhaven Health and Rehabilitation Center (with 08/19/2011 & 08/29/2011 letters from CMS and 07/29/2011 CMS Survey attached)
The Heritage 73	12/16/2011 letter from CMS to Cumberland Nursing and Rehabilitation Center (with 11/30/2011 CMS Survey attached)
The Heritage 74	03/31/2010 letter from Nursing Home Licensure and Certification Section to Britthaven of Guilford (with 04/15/2010 letter from CMS and 03/29/2010 CMS Survey attached)
The Heritage 79	08/12/2011 CMS Survey, Britthaven of Chapel Hill
The Heritage 80	06/24/2010 letter from Nursing Home Licensure and Certification Section to City of Oaks Health and Rehab Center (with 07/8/2010 letter from Nursing Home Licensure and Certification Section, 07/08/2010 letter from CMS, and 06/10/2010 CMS Survey attached)
The Heritage 81	01/28/2011 letter from Nursing Home Licensure and Certification Section to Capital Nursing and Rehabilitation Center (with 02/18/2011 & 03/24/2011 letters from CMS and 01/21/2011 CMS Survey attached)
The Heritage 82	10/27/2011 letter from CMS to Liberty Commons Nursing & Rehabilitation (with 09/30/2011 CMS Survey attached)
The Heritage 83	03/31/2011 letter from CMS to Mary Gran Nursing Center (with 03/11/2011 CMS Survey attached)
The Heritage 84	03/07/2011 letter from Nursing Home Licensure and Certification Section to N.C. State Board of Examiners for Nursing Home Administrators (with 03/11/2011 letter from CMS to Liberty Commons Nursing & Rehabilitation - Rowan, 03/07/2011 letter from Nursing Home Licensure and Certification Section to Liberty Commons Nursing & Rehabilitation - Rowan, and 02/23/2011 CMS Survey attached)
The Heritage 85	06/22/2010 letter from Nursing Home Licensure and Certification Section to Liberty Commons Nursing and Rehabilitation Center of Halifax County (with 06/10/2010 CMS Survey attached)
The Heritage 86	11/19/2010 letter from CMS to Springwood Care Center of Forsyth (with 11/17/2010 letter from Nursing Home Licensure and Certification Section and 11/05/2010 CMS Survey attached)

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The Heritage 86a	Excerpt from 11/29/2010 CMS Survey, Springwood Care Center of Forsyth
The Heritage 87 The Heritage 87a	Liberty CMS Nursing Home Compare Monetary Penalty Listings Medicare.gov Nursing Home Profile, Liberty Commons Nursing and Rehabilitation Center of Halifax County
The Heritage 88	Nursing Home Data Compendium 2010
The Heritage 90	01/14/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of Charlotte (with 12/23/2010 CMS Survey attached)
The Heritage 91	03/10/2011 letter from Nursing Home Licensure and Certification Section to Britthaven of New Bern (with 03/15/2011 letter from CMS and 02/25/2011 CMS Survey attached)
The Heritage 92	12/22/2011 letter from Nursing Home Licensure and Certification Section to Piney Grove Nursing and Rehabilitation Center (with 12/23/2011 letter from Nursing Home Licensure and Certification Section, 02/29/2012 letter from CMS and 12/14/2011 CMS Survey attached)
The Heritage 93	Charts re: Liberty deficiencies and penalties
The Heritage 97	Chart re: Britthaven deficiencies
The Heritage 101	Excerpts from Transcript of Deposition of Robert Evans

Hillcrest's Exhibits

502	Floorplan of Hillcrest's proposed facility
503	Floorplan of Hillcrest's proposed facility
505	3D View of Hillcrest's proposed facility
506	Chart of FY2010 Data from License Renewal Applications
507	Photographs from the Hillcrest Application

511	12/14/2011 CMS Survey, Piney Grove Nursing and Rehabilitation Center
512	12/23/2010 CMS Survey, Britthaven of Charlotte
514	The Carriage Club of Charlotte 2011 license (with 2011 Renewal Application attached)
515	The Carriage Club of Charlotte 2012 license (with 2012 Renewal Application attached)
516	Comparative Analysis (as compared to Hillcrest)
517	07/15/2011 E-mails between Max Mason and Dannie Kennedy
518	N.C. Medical Board Licensee Information for Dr. Aarti Dixit
519	Photographs of Hillside resident rooms

Britthaven's Exhibits

609	Required State Agency Findings, 2010 Catawba County Nursing Home Review
610	Required State Agency Findings, 2010 Richmond County Nursing Home Review
611	Required State Agency Findings, 2008 New Hanover County Dialysis Review
612	Required State Agency Findings, 2011 Cabarrus County Dialysis Review
622	Hillcrest 2012 license (with 2012 Renewal Application attached)
627	N.C. Division of Aging and Adult Services, Continuing Care Retirement Communities
628	Hillcrest Resident Charges Chart
629	Hillcrest Durham - Payor Mix Chart
631	08/02/2011 E-mails between Doug Whitman, Mathew Bork and Hunter Diefes
632	Principle Long Term Care, Inc. Summary of Patient Days Chart (July 2010 - Jan. 2012)
633	Principle Long Term Care, Inc. Summary of Patient Days Chart (Feb. 2010 - Aug. 2011)
634	07/27/2010 CMS Survey, Britthaven of Chapel Hill
636	04/30/2010 CMS Survey, Britthaven of Guilford

639	06/10/2010 CMS Survey, Britthaven of Charlotte
642	Brookdale Senior Living, Company Update
643	03/16/2010 letter from Oklahoma State Department of Health to Bradford Village
644	02/26/2010 CMS Survey, Bradford Village
645	05/03/2011 letter from Oklahoma State Department of Health to Bradford Village
646	04/21/2011 CMS Survey, Bradford Village
647	Brookdale Senior Living locations (website printout)
648	07/16/2011 E-mails between Martha McMillan, Max Mason and Beverly Johnson (CONFIDENTIAL)
652	Substandard Quality of Care Deficiencies in Britthaven Chart

BellaRose's Exhibits

705	Comparison of The Heritage and BellaRose Chart
707	Photographs of Hillside Nursing & Rehab
708	Photographs of Hillside Nursing & Rehab resident rooms
709	Excerpt from Transcript of Deposition of Todd Kaestner
710	Excerpt from Transcript of Deposition of Daniel Carter

Agency's Exhibits

800	Required State Agency Findings, 1996 Carteret County Nursing Home Review
801	Required State Agency Findings, 1997 Lenoir County Nursing Home Review
802	Required State Agency Findings, 1998 Nash County Nursing Home Review
803	Required State Agency Findings, 2001 Wayne County Nursing Home Review

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804	Required State Agency Findings, 2003 Union County Nursing Home Review
805	Required State Agency Findings, 2006 Brunswick County Nursing Home Review
806	Required State Agency Findings, 2006 Cumberland County Nursing Home Review
807	Required State Agency Findings, 2006 Union County Nursing Home Review
808	Required State Agency Findings, 2007 Mecklenburg County Nursing Home Review
809	Required State Agency Findings, 2008 Union County Nursing Home Review
810	Required State Agency Findings, 2010 Johnston County Nursing Home Review
811	Recommended Decision in 08 DHR 3676 & 08 DHR 3680
814	Final Agency Decision in 10 DHR 3788
819	2012 License Renewal Applications Chart
820	10/20/2005 Memo from CMS to State Survey Agency Directors
821	Public records for Arati Dixit
822	White Pages website print out for Aarti Dixit
823	1997 State Medical Facilities Plan
824	2008 State Medical Facilities Plan

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

The Parties

1. Petitioner AH North Carolina Owner, LLC d/b/a The Heritage of Raleigh ("The Heritage") currently owns and operates a senior living community with independent living and multi-unit assisted housing and services in Raleigh, North Carolina. (Joint Ex. 4). The Heritage is a wholly-owned subsidiary of Brookdale Senior Living, Inc., ("Brookdale"). Brookdale Senior Living, Inc. owns and operates senior housing communities throughout the United States, including a continuing care retirement community ("CCRC") in Charlotte, North Carolina that includes Medicare certified nursing facility beds. (Joint Ex. 4).

2. Petitioner Hillcrest Convalescent Center, Inc. currently owns and operates a skilled nursing facility in Durham, North Carolina. (Joint Ex. 2). The Hillcrest nursing facility in Durham has an on-site pharmacy. Hillcrest's Durham nursing facility has been family owned and operated since 1951. (Joint Ex. 2).

3. Petitioners Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County, LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC (collectively "Liberty") own and operate nursing facilities in North Carolina. (Joint Ex. 6). The Liberty entities are North Carolina limited liability companies. Affiliates of Liberty own and operate 19 nursing homes throughout North Carolina.

4. Respondent Certificate of Need Section ("CON Section" or "Agency") is the agency responsible for the administration of North Carolina's Certificate of Need ("CON") Law, codified at N.C. Gen. Stat. Chapter 131E, Article 9.

5. Respondent-Intervenors E.N.W., LLC and BellaRose Nursing and Rehab Center (collectively "BellaRose") were formed in 2011. (Joint Ex. 7). Respondent-Intervenors E.N.W., LLC (lessor) and BellaRose Nursing and Rehab Center, Inc. (lessee) are corporate entities registered in North Carolina. The principles in each of the co-applicants are all members of the same family who have been involved in the ownership and operation of long term care facilities in North Carolina since 1958. The principals of these companies own and operate Hillside

Nursing Center of Wake Forest in Wake County and Windsor Point CCRC in Fuquay-Varina, Wake County.

6. Respondent-Intervenors Britthaven, Inc. and Spruce LTC Group, LLC (collectively "Britthaven") own and operate nursing facilities in North Carolina. (Joint Ex. 3). The facilities are operated by the same management company. The Britthaven applicants own and/or operate 10 facilities in North Carolina. (Joint Ex. 3). Additionally, Britthaven's affiliate, Principle Long Term Care, Inc., manages 43 facilities in North Carolina, more than 10 percent of all nursing homes in in the State, including Tower Nursing and Rehab Center in Wake County. (*See, e.g.*, Joint Ex. 3).

Special Allocation of Nursing Facility Beds in Wake County

1. The State Medical Facilities Plan ("SMFP") is the official plan developed and published each year which inventories certain services, facilities, and equipment that are subject to CON regulation as well as the utilization of those services, facilities, and equipment. The SMFP also projects future needs for additional services, facilities, and equipment in each service area. (*See* Agency Ex. 818). The State Medical Facilities Plan is developed under the direction of the North Carolina State Health Coordinating Council ("SHCC"). N.C. Gen. Stat. § 131E-176(25); *Frye Reg'l Med. Ctr., Inc. v. Hunt,* 350 N.C. 39, 42-43, 510 S.E.2d 159, 162-63 (1999).

2. The 2011 SMFP included a special need determination for 240 additional nursing facility beds in Wake County. (Heritage Ex. 8). This special need allocation was the result of a Petition filed by Brookdale Senior Living, Inc. in the summer of 2010. (Joint Ex. 1). In its Petition, Brookdale contended that underutilized nursing facilities in Wake County were chronically underutilized and, as a result, the standard need methodology for nursing facility beds failed to show the true need for additional nursing facility beds in Wake County. (Joint Ex. 1). Brookdale's Petition was granted by the North Carolina State Health Coordinating Council and the special allocation of 240 nursing facility beds for Wake County was included in the 2011 SMFP. (Heritage Ex. 8).

The Applications

1. On or around August 15, 2011, in accordance with the review schedule set forth in the 2011 SMFP, sixteen (16) applications were filed to develop part of the 240 nursing facility beds allocated in the 2011 SMFP. (Joint Ex. 1). Because the applications sought approval to develop a total of 1,570 new nursing care beds, exceeding the need determination, the Agency batched the applications for purposes of a competitive review (the "Review").

2. The Heritage filed an application to develop a 90-bed nursing facility on the campus of the existing senior living community, The Heritage of Raleigh. (Joint Ex. 4). In the Agency Findings, The Heritage is referred to as "Brookdale-North Raleigh." (Joint Ex. 1).

3. Hillcrest filed a CON application to develop a 120-bed nursing facility in Wake Forest, Wake County, North Carolina, identified as Project I.D. No. J-8711-11. (Joint Ex. 2). In the Agency Findings, Hillcrest is referred to as "Hillcrest-Wake Forest." (Joint Ex. 1).

4. Liberty filed a CON application to develop a 130-bed nursing facility with 120 new nursing facility beds and 10 nursing facility beds relocated from Capital Nursing Rehabilitation Center in Wake County. (Joint Ex. 6). In the Agency Findings, the application of Liberty at issue in this case is referred to as "Liberty-North Raleigh." (Joint Ex. 1).

5. BellaRose filed a CON Application with the Agency proposing to develop a 100-bed nursing facility pursuant to the adjusted need determination in the 2011 SMFP in Raleigh, Wake County, North Carolina, identified as Project I.D. No. J-8729-11. (Joint Ex. 7). In the Agency Findings, BellaRose is referred to as "BellaRose-Raleigh." (Joint Ex. 1).

6. Britthaven filed a CON application to develop a 120-bed nursing facility. (Joint Ex. 3). In the Agency Findings, the application at issue in this case is referred to as "Britthaven-Brier Creek." (Joint Ex. 1).

CON Section's Decision

1. The applications of The Heritage, Hillcrest, Liberty, BellaRose, and Britthaven, along with several other applications, were reviewed in a competitive review cycle beginning September 1, 2011. (Joint Ex. 1). Project Analyst Mike McKillip and CON Section Assistant Chief Martha Frisone were the Agency employees assigned to the Review. CON Section Chief Craig Smith was also consulted and provided some input into the Agency's decision in this Review.

2. As provided under the CON review process, the applicants, including The Heritage, Hillcrest, Liberty, BellaRose, and Britthaven, filed written comments and exhibits concerning the proposals submitted by other applicants. N.C.G.S. § 131E-185(a1). (Joint Ex. 1). The CON Section also held a public hearing in Wake County as required under the CON law. (Joint Ex. 1). Each of the applicants whose proposals are at issue in these contested case made presentations at the public hearing and submitted response to the written comments.

3. Mr. McKillip reviewed each application and determined whether each individual application, standing alone, conformed to the statutory and regulatory review criteria. After making determinations regarding conformity to the review criteria for each application, Mr. McKillip conducted a comparative analysis of the applications.

4. On or around January 27, 2012, the CON Section notified the applicants about its decision to approve BellaRose and Britthaven, and to conditionally approve Universal Properties, Fuquay-Varina, LLC. The applications submitted by The Heritage, Hillcrest, and Liberty were disapproved. On February 3, 2012, the CON Section issued written notice of the findings and conclusions upon which it based its decision.

5. The Agency approved: (a) an application filed by Britthaven to develop a 120-bed nursing facility; (b) an application filed by BellaRose to develop a 100-bed nursing facility in Wake County; and (c) an application from Universal Properties/North Raleigh, LLC and Universal Health Care/North Raleigh, Inc. (collectively "Universal") to add 20 licensed nursing

care beds to Universal's existing nursing facility in Wake County. Universal is not a party to this contested case and the 20 beds awarded to Universal are not at issue.

6. The Agency determined that BellaRose did not conform with the requirement of SMFP Policy GEN-4 because the BellaRose application did not include a written statement describing the project's plans to assure water conservation. (Joint Ex. 1). However, the Agency determined that this deficiency could be conditioned and BellaRose was approved subject to the condition that it submit documentation that meets the requirements of Policy GEN-4.

7. The applications submitted by The Heritage and Hillcrest were found nonconforming with N.C.G.S. § 131E-183(a)(13)(c) ("Criterion 13(c)"), which addresses proposed services to medically underserved groups. (Joint Ex. 1). Based on its finding that The Heritage and Hillcrest were nonconforming with Criterion 13(c), the CON Section found both applications nonconforming with Criteria 1 (SMFP Policy GEN-3), 4, and 18a. (N.C.G.S. § 131E-183(a)(1), (4) and (18a); Joint Ex. 1).

8. Liberty's application was found nonconforming with statutory Criterion 20 which addresses quality of care. (N.C.G.S. § 131E-183(a)(20); Joint Ex. 1). For the same reasons that the Agency found Liberty nonconforming with Criterion 20, the application also was found nonconforming with Criteria 1 (SMFP Policy GEN-3), 4, and 18a. (N.C.G.S. § 131E-183(a)(1), (4) and (18a); Joint Ex. 1).

9. Although The Heritage, Hillcrest, and Liberty were all found to be nonconforming to certain review criteria, the Agency nonetheless included them in its comparative analysis, as it did with all 16 applicants. (*See, e.g.*, Joint Ex. 1).

Petitions for Contested Case Hearing

1. On or about February 24, 2012, Heritage filed a Petition for Contested Case Hearing to appeal the denial of the Heritage Application and the conditional approvals of the BellaRose and Britthaven Applications (as well as the approval of the Universal Application). This contested case was assigned case number 12 DHR 01164, re-filed case number 12 DHR 08691.

2. On or about February 24, 2012, Hillcrest filed a Petition for Contested Case Hearing to appeal the denial of the Hillcrest Application and the conditional approvals of the BellaRose and Britthaven Applications (as well as the approval of the Universal Application). This contested case was assigned case number 12 DHR 01179, re-filed case number 12 DHR 08666.

3. On or about February 27, 2012, Liberty filed a Petition for Contested Case Hearing to appeal the denial of the Liberty Application and the conditional approval of the Britthaven Application (Liberty did not appeal the Agency's decision to conditionally approve the BellaRose Application). This contested case was assigned case number 12 DHR 01180, re-filed case number 12 DHR 08669.

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4. Britthaven and BellaRose filed motions to intervene in the contested cases of The Heritage, Hillcrest and Liberty, which were granted by the Undersigned. The Heritage filed motions to intervene in the contested cases of Hillcrest and Liberty, which were granted by the Undersigned. Liberty filed motions to intervene in the contested cases of The Heritage and Hillcrest, which were granted by the Undersigned. Hillcrest filed motions to intervene in the contested cases of The Heritage and Liberty, which were granted by the Undersigned.

5. The Parties filed a Joint Petition to Consolidate, and the consolidation order was entered on or about July 2, 2012. The appeal of the approval of Universal for 20 nursing facility beds was dismissed. As a result, the maximum number of nursing facility beds which can be awarded through this contested case is 220.

6. On September 20, 2012, the Parties entered into a Consent Order and Voluntary Dismissal without Prejudice. According to the terms of the Consent Order, which was issued on September 24, 2012, the Parties were allowed to re-file their petitions within ten days from the entry of the Consent Order by the undersigned ALJ. The Consent Order also allowed for the parties to intervene as allowed previously in all three re-filed contested cases, and that the three re-filed contested cases be consolidated.

7. On September 25, 2012, Heritage re-filed its Petition for Contested Case Hearing to appeal the denial of the Heritage Application and the approvals of the BellaRose and Britthaven Applications, designated as File No. 12 DHR 08691.

8. On September 25, 2012, Hillcrest re-filed its Petition for Contested Case Hearing to appeal the denial of the Hillcrest Application and the approvals of the BellaRose and Britthaven Applications, designated as File No. 12 DHR 08666.

9. On September 25, 2012, Liberty re-filed its Petition for Contested Case Hearing to appeal the denial of the Liberty Application and the approval of the Britthaven Application, designed as File No. 12 DHR 08669.

Criteria 20

1. The General Assembly has found that to promote the general welfare and health of its citizens, CON applicants for new health services must be evaluated as to the quality of care they will provide. N.C.G.S. § 131E-175(7). Criterion 20 requires that "[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past." (N.C. Gen. Stat. § 131E-183(20)).

2. Criterion 20 serves to benefit future residents of a proposed nursing facility by ensuring that an existing provider cannot be awarded a CON unless it can demonstrate that it is currently providing quality care at its existing facilities. Criterion 20 is especially important in nursing home reviews because the residents of nursing facilities have serious medical issues and are completely dependent on the facility to meet their care needs 24 hours a day.

3. All CON applicants are required to demonstrate how a project will promote quality in the delivery of health care services. (Agency Ex. 818). Safety and quality are the first basic principle that governs the health care planning process in the State Medical Facilities Plan. (*Id.*).

4. Criterion 20 does not specify what geographic area the Agency must consider when evaluating whether an applicant has provided quality care in the past. In other statutory criteria, the legislature has specifically limited the relevant geographic area under consideration to the "service area" at issue. (N.C. Gen. Stat. §§ 131E-183 (13)(a), (18a)).

5. It is the Agency's practice in considering Criterion 20, to limit the geographic scope of its review of substandard quality of care deficiencies to only facilities operated in the service area where the proposed project is to be located. For nursing home reviews, the service area is a single county.

6. In this review, the Agency only considered the applicants' history of providing quality care in Wake County. (Joint Ex. 1). The Agency ignored quality of care by an applicant in other counties.

7. The Agency's interpretation of the geographic scope of the statute has resulted in it determining that Criterion 20 is not applicable to applicants that operate nursing facilities outside of the county where the proposed project is to be located. (Joint. Ex. 1).

8. The language of Criterion 20 does not expressly limit or even suggest that the geographic scope of the Agency's review should be limited to only those facilities operated in the county where the proposed project is to be located. Instead, Criterion 20 makes clear that all existing providers must demonstrate that they have provided quality care in the past. (N.C.G.S. § 131E-183(a)(20)).

9. The Agency provided no reasonable basis for ignoring an applicant's quality track record outside the county in determining conformity with Criterion 20. When asked why the Agency excluded facilities outside the county where the proposed project was to be located, the Assistant Chief of the Agency agreed that it was historical practice and that she did not know why. Mike McKillip, Project Analyst at the Agency's CON Section, testified that he did not know why the Agency has traditionally limited its Criterion 20 analysis to the county at issue in the review.

10. Craig Smith, Chief of the CON Section, testified that it was possible that the Agency would consider quality issues in other counties when determining conformity with Criterion 20, but the Agency would only do so if the Agency determined that the applicant had severe quality issues. However, the evidence shows two examples of nursing home reviews in which the Agency looked outside the county to determine conformity with Criterion 20. (Joint Ex. 205, Heritage Ex. 24). In each instance the applicant had no quality issues that would have resulted in nonconformity with Criterion 20.

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11. In kidney dialysis reviews, the Agency has created a form to request information from the Acute Care Licensure Section, which does not limit the Acute Care Section's review to only the county at issue. (Heritage Ex. 24). The service area in kidney dialysis reviews is also county specific. In at least one kidney dialysis review decision entered into the record, the Agency looked at quality issues outside the county where the proposed project was to be located. (Heritage Ex. 28).

12. When asked why the Agency had not created a form to request state-wide information in nursing facility reviews, Mr. Smith testified that the Agency did fewer nursing facility reviews than dialysis review and that the Agency might consider creating a similar form in the future.

13. Ms. Frisone stated that it was possible that employees at an existing facility within a county might transfer to the proposed facility in that same county. However, she admitted that it was just as likely that staff from other existing facilities operated by the applicant could come to work at the proposed facility and that she did not know why the Agency only reviewed a single county.

14. Britthaven's facilities are not managed on a county by county basis and all of Britthaven's nursing facilities are governed by the same quality of care policies, and procedures regardless of the county in which they are located. Britthaven's facilities are managed by the same management company and share a single corporate office in Kinston, North Carolina. (Joint Ex. 3). Similarly, all of Liberty's facilities follow the same quality of care policy and standards and there is no county-wide management of its facilities that would distinguish the management or operations of the facilities on a county by county basis.

15. N.C. Gen. Stat. § 131E-182(b) states that the Agency should create application forms to be used by applicants for CONs, and that the form may require an applicant "to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria...and with duly adopted standards, plans and criteria." The application form developed by the Agency for nursing home CONs asks for an applicant's history of providing quality care throughout the entire State. (E.g., Joint Ex. 6)

16. In determining conformity with Criterion 20, it is the Agency's practice to only consider substandard quality of care occurring eighteen (18) months prior to the issuance of the CON Section's decision. (Joint Ex. 1, p. 1976; McKillip, T. Vol. 1, p. 227).

17. N.C. Gen. Stat. § 131E-182(b) states that the Agency must create application forms to be used by applicants for CONs, and that the form may require an applicant "to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria...and with duly adopted standards, plans and criteria."

18. The language of Criterion 20 does not expressly set forth a specific time frame that the Agency must consider. (N.C.G.S. § 131E-183(a)(20)). However, the application form developed by the Agency for nursing home CONs asks for an applicant's history of providing

quality care during "the eighteen months immediately preceding the submittal of the application." (E.g., Joint Ex. 6).

19. In this review, the Agency considered the applicant's history of providing quality care during the eighteen (18) months immediately preceding the date of the decision, as opposed to the timeline requested and specified by the application form. (Joint Ex. 1). In doing so the Agency ignored a little over four months of quality care issues it sought in the application form.

20. Mike McKillip, Project Analyst at the Agency's CON Section, and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that the Agency's practice of considering an applicant's history of providing quality care during the eighteen (18) months is different than what is requested on the nursing home CON application form.

21. It is unreasonable and contrary to N.C.G.S. § 131E-182(b) for the Agency to implement a policy that ignores information applicants are required to provide in the application form.

22. The Agency's consideration of quality of care events and information it obtains after an application has been filed promotes the interest of citizens of North Carolina because it allows the Agency the opportunity to consider quality of care issues that occur after the filing of the applications but prior to the issuance of the Agency decision.

23. Criterion 20 puts the burden on the applicant to prove that it has provided quality care in the past: "An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past." (N.C. Gen. Stat. § 131E-183(20)).

24. The plain language of Criterion 20 does not provide a specific time period that the Agency must use in determining whether an applicant has provided quality of care in the past. Unlike the geographic scope, Criterion 20 provides the Agency with flexibility to determine the look back period it will use.

25. Although the Agency has discretion to consider the appropriate look back period, N.C.G.S. § 131E-182(b) requires that applicants "shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. § 131E-183 and with duly adopted standards, plans and criteria."

26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table ("Table 6") and identify whether any of the applicant's existing facilities statewide have experienced any of a set of specified quality-related events. (E.g., Joint Ex. 3). The specified quality-related events include "Substandard Quality of Care as Defined by [the Federal Government]" and "State and Federal Fines." (E.g., Joint Ex. 3).

27. The CON Application form does not state whether the relevant date for purposes of the Agency's review is the date of the "incident," or the date of the resulting State or Federal action. Ms. Frisone testified that the application form asks for the date of the incident at the

facility that constituted substandard quality of care because this is the date that the Agency uses to determine whether an incident and the resulting deficiency falls within or outside the look back period.

28. Although Britthaven identified 46 facilities in Table 6 of the Britthaven Application, it did not disclose that any of those facilities had experienced incidents of substandard quality of care. (Joint Ex. 3). The evidence at the hearing revealed that, in fact, seven (7) Britthaven facilities had experienced eleven (11) events constituting substandard quality of care during the eighteen (18) months prior to the application date. (E.g., Joint Exs. 225, 226, 227, 229, 230, 232b, 234, 236, 240, 242, 243, 245).

29. Max Mason, who prepared the Britthaven Application, testified at the hearing that Britthaven's events of substandard quality of care were purposefully not identified in the Britthaven Application because he knew that the Agency would only evaluate whether Britthaven's Wake County facility had provided quality care in the past, and none of Britthaven's eleven (11) events of substandard quality of care occurred at Britthaven's Wake County facility.

30. The Britthaven Application did identify several "State and Federal Fines." (Joint Ex. 3). However, in response to Question 6(b), which asked for the circumstances surrounding all disclosed quality events, the Britthaven Application stated: "The penalties against the various facilities were assessed for alleged deficiencies. Except where otherwise noted, all matters are under appeal with CMS." (Id. at 71). The evidence at the hearing revealed that at least some of the disclosed fines were in fact not under appeal with CMS when Britthaven filed its application. At the hearing, Mr. Mason testified that the statement in the Britthaven Application indicating that all fines were under appeal was not true and was simply boilerplate language that Britthaven used in multiple CON applications.

31. Mr. Mason testified that although he is ultimately in charge of completing CON applications on behalf of Britthaven, he relies on a paralegal, Martha McMillan, to fill out Table 6 of the application. He does not independently verify her work, nor does he know the procedure she follows in filling out Table 6. He further testified that he was not familiar with her qualifications. To his knowledge, Ms. McMillan has no clinical training or experience with CMS surveys. Britthaven did not call Ms. McMillan as a witness at the hearing. Mr. Mason also testified that based on the Agency's longstanding practice of basing conformity determinations on the survey history of facilities within the same county as the proposed facility, he generally verifies the information provided by Ms. McMillan for any facilities in the same county where the proposed facility is to be located.

32. Mike McKillip, the analyst who performed the review in this case, testified that his interpretation of Table 6 of the Britthaven Application was that no Britthaven facility in North Carolina had an episode of Substandard Quality of Care.

33. Mr. McKillip testified that Britthaven should have identified which of its facilities had experienced events constituting substandard quality of care. He further testified that had Britthaven fully identified its events of substandard quality of care, he would likely have

followed up on the disclosed issues. Craig Smith, Chief of the Agency's CON Section, testified that he expects the entire CON application to be completed in a complete and accurate manner.

34. Doug Suddreth, who was admitted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and design and how care practices and work care practices flow from such design, and who testified on behalf of Britthaven and BellaRose, opined that it was a mistake for Britthaven not to fully complete Table 6.

35. On Table 6 of the Liberty Application, Liberty identified seventeen (17) existing Liberty-affiliated nursing homes in North Carolina. (Joint Ex. 6). Several months prior to submitting its application in this case, Liberty acquired two (2) additional nursing homes in Forsyth County that were inadvertently excluded from Table 6 of the Liberty Application. However, these facilities did not experience any quality-related events after Liberty's acquisition of the facilities. Liberty also inadvertently failed to identify its Johnston County facility on Table 6. However, this facility also did not experience any quality-related events during the eighteen (18) month period prior to the application date.

36. Despite inadvertently failing to include the two (2) Forsyth County facilities and the Johnston County facility on Table 6, Liberty did identify these three (3) facilities in the Liberty Application as facilities owned, operated or managed by the Liberty entities. (Joint Ex. 6).

37. In Table 6, Liberty identified three events of substandard quality of care, one denial of payment, and four fines. (Joint Ex. 6). Liberty also completed Question 6(b) and provided the circumstances of each of these events.

38. The Agency is obligated to review applications and determine whether they are consistent with the statutory review criteria. N.C. Gen. Stat. § 131E-183(a).

39. In reviewing whether the applications submitted in this case conformed to Criterion 20, Mike McKillip, Project Analyst at the Agency's CON Section, sent an e-mail dated December 20, 2011 to Beverly Speroff, Chief of the Agency's Nursing Home Licensure and Certification Section. (Joint Ex. 1). The e-mail included a list of the applicants' existing facilities in Wake County and asked whether any of those facilities had quality of care problems since August 2010.

40. Ms. Speroff responded to Mr. McKillip's e-mail and stated which of the facilities identified by Mr. McKillip, "had certification deficiencies constituting substandard quality of care during this period." (Joint Ex. 1 pp. 1567-68). Ms. Speroff's e-mail did not contain any details about the certification deficiencies. Ms. Speroff's e-mail also did not contain any information regarding whether the applicants' remaining facilities in North Carolina had experienced any quality of care issues.

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41. Mr. McKillip and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that the Agency's determination of whether the applications in this review conformed to Criterion 20 was based entirely on Ms. Speroff's e-mail.

42. During the time period relevant to this review, Britthaven operated forty-two (42) nursing facilities in North Carolina. (Joint Ex. 3). During the same time period the Licensure Section determined that Britthaven provided substandard quality of care in thirteen (13) surveys it conducted in nine (9) facilities operated by Britthaven. Twelve (12) of the thirteen (13) surveys resulted in a determination that the substandard quality of care incident had placed Britthaven's residents in immediate jeopardy. (Joint. Exs. 224-43). In total, Britthaven received twenty-three (23) substandard quality of care deficiencies during the relevant time period, twenty-one (21) of which constituted Immediate Jeopardy. (Heritage Ex. 97).

43. The Agency failed to consider any of these incidents of substandard quality of care in its review of Britthaven's application. If any of these events would have occurred within Wake County, the Agency would have found Britthaven nonconforming with Criterion 20.

41. In its application Liberty represented that it operated seventeen (17) nursing facilities in North Carolina with quality of care track records relevant to this review. Four (4) of Liberty's seventeen (17) facilities received substandard quality of care deficiency surveys during the time period relevant to this review. In these 4 surveys, Liberty received 8 substandard quality of care deficiencies. (Heritage Ex. 93). Other than Liberty's Wake County facility, the Agency failed to consider any incidents of substandard quality of care in its review of Liberty's application.

42. Neither the language of Criterion 20 nor any Agency rule or regulation specifies the data or specific source of quality-related information to be used by the Agency to determine conformity. The agency failed to consider any matters of positive quality of care provided by the applicants in this case and only sought out deficiencies in facilities in Wake County.

43. The evidence presented at the hearing showed that the Agency had additional information related to the applicants' past history of providing quality care, but this additional information did not factor into the Agency's decision regarding whether the applications conformed to Criterion 20.

44. Mr. McKillip testified that after receiving Ms. Speroff's e-mail, he obtained a copy of the survey associated with the deficiencies at Capital Nursing and placed it in the Agency file, but it did not factor in to the Agency's determination regarding an applications conforming to Criterion 20.

45. Public comments provided information regarding the Centers for Medicare and Medicaid Services Nursing Home Compare program, which provides a star-rating system for nursing home facilities. (Joint Ex. 127). The public comments provided information with the average star rating for all applicants' North Carolina facilities, as well as the detailed information for each of these facilities' star ratings. (Joint Ex. 1). Nursing Home Compare measures three

types of facility performance, each of which has its own five star rating: health inspections, staffing, and MDS quality measures. (Joint Ex. 127).

46. Mr. McKillip testified that after reviewing the public comments that referred to the Nursing Home Compare program, he printed off the Nursing Home Compare data for Liberty's and Britthaven's existing Wake County facilities and placed them in the Agency file, but they did not factor in to the Agency's determination regarding whether the Liberty Application or Britthaven Application conformed to Criterion 20.

47. The CMS Quality Score is one of several metrics reported on the CMS Nursing Home Compare website. The CMS Quality Score is calculated using self-reported data that is not verified for accuracy. (Joint Ex. 26). Nursing Home Compare data is designed to allow consumers to compare different nursing homes. As such, Mr. Suddreth testified that the Nursing Home Compare data was a comparative analysis and did not lend itself to determinations of conformity. Ms. Speroff testified that the quality measures rating itself is not necessarily instructive of the quality of care being provided at a facility, and that the population of a given facility can have an impact on the quality measures rating separate and apart from the quality of the care being provided at the facility.

48. The Heritage took the position at the hearing that the Agency should have considered the 2010 Nursing Home Data Compendium, a 166-page compilation of statistics published annually by CMS regarding nursing home ownership and certification, nursing home residents, and survey findings nationwide. The most recent data available in the 2010 Compendium was for the year 2009. (*See* Heritage Ex. 88). While Mr. Carter opined that both Britthaven and Liberty had more than their proportionate share of immediate jeopardy citations statewide, he was relying on statewide data regarding 2009. The relevant surveys for Britthaven and Liberty occurred in 2010 and 2011.

49. Both Britthaven and Liberty introduced charts comparing the number of days of care that constituted immediate jeopardy or substandard quality of care with the total number of patient days provided by their facilities. (Joint Ex. 168; Britthaven Ex. 652). Neither Britthaven or Liberty provided the Agency with any of this information in their applications, comments, or response to comments. (Joint Exs. 3 and 6). The information was not requested by the Agency as it is not used in a quality of care analysis since their sole focus was existing facilities in Wake County.

50. Other information was not considered by the Agency in analyzing quality of care. Kahlisia Tillery, a facility consultant for Principle Long-Term Care, Inc., provided testimony about the extensive measures that Britthaven uses to ensure the quality of care provided to its residents. In many instances, Britthaven's survey deficiencies were designated as past noncompliance only, meaning they were identified and corrected before state surveyors ever arrived at the facility. In one instance, Britthaven created a new full-time staff position to ensure that the mistake which led to the deficiency would not occur again.

51. Britthaven's conformity was defended by Doug Suddreth, a licensed nursing home administrator with almost forty years of experience operating nursing homes. Mr.

Suddreth disagreed with a focus on deficiencies only and opined that if a statewide analysis were conducted, it must also consider Britthaven's good surveys and facilities that Petitioners ignored. This of course would and should be true for all applicants.

52. Hillcrest operates a nursing facility located in Durham County, North Carolina. (Joint Ex. 2). Hillcrest has not received a substandard quality of care deficiency at its one facility in Durham County.

53. The Heritage's parent company Brookdale operates certified nursing facility beds in Mecklenburg County, North Carolina. (Joint Ex. 4). That facility has not received a substandard quality of care deficiency.

54. In the CON application, Question I.12.a requires applicants to list certain related facilities, and Question II.6.a requires applicants to provide regulatory history for all such facilities identified in response to Question I.12.a. The Heritage identified 38 nursing home facilities in other states in response to Question I.12.a, but provided no regulatory history for any of such out of state facilities. (Joint Ex. 4).

55. The Agency had no basis for determining that Criterion 20 was not applicable to both Hillcrest and The Heritage because both were "involved in the provision of health services" by operating nursing facilities in North Carolina. (N.C.G.S. § 131E-183(a)(20)).

56. The Agency reviews every application in its entirety to determine whether it contains sufficient information to determine conformity. The Agency has no policy or follows no rule regarding errors, mistakes, or omissions in a CON application whether intentional or not that would or would not result in a finding of non-conformity.

57. Expert witnesses for Petitioners acknowledged that the Agency may consider information throughout the application and outside the application in evaluating conformity. The Agency should seriously and thoroughly review all available information, including but not limited to competitive comments and publicly available data.

58. The Heritage and Hillcrest have argued, that if an applicant or an entity related to it received a single substandard quality of care or immediate jeopardy citation at a facility anywhere in the State, the applicant should be found non-conforming with Criterion 20. The Heritage's expert witness contended that a nonconformity should be triggered by any substandard quality of care deficiency, while the Hillcrest expert testified that nonconformity would be triggered by any immediate jeopardy deficiency. The Agency appears to have followed this single citation in reviewing the applicants in this case but only in Wake County where the facilities were to be built.

59. The Heritage's expert witness, Daniel Carter, testified that the language of Criterion 20 itself does not require such a "zero tolerance" interpretation. Instead, his opinion was based on what he believes is a consistent way the Agency has applied Criterion 20 in the past.

60. Similarly, Mr. Legarth, Hillcrest's expert witness, based his opinion largely on historical agency practice, in which a single substandard quality of care or immediate jeopardy citation in the same county generally results in nonconformity. Unlike Mr. Carter, he believed the Agency's historical practice should be expanded to facilities statewide. Ms. Frisone, Assistant Chief of the CON Section, testified that such a statewide zero-tolerance interpretation would not be feasible because it would significantly reduce the pool of approvable applicants and encourage litigation.

61. Evidence presented in this contested case showed that the more facilities that a nursing home provider operates, and the more days of patient care that it delivers, the more likely it is to receive a substandard quality of care citation because it has more opportunities.

62. In any given period, the total days of patient care provided varies tremendously by provider. For example, during 2011 Britthaven provided 1.77 million days of patient care in its 43 facilities. (Britthaven Ex. 632). During a comparable one-year period, Liberty provided 616,417 days of patient care in all its facilities. (Liberty Ex. 302). During fiscal year 2011, The Heritage provided 11,725 days of care in a single facility in the State and Hillcrest provided 31,407 in its single facility in the State. (Hillcrest Ex. 515; Joint Ex. 105).

63. The Heritage's Vice President of Skilled Nursing Services, Linda May, testified that if a provider's IJ level deficiencies represented an extremely small percentage of the provider's total days of care, the provider had provided good quality of care.

64. Kathy Platt, who was admitted as an expert in health care planning and submission of CON applications, and who testified on behalf of Liberty, opined that the Liberty Application conformed to Criterion 20. (Joint Exs. 123 and 168).

65. Martha Frisone, Assistant Chief of the Agency's CON Section, testified:

> Q Taking into account…17 facilities, a large amount of patient day[s of] care[] over that five month review period as well as the 18 months prior to application, do you believe that Liberty in these circumstances has provided evidence of quality care?
>
> A If I'm going to look statewide and look at all of [Liberty's] facilities--I mean I've not done it this way before, but I think the same answer, that yes, I think there is evidence of quality of care.

(Frisone, T. Vol. 35, pp. 8412-13).

66. The Agency's determination that the Liberty Application was nonconforming with Criteria 1, 4 and 18a were purely derivative of the determination that the Liberty Application was nonconforming with Criterion 20. McKillip. T. Vol. 1, pp. 205-208. No grounds other than the Agency's finding that the Liberty Application was nonconforming with Criterion 20 existed to support a finding that Liberty was nonconforming with Criteria 1, 4 or 18a. Id.

Criteria 13(c)

1. N.C.G.S. § 131E-183(a)(13)(c) ("Criterion 13(c)") states:

The applicant shall demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and members of medically underserved groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the applicant shall show....

(c) That the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services; and...

2. In applying Criterion 13(c) in a nursing facility review, the CON Section looks at the percentage of service to Medicaid and Medicare proposed by the applicant. In this case, the Agency found no issue with any of the applicants proposed services to Medicare.

3. In its review of the applicants' proposed service to Medicaid, the CON Section compared the applicants' projection of service to Medicaid with the State and county average service to Medicaid. The Agency considers the extent to which each applicant has projected to provide services to medically underserved groups. For the purposes of Criterion 13(c), the concern is with future projections, as opposed to Criterion 13(a), which is concerned with past practice.

4. In applying Criterion 13(c), the Agency gathers data from DMA cost reports for existing nursing facility beds to calculate both a State and county Medicaid average. There are no rules that apply to the manner in which the Agency determines to define a county Medicaid average for purposes of applying Criterion 13(c).

5. In its application, The Heritage projected that it would serve 55.4% Medicaid. (Joint Ex. 4). The Heritage's projection was based upon the average service to Medicaid recipients in all skilled nursing facilities in Wake County, excluding continuing care retirement communities (CCRCs). The Heritage excluded CCRCs in computing the county average service to Medicaid because CCRCs are not permitted to serve Medicaid recipients. (Agency Ex. 818).

6. The Heritage calculated its projected payor mix using the actual average payor mix of existing Wake County skilled nursing facility providers (excluding continuing care retirement communities). (Joint Ex. 4). Because The Heritage proposed to be a new provider of skilled nursing facility services in Wake County, it had no history in Wake County upon which to base its expected payor mix other than the county average. (Joint Ex. 4). It was reasonable for The Heritage to project that its service to Medicaid would mirror the average Medicaid

utilization in Wake County. The Heritage application describes in detail how it arrived at its projections of patient days by payor source, including Medicaid. (Joint Ex. 4).

7. Agency witnesses agreed that projecting the county average of Medicaid service is sufficient to be conforming with Criterion 13(c). However, in this review, the Agency computed the Wake County Medicaid average by excluding hospital-affiliated nursing facilities that serve Medicaid recipients. (Joint Ex. 1).

8. Before the review began, Mr. McKillip did not know how he would compute the Wake County average percent of service to Medicaid. After the review began, Mr. McKillip was instructed by Ms. Frisone to compute the Wake County average excluding any skilled nursing facilities that are affiliated with a hospital. (Joint Ex. 1). This decision to exclude the hospital-affiliated nursing facilities resulted in The Heritage application being below the county average, as calculated by the CON Section.

9. The project analyst testified that hospital-affiliated nursing facilities were excluded from the computation of county average in this review because generally hospital-affiliated nursing facilities have different admission patterns than non-hospital-affiliated nursing facilities. However, hospital-affiliated nursing facilities are regulated in the same manner as non-hospital-affiliated nursing facilities. They must meet the same Certificate of Need and licensure and certification requirements. Hospital-affiliated nursing facilities accept Medicaid and Medicare patients. They are also included in the need methodology in the State Medical Facilities Plan.

10. In deciding to exclude the hospital-affiliated facilities in calculating the county average, the Certificate of Need Section did no analysis of the percentage of Medicaid served by hospital-affiliated nursing facilities as compared to non-hospital-affiliated facilities.

11. Mr. McKillip was unaware that some hospital-affiliated nursing facilities in Wake County provide a greater percentage of service to Medicaid than non-hospital-affiliated nursing facilities. The nursing facility on the campus of Rex Hospital has a higher percentage of Medicaid than some nursing facilities in Wake County that have no hospital affiliation. (Heritage Ex. 15). The Agency did no analysis of admission patterns in Wake County before deciding to exclude hospital-affiliated nursing facilities in computing the county average service to Medicaid.

12. The Agency also did no analysis of whether Medicaid recipients were being denied access to skilled nursing facilities in Wake County. There are under-utilized skilled nursing facilities in Wake County that have available Medicaid beds.

13. Agency witnesses testified that if a hospital-affiliated applicant had applied in the review, the Agency would have calculated the county average differently. The Agency further admitted that if a hospital-affiliated facility had applied, The Heritage would have been conforming with Criterion 13(c). It is arbitrary and unreasonable to determine if an application conforms with a statutory review criterion based upon whether or not a hospital-affiliated entity has applied.

14. The CON Section's decision to exclude hospital-affiliated nursing facilities also is contradicted by prior Wake County nursing facility decisions. In applying Criterion 13(c) to the review of an application submitted by Britthaven in 2010, the Agency accepted a calculation of the Medicaid county average, which included hospital-affiliated nursing homes. (Joint Ex. 1). In reviewing an application by Universal Health Care, the CON Section also accepted a calculation of Medicaid county average that included hospital-affiliated nursing facilities. (Joint Ex. 207).

15. The CON Section does not publish in a rule or other written communication the way in which the county average will be calculated or that the county average will be used as a threshold for determining conformity with Criterion 13(c). Agency witnesses contend that a review of prior Agency findings provides notice to applicants of the way the Agency will apply Criterion 13(c).

16. However, there are numerous inconsistencies and contradictions in the Agency's findings. As Mr. Carter testified, the Agency findings on Criterion 13(c) and calculation of county average are varied. In the two prior nursing facility reviews in Wake County, the Agency calculated the county average including hospital-affiliated nursing facilities. (Joint Ex. 1; Joint Ex. 207). When asked if The Heritage could have relied on these decisions in calculating its county average, Assistant Chief Martha Frisone responded that it could have.

17. Applicants have no way of knowing how the Agency will calculate the county average. The Agency and Respondent-Intervenors contend that The Heritage could have asked Mr. McKillip at the pre-application conference. However, Mr. McKillip, the most senior analyst at the CON Section, did not know how he would compute the county average of Medicaid until after the review began.

18. Statutory Criterion 13(c) is worded the same, regardless of whether the review is competitive or noncompetitive and regardless of whether a non-hospital-affiliated nursing facility has applied. (N.C.G.S. § 131E-183(a)(13)(c)).

19. The Heritage's calculation of the county average service to Medicaid using data from licensure renewal applications was reasonable. The Agency has frequently relied upon licensure renewal data, even to calculate the county average of Medicaid under Criterion 13(c). (*See*, Agency Exs. 214, 215; Joint Ex. 1). Licensure renewal data is more recent than cost report data. (Joint Ex. 1).

20. In calculating the county average of Medicaid service, it was reasonable for The Heritage to include hospital-affiliated nursing facilities because hospital-affiliated facilities provide services to Medicaid recipients. The Heritage's projection of 55.4% Medicaid demonstrates conformity with the requirements of Criterion 13(c).

21. The only reason that The Heritage Application was found nonconforming with Criteria 1 (Policy GEN-3), 4, and 18(a) was the Agency's determination under Criterion 13(c) that The Heritage did not project sufficient Medicaid access. (Joint Ex. 1). Because The

Heritage projected sufficient Medicaid access and conforms with Criterion 13(c), The Heritage also conforms with Policy GEN-3 and statutory Criteria 1, 4, and 18(a).

22. Hillcrest projected that its service to Medicaid would be 49% of its projected patient days. (Joint Ex. 1; Joint Ex. 2). As a basis for its projection, Hillcrest presented testimony that it arrived at its projection by calculating the Wake County Medicaid average to include nursing facility beds in continuing care retirement communities ("CCRCs"). (Joint Ex. 1).

23. It was not reasonable for Hillcrest to include in its computation of the Medicaid county average nursing facility beds in CCRCs. Most CCRCs have developed their nursing facility beds under a policy that does not permit them to serve Medicaid. (Agency Ex. 818). Therefore, CCRCs, unlike non-hospital-affiliated and hospital-affiliated nursing facilities, are not open to the public. In its computation of its county average service to Medicaid, Hillcrest included three CCRCs that provide no service to Medicaid recipients. (Joint Ex. 4; Heritage App., Ex. 25).

24. Hillcrest projected that less than 50% of its services will be to Medicaid recipients. (Joint Ex. 1; Joint Ex. 2). A projection of service to Medicaid in Wake County of less than 50% is not projecting adequate access to Medicaid when the county average service to Medicaid in Wake County is above 50%. (Joint Ex. 4; Heritage App., Ex. 25; Joint Ex. 1).

25. Hillcrest does not intend to have all of its beds certified to be able to accept Medicaid and Medicare recipients. (Joint Ex. 2). This can result in an access problem for Medicaid and a lower percentage of service to Medicaid.

26. Hillcrest's application fails to conform with Criterion 13(c). Because Hillcrest's projection of Medicaid also is a factor in determining conformity with Criteria 1 (Policy GEN-3), 4, and 18(a), Hillcrest's application also fails to conform with these criteria.

27. The Medicaid payor mix percentages for existing nursing facilities in Wake County using 2009 DMA data was available to all Applicants in this review. The data indicate that the majority of facilities offer 62 to 77 percent of total patient days for Medicaid recipients. The average Medicaid percentage for Wake County was approximately 61.8 percent.

Existing Wake County Facilities	Medicaid Days as a % of Total Days
Litchford Falls Healthcare & Rehab	77.4%
City of Oaks Health & Rehab Center (Tower Nursing)	76.0%
Capital Nursing and Rehab Center	73.7%
Raleigh Rehab & HealthCare Center	71.0%
Hillside Nursing Center	70.0%
The Laurels of Forest Glen	67.3%
Wellington Rehabilitation and Healthcare	65.6%
Cary Health & Rehab Center	64.9%
Guardian Care of Zebulon	63.6%

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Universal Healthcare/North Raleigh	62.5%
Sunnybrook Healthcare & Rehab	42.3%
The Oaks of Carolina, LLC (UniHealth Post-Acute)	40.2%
Blue Ridge Health Care Center	38.5%
Mayview Convalescent Center	37.9%

(Joint Ex. 1, p. 1963)

Policy NH-8

1. To be conforming to Criterion 1, a CON applicant must demonstrate conformity with all applicable policies in the State Medical Facilities Plan (SMFP). (N.C.G.S. § 131E-183(a)(1)). Policy NH-8 is a policy in the SMFP that is applicable to nursing home projects. (Agency Ex. 818). Policy NH-8 requires that applicants proposing new nursing facilities pursue "innovative approaches in care practices, work place practices, and environmental design that address quality of care and quality of life needs of the residents." (Agency Ex. 818).

2. In reviewing the competing applications, the CON Section found all sixteen applicants in the review were found conforming with all three innovations required under Policy NH-8. (Joint Ex. 1).

3. Daniel Carter offered the opinion on behalf of The Heritage that the Liberty Application and the Britthaven Application should have been found nonconforming to Policy NH-8 because each failed to propose an innovative environmental design. Mr. Carter further opined that the BellaRose Application was nonconforming to Policy NH-8 because it had failed to address innovative approaches in care practices and work place practices.

4. Mr. Carter's opinion regarding environmental design was based on the testimony of Todd Kaestner, the Executive Vice President of Corporate Development for Brookdale Senior Living, The Heritage's parent company. Mr. Kaestner is in charge of development of Brookdale facilities. In developing nursing homes for Brookdale, he assists with the concept as well as the location and the site plan, working closely with the architect in directing the design of the community. Mr. Kaestner identified several design elements in the Britthaven and Liberty proposals which he contended were not innovative.

5. Mr. Kaestner further testified that innovation is not a pass-fail standard and that he believes an innovative design must be new or cutting edge. He also testified that he believed innovation can only be judged by comparing the proposals.

6. Doug Suddreth was the only person other than Mr. Kaestner to be recognized by the Undersigned as an expert in facility design. Mr. Suddreth, expert witness for Britthaven and BellaRose, disagreed with Mr. Kaestner and testified that all of the applicants in the Review satisfied the environmental design prong of Policy NH-8. Mr. Suddreth is a Vice President of development for Autumn Corporation, a nursing care provider with 25 facilities in North Carolina and Virginia, and has expertise in nursing facility design similar to Mr. Kaestner's expertise.

7. Whereas Mr. Kaestner was not familiar with Policy NH-8 or what the drafters of Policy NH-8 intended as a baseline for comparison in judging what constitutes an innovative design, Mr. Suddreth was personally involved with the development of Policy NH-8 in North Carolina.

8. Mr. Suddreth testified that the policy was intended to decentralize nursing functions in order to create a more homelike environment but to do so in a way that did not become cost-prohibitive and therefore inhibit access by Medicaid patients. Mr. Suddreth further testified that the Agency gives adequate regard to the importance of Policy NH-8 and that as a result, the new facilities being approved and built in the State since the adoption of Policy NH-8 are more residential in character with decentralized nursing facilities.

9. Although Mr. Kaestner identified several design aspects of the Britthaven proposal that he contended were not innovative, he also agreed that there were innovative design elements in Britthaven's proposal. Mr. Kaestner's fundamental complaint with the Britthaven design was that he did not believe it was as innovative as the Heritage design.

10. In comparing The Heritage, Britthaven, BellaRose and Liberty under Policy NH-8, there are differences in the area of innovative facility design that promotes the quality of care and quality of life needs of the residents. (Heritage Ex. 11). The proposed facility designs of Britthaven, BellaRose, and Liberty do not have the number of private rooms as the facility design proposed by The Heritage. Further, those applicants proposed approximately the same amount of space for a semi-private room as a private room. The Heritage proposed almost twice as much space for a semi-private room as a private room.

11. Both Mr. Carter and Ms. Frisone testified that the Agency cannot evaluate conformity by comparing the proposals of competing applicants. Conformity to Policy NH-8 is a pass/fail standard, and the mere fact that one applicant may propose something that is more innovative than another is not determinative.

12. Mr. Suddreth testified that Britthaven's proposed design with four distinct neighborhoods and other innovative elements promotes the purposes of Policy NH-8 by decentralizing services and creating a homelike environment where care can be effectively rendered, all while promoting consistent staffing and offering a very nice physical plant for its residents. He further testified that he has personally overseen three projects in the past two years that built the same design as Britthaven proposed in the Review, and that he has received very positive feedback from those who use the facilities.

13. In a CON Application, all of the information responsive to Policy NH-8 will not be found under the heading labeled Policy NH-8. Rather, the philosophies and approaches to be employed by the applicant will be contained within various sections of its application.

14. In this review, the Agency determined that the information furnished by BellaRose was adequate to demonstrate conformity with Policy NH-8. (McKillip, p. 317)

15. Policy GEN-4 requires, in pertinent part, that an applicant provide a written statement describing the project's plan to assure improved energy efficiency and water conservation. (Joint Ex. 1) Although not listed under a specific heading, BellaRose provided

narratives in its Application generally responsive to the requirements of Policy GEN-4. However, the Agency elected to find BellaRose conditionally conforming to Policy GEN-4 with a condition for BellaRose to provide additional information on its water conservation plan. BellaRose supplied the additional information requested by the Agency in this regard. Section 131E-186 was described by Ms. Frisone as the provision of the CON Law that provides the authority to the Agency to condition an applicant.

16. One of the focuses of Policy NH-8 is to encourage providers to develop less institutional nursing facility designs creating more residential-type settings. Historically, nursing facilities gravitated to functional designs with full centralized dining and bathing and wings of resident rooms extending from a single central area.

17. Policy NH-8 was developed to encourage more residential, home-like experiences for residents within the nursing facility. By encouraging the development of less centralized designs with neighborhoods, residents and families would be able to have recreation and dining and family visiting within an individual neighborhood.

18. One of the benefits of the neighborhood design concept is that it allows for consistency of staff assignments so that staff can regularly interact with and serve patients within an individual neighborhood, including those with Alzheimer's disease or dementia.

19. There are no rules that define facility designs so that one is more effective than the other. In prior reviews, the Agency has not undertaken to compare particular floor plans and facility designs.

20. No rules are in place to inform applicants with respect to comparisons between facility designs and practices as to which could be considered more effective. In prior reviews, the Agency has not undertaken to compare a particular care practice proposed by one applicant to a particular care practice described by another applicant. Similarly, the Agency has not attempted to draw comparisons between particular work place practices or reach conclusions as to which work place practices are more effective.

21. Based on the entirety of the testimony and exhibits regarding the requirements of Policy NH-8 and what each of the applicants involved in this case furnished in their respective Application, the Agency properly found that all parties demonstrated conformity and addressed all three parts of Policy NH-8.

Criteria 3, 4, and 6

1. The Heritage's expert witness, Daniel Carter, testified that Britthaven should have been found nonconforming with N.C. Gen. Stat. § 131E-183(a)(3), (4) and (6) ("Criterion 3," "Criterion 4," and "Criterion 6" respectively) because of the utilization rate at the Tower Nursing and Rehabilitation facility in Wake County ("Tower"). Mr. Carter suggested that, instead of proposing a new facility, Britthaven should have improved utilization at its existing facility. In addition, low utilization at Tower was raised as a criticism of the Britthaven application in competitive comments during the CON review. (*See, e.g.*, Joint Ex. 1).

2. Criterion 3 requires an applicant to "identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed . . . ." (N.C. Gen. Stat. § 131E-183(a)(3)).

3. Criterion 4 requires that "[w]here alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed." (N.C. Gen. Stat. § 131E-183(a)(4)).

4. Criterion 6 requires an applicant to "demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." (N.C. Gen. Stat. § 131E-183(a)(6)).

5. Tower is an existing 180-bed nursing facility which is managed by Principle Long Term Care, Inc. (Joint Ex. 3).

6. According to data in the Petition for Adjusted Need Determination that resulted in a 240-bed need determination in the 2011 State Medical Facilities Plan, Tower was operating at 74% utilization, which was below average for Wake County nursing facilities at the time. (Joint Ex. 1). Tower's utilization was relatively low partly because the building was outdated, very large, and operationally inefficient; and partly because it was in an area of the county with a surplus of nursing home beds. (Joint Ex. 1).

7. In 2010, after the Petition for Adjusted Need Determination, but before the CON Review at issue, Britthaven applied to relocate 90 of Tower's 180 beds to a new facility to be constructed in Holly Springs, for which it was approved in April 2011. (*See* Joint Ex. 1).

8. Britthaven's Certificate of Need to develop a 90-bed nursing home facility in Holly Springs was projected to be completed and operational by October 2012. (Joint Ex. 3). In October 2012, Britthaven had not yet acquired property on which to build the nursing home facility. Britthaven's underutilized facility in Wake County and its Certificate of Need for a second nursing home facility that has not yet been developed were not considered by the Agency.

9. The Agency determined as part of its analysis in this review that Britthaven had already addressed any alleged underutilization at Tower via relocation of half of its beds to a separate building in Holly Springs.

10. The CON review at issue concerns 240 new nursing beds in Wake County, for which the need was identified in the 2011 SMFP. (Joint Ex. 1). Britthaven's proposal to develop a new 120-bed facility in the Brier Creek area of Wake County was specifically in response to the identified need for new beds, and was not proposed as a means to improve utilization at Tower or as an alternative to its previously approved Holly Springs project. (*See* Joint Ex. 3). All 180 nursing beds at the Tower facility are existing nursing home beds, including the 90 beds to be located to a new facility in Holly Springs. (*See* Joint Ex. 1). Therefore, that project would not result in the addition of any new nursing beds, and would have no effect on total nursing home bed capacity in Wake County. Consequently, that project did not and would not address the identified need for 240 new nursing beds in Wake County.

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11. The Agency has promulgated a rule setting forth performance standards to notify applicants how it will determine conformity with Criteria 3 and 6 in nursing home reviews. The performance standards for nursing home reviews are set forth in 10A NCAC 14C.1102. (*See* Joint Ex. 1). 10A NCAC 14C.1102(a), which applies where the applicant is proposing to add new beds to an existing facility, requires applicants to show that past utilization of that existing facility reached a certain level. However, Britthaven proposed no such project. Instead, Britthaven proposed a new 120-bed facility in the Review, and was therefore subject to 10A NCAC 14C.1102(b), which requires only prospective projections of the utilization of the proposed new facility and requires no consideration of the utilization of any existing facility.

12. Britthaven reasonably projected to reach the utilization levels required by the performance standards, and was therefore found conforming to Criterion 3. (Joint Ex. 1). Petitioners have not demonstrated why lower utilization of one existing facility that is encumbered by an outdated, inefficient building would prevent a new facility in a new, rapidly growing and underdeveloped area from reaching its target utilization.

13. With respect to Criterion 4 (most effective alternative for meeting the need for the proposed project), the Agency reviewed the alternatives identified and discussed by Britthaven to meet the need and found Britthaven conforming. (Joint Ex. 1). Further, improved utilization at Tower and/or completion of the relocation of existing beds to Holly Springs would not address the need for the proposed project, since it would not add any bed capacity and would thus do nothing to alleviate the identified need for 240 additional beds in Wake County.

14. With respect to Criterion 6 (no unnecessary duplication), the Agency noted that Britthaven's proposal was consistent with the identified need for 240 additional nursing beds in the county, that it had demonstrated the need for its proposal (based on the required performance standards), and that Britthaven was conforming. (Joint Ex. 1). One of Britthaven's expert witnesses, Max Mason, also testified that there was no unnecessary duplication since the proposed Brier Creek facility specifically addressed the identified need for new beds and would be located in an area of the county with a shortage of nursing home beds.

Criteria 5

1. N.C.G.S. §131E-183(a)(5) ("Criterion 5") states:

Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

2. In applying Criterion 5, the CON Section reviews the financial and operational projections contained in the application, including cost, revenue and charges, to determine if the projections are reasonable and demonstrate that the proposed project will be financially feasible in its second year. (Joint Ex. 1).

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3. In its application, The Heritage projected, based on its projected revenue and expenses, that the proposed facility would be profitable by the second year of the project. (Joint Ex. 1).

4. BellaRose submitted written comments to the Agency stating that it believed that The Heritage's Application overstated its revenue by double counting ancillary revenue and therefore was nonconforming with Criterion 5. (Joint Ex. 1). The Heritage provided the CON Section with a written response explaining why BellaRose's criticism was unfounded. (Joint Ex. 1). The Agency considered both BellaRose's written comment and The Heritage's written response during its review and found The Heritage's projections to be reasonable and conforming with Criterion 5.

5. BellaRose's expert witness, Jim Weigard, provided testimony that he believed The Heritage had double counted its ancillary revenue. Mr. Weigard opined that The Heritage's pro forma included a line item for ancillary revenue and that the Medicare revenue line item also included ancillary revenue. Mr. Weigard could only provide an estimate of the amount of money that he believed that The Heritage would lose in year 2 of operations.

6. Mr. Weigard's opinion that The Heritage's Medicare rate included all Medicare ancillary revenue was partially based on his belief that The Heritage's Medicare rate was comparable to BellaRose's proposed Medicare rate, which included ancillary revenue. Mr. Weigard also based his opinion on financial disclosure information relating to other facilities operated by The Heritage's parent company, Brookdale.

7. BellaRose's Medicare rate was modeled on the Medicare rate received by the Hillside Nursing Facility, which is located in Wake County. (Joint Ex. 7). BellaRose's projected Medicare rate adjusted the Hillside rate downward to reflect a Medicare rate cut that was set to go into effect after the applications were filed. BellaRose also factored in an additional eight percent (8%) reduction in its proposed Medicare Rate to provide a conservative estimate of its Medicare rate to the Agency. (Joint. Ex. 7).

8. In his analysis, Mr. Weigard failed to take into account that The Heritage had not made the significant downward adjustments assumed in the BellaRose Medicare rate. (Joint. Ex. 4).

9. Doug Suddreth, BellaRose's other expert witness, testified that there is a wide variation in Medicare rates charged by different providers and that variations can even occur between facilities under the same ownership.

10. No other expert witness testified that The Heritage had double counted ancillary revenue in its application. BellaRose's other expert witness, Doug Suddreth opined that he had no issue with the Agency's decision to find The Heritage conforming with Criterion 5.

11. The Heritage's cost and charges and revenue projections were reasonable and conformed with Criterion 5. (Agency File, Ex. 1).

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12. Mr. Weigard also opined that The Heritage failed to conform with Criterion 5 because its proposed Medicare rate failed to take into account a Medicare rate cut that was set to go into effect after the submission of the application.

13. However, the CON Section specifically instructed applicants that they should use the current rates when making projections. (Heritage Ex. 15). Britthaven's other expert, Doug Suddreth, testified that he understood and did not disagree with The Heritage's decision to use the current rate in light of the Agency's guidance.

14. The Heritage's use of the current Medicare rate was reasonable and consistent with the Agency's instructions and cannot serve as a basis for finding its application nonconforming with Criterion 5.

Further Findings

1. When the approval of one Application requires the disapproval of other Applications, the review is considered to be competitive. In a competitive review, following an analysis of each application under the applicable criteria and rules, the Agency conducts a comparison of the Applications to determine which Applicant is the most effective. The Agency's comparative analysis is separate and independent from the assessment of whether each applicant is conforming with the statutory review criteria. The Agency considers a range of comparative factors, looking at all the factors together in order to draw a conclusion about which applicant is the most effective alternative overall. The comparative analysis process is not a mathematical exercise of tallying the number of factors upon which an applicant is found more effective to determine the applicant which is most effective overall.

2. The Agency, in its comparative analysis, considers all of the comparative factors and makes an assessment of how the applicants compare. The Agency also considers whether the applicants have demonstrated conformity with the review criteria. In reviews in which certain applicants are determined to be unapprovable, the applicants are nonetheless included within the Agency's comparative analysis. The fact that particular applicants were non-conforming with individual review criteria did not cause the Agency to overlook those applicants in the comparative analysis. Instead, all sixteen (16) applicants, regardless of determinations of conformity, were included in the comparative analysis.

3. The Agency conducted a comparative analysis of the competing applications in this review. (Joint Ex. 1) In this review, the Agency's comparative analysis used a number of factors that have been used by the Agency in prior reviews. The comparative factors used by the Agency in this review were: geographic distribution of beds, private rooms, access by underserved groups, private pay charges, operating costs, salaries, taxes and benefits, nursing hours per patient day and conformity to statutory review criteria. (Joint Ex. 1)

4. In this review, Policy NH-8 was not used as a separate comparative factor. Policy NH-8 was not used as a comparative factor in this review because all of the applications were found conforming with Policy NH-8.

5. When Policy NH-8 has been used as a comparative factor in prior reviews, it has been applied to point out which applicants were conforming or non-conforming to the Policy. Although the Agency may have referenced Policy NH-8 within the comparative analysis in prior reviews, no Agency findings were brought forth in which the Agency found one applicant more effective than another as to Policy NH-8 when all applicants were found conforming.

6. The Heritage and Hillcrest proposals were compared to all applicants in this review notwithstanding the Agency determinations with respect to non-conformities. In this review, Mr. McKillip considered what Hillcrest and The Heritage proposed with respect to all of the comparative factors addressed within the comparative analysis.

7. Both BellaRose and The Heritage addressed plans to provide a home-like setting and a less institutional environment. Although The Heritage proposed a three-story facility design with elevators, The Heritage described its project as proposing to create a home-like living space, with a less institutional design.

8. The Agency considers cost, charges, and Medicaid access as comparative factors in every CON review. Considering the weight or significance to be placed upon various factors within the review, the Agency considers the factor of Medicaid access to be a factor that will always be important in the selection of applicants for approval. Access to medically underserved groups including the Medicaid population is a matter of significant concern and is one of the reasons why North Carolina maintains a Certificate of Need program. Generally, an applicant proposing the higher Medicaid percentage is the more effective alternative with regard to the Medicaid access comparative factor.

9. The Agency determined that BellaRose, along with Britthaven and Liberty, projected the highest percentage of total patient days to be provided to Medicaid recipients, at 72 percent. Hillcrest proposed 49.1 percent of total patient days to be provided to Medicaid recipients. BellaRose, Britthaven, and Liberty were more effective alternatives than Hillcrest under the comparative factor Access by Underserved Groups. The Heritage proposed 55.4 percent of total patient days to be provided to Medicaid recipients. BellaRose, Britthaven, and Liberty were more effective alternatives The Heritage under the comparative factor Access by Underserved Groups.

10. The Hillcrest Application was properly found nonconforming to Criteria 1, 4, 13c, and 18a as a result of its low projected days of service to Medicaid recipients. As a result, the Hillcrest Application could not have been awarded a CON regardless of the relative effectiveness of the Hillcrest Application on the various comparative factors. In addition, all of the Agency witnesses testified that the Hillcrest application was comparatively less effective than the approved applications, and that even if the Agency had found the application fully conforming to the review criteria, it would not have approved Hillcrest.

11. Mike McKillip, Project Analyst at the Agency's CON Section, and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that, as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior.

12. Kathy Platt, who was admitted as an expert in health care planning and submission of CON applications, and who testified on behalf of Liberty, opined that as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior. (Joint Ex. 123).

13. Daniel Carter, who was admitted as an expert in CON review and analysis and health planning, and who testified on behalf of Hillcrest, testified that as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior.

14. Doug Suddreth, who was admitted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and design and how care practices and work care practices flow from such design, and who testified on behalf of Britthaven and BellaRose, opined that as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior.

15. The Liberty Application was a more effective alternative than The Heritage Application on nine (9) comparative factors. (Joint Ex. 1). The Heritage Application was a more effective alternative than the Liberty Application on three (3) comparative factors. (Joint Ex. 1). The Liberty Application and The Heritage Application could not be compared on the comparative factor involving Assistant Director of Nursing salaries, since The Heritage Application did not propose an Assistant Director of Nursing position. (Joint Ex. 1).

16. The Heritage Application should have been found conforming to Criteria 1, 4, 13c, and 18a, and should therefore have been found conforming to all applicable review criteria. However, all three Agency witnesses agreed that even if the Heritage Application were fully conforming, it was comparatively less effective on the comparative factors and would not have been approved in this Review.

17. The Heritage's expert witness, Daniel Carter, acknowledged that the Heritage Application was a less effective alternative than the other approvable applicants when evaluated on the factors on which the Agency compared the applications, and would have only been found comparatively more effective by weighing the factors differently than the Agency did and by relying on comparative factors that the Agency, in its discretion, did not use.

18. Mike McKillip, Project Analyst at the Agency's CON Section, and Martha Frisone, Assistant Chief of the Agency's CON Section, testified that the Liberty Application and the Britthaven Application were comparatively close.

19. The Liberty Application was a more effective alternative than Britthaven on seven (7) comparative factors. (Joint Ex. 1). The Britthaven Application was a more effective alternative than the Liberty application on five (5) comparative factors. (Joint Ex. 1). The Liberty Application and the Britthaven Application were tied on one (1) comparative factor, geographic distribution of beds. (Joint Ex. 1).

20. Not all comparative factors are given equal weight. Ms. Frisone testified that private pay charges, Medicaid access, and operating costs can easily be determining factors.

Britthaven was more effective with regard to both Medicaid access and operating costs (Joint Ex. 1). Mr. McKillip testified that salaries, taxes, and benefits generally carry less weight in the comparative analysis. The testimony reflects that the fact that one applicant may have more factors on which it is effective is not determinative.

21. Ms. Frisone stated that "if both Liberty and Britthaven were determined to be conforming on all statutory review criteria and there was [sic] only 120 beds left to award, that the applications based upon the comparative review . . . were basically too close to call as to who would have been the competitively superior or more effective alternative." (Frisone T. Vol. 35 pp. 8187-88).

22. The need determination in the SMFP was for 240 beds. Britthaven asserts that in this case, the Agency could have approved both the Liberty Application for 120 beds and the Britthaven Application for 120 beds consistent with the determinative limit of 240 additional beds in Wake County, and disapproved all other applicants.

23. By challenging only Britthaven, Liberty offered no evidence to demonstrate how the Liberty Application would have fared in a comparative analysis including BellaRose and/or Universal, the two other applicants approved in the Agency's decision.

24. There are multiple possible outcomes in which Liberty could be found comparatively superior to Britthaven without resulting in denial of Britthaven's application, including: (1) Liberty and Britthaven (both of which proposed a 120-bed facility) were the two most effective applicants, in which case each would be approved for 120 beds (total of 240 beds). All other applicants would have been denied. (2) Liberty, Britthaven and BellaRose were considered equally effective, and all three are approved subject to the condition that they develop no more than 80 beds each (total of 240 beds). All other applicants would have been denied. (3) Liberty and Britthaven (both of whom filed multiple applications targeting different areas of the County) were considered the most effective applicants; the Agency approves the Britthaven Brier Creek application and the Liberty application proposing a facility in Garner (Project ID J-8723-11) or, alternatively, the Liberty North Raleigh application and the Britthaven application proposing a facility in Garner (Project ID J-8715-11). (*See* Joint Ex. 1).

25. Britthaven asserts that the evidence in the record does not establish that approval of the Liberty Application would necessitate or require disapproval of the Britthaven Application.

26. Britthaven further asserts that Liberty alleged that its application was comparatively superior to all other applicants, (Liberty Re-Filed Pet. for Contested Case Hearing) but at hearing failed to put on any evidence with respect to two applicants, BellaRose and Universal.

27. BellaRose intervened in and participated with all the rights of a party to this contested case and suffered no prejudice as a result of Liberty's decision not to challenge the approval of the BellaRose application.

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28. Liberty asserts that its decision not to challenge the approval of the BellaRose Application is not fatal to its challenge to the approval of the Britthaven Application. Liberty cites N.C. Gen. Stat. § 131E-188(a) which states that an affected party may initiate a contested case hearing "[a]fter a decision of the [Agency] to issue, deny or withdraw ***a*** [CON]." (emphasis added). Liberty further asserts that the statute then provides that in the event such a contested case hearing is initiated, "the [Agency] shall send notification of the petition to the proponent of each application that was reviewed with the application for a [CON] that is the subject of the petition." N.C. Gen. Stat. § 131E-188(a).

29. Liberty further cites 10A N.C. Admin. Code 14C.0401(a) which states that the Agency "will not issue a [CON] to an applicant so long as any affected person has filed a petition for contested case challenging the decision to award a certificate to that applicant[.]"

30. N.C. Gen. Stat. § 131E-188 supports the finding that while multiple CON applications may have been approved in a review, a decision regarding the approval of just one of those applications may be challenged in a contested case hearing. Further 10A N.C. Admin. Code 14C.0401(a) supports and confirms that an affected person is entitled to challenge only a subset of approved CON applications.

31. Even though Liberty only filed a challenge to the approval of the Britthaven application, Liberty would be able to meet its burden of proving that it is entitled to receive a CON in this case if the preponderance of the evidence shows that: (a) the Liberty Application conformed to all statutory criteria; and (2) the Liberty Application was comparatively superior to the remaining applications (absent BellaRose) in this case that conformed to all statutory criteria.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

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

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

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3. To obtain a CON for a proposed project, a CON Application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an Application fails to conform to any one of these criteria, then the Applicant is not entitled to a CON for the proposed project as a matter of law. *See Presbyterian-Orthopaedic Hospital v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996) (holding that "an application must comply with *all* review criteria" and that failure to comply with one review criteria supports entry of summary judgment against the applicant) (emphasis in original); *see also Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Human Res.*, 136 N.C. App. 103, 109, 523 S.E.2d 677, 681 (1999) ("[A]n application must be found consistent with the statutory criteria before a CON may be issued")

4. In a competitive review, the Agency must first evaluate each Application on its own merits, and then perform a comparative review to determine which Applicant is the superior applicant, and should receive the CON. *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 464 (1995)

5. The Agency has statutory authority to approve an Applicant with conditions that ensure the project conforms to applicable review criteria. N.C. Gen. Stat. § 131E-186; 10A N.C.A.C. 13C .0201(a); *see also Dialysis Care of N.C., LLC v. N.C. Dep't of Health and Human Svs.*, 137 N.C. App. 638, 648-51, 529 S.E.2d 257, 263-64 (2000), aff'd *per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000) (affirming conditional approval of an Application regarding availability and commitment of portion of funding required for proposed project); *In re Humana Hosp. Corp. Inc. v. N.C. Dep't of Human Res.*, 81 N.C. App. 628, 632 345 S.E.2d 235, 237 (1986) ("the law does not require that applications for certificates of need be approved precisely as submitted or not at all, and it would be folly if it did so").

6. The subject matter of this contested case is the Agency's decision to approve the BellaRose Application and the Britthaven Application and to disapprove the Applications of Liberty, Hillcrest and The Heritage. N.C. Gen. Stat. § 131E-188(a); *Presbyterian Hospital v. N.C. Dept. of Health and Human Services,* 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006); *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). The subject matter of this contested case is an Agency decision that, in part, properly approved BellaRose. That decision is not challenged by Liberty or Britthaven. As to the decision to approve BellaRose, only Hillcrest and The Heritage are Petitioners.

7. In CON contested cases, the ALJ is limited to considering that evidence that was presented or available to the Agency during the review period. *See, e.g., Dialysis Care of North Carolina, LLC v. N.C. Dep't of Health and Human Servs.*, 137 N.C. App. 638, 647-48, 529 S.E.2d 257, 262 (2000); *In re Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791 (1987) ("The hearing officer is properly limited to consideration of evidence which was before the Section when making its initial decision, but the hearing officer is not limited to that part of the evidence before it that the Section actually relied upon in making its decision.")

8. Deference is owed to an Agency's interpretation of a law "so long as the Agency's interpretation is reasonable and based on permissible construction of the statute." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.,* 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006).

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9. The weight of the Agency's interpretation in a particular case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it a power to persuade, if lacking power to control." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't Health and Human Servs.*, 201 N.C. App. 70, 72, 685 S.E.2d 562, 565 (2009) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005).

10. Administrative agency decisions may be reversed as arbitrary and capricious upon a showing that they are "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment.'" *ACT-UP Triangle v. Comm'n for Health Services for the State of North Carolina*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).

11. In a nursing home review, Criterion 1 requires each applicant to demonstrate conformity with Policy NH-8. *See* N.C. Gen. Stat. § 131E-183(a)(1); (Agency Ex. 818).

12. Policy NH-8 requires applicants proposing new facilities to demonstrate that they will pursue innovative approaches in care practices, work place practices, and environmental design that address quality of care and quality of life needs of the residents. (*See* Agency Ex. 818).

13. The Agency may not compare applications for purposes of determining conformity to the review criteria. *Britthaven, Inc. v. N.C. Dep't of Health & Human Servs.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 461 (1995). Conformity is a pass-fail standard, and it is not material in evaluating conformity whether one applicant may have proposed a more innovative design than another.

14. As such, the Agency could not find BellaRose, Liberty and Britthaven nonconforming to Policy NH-8 (and therefore Criterion 1) based on a comparison of the relative merits of the BellaRose, Liberty and Britthaven proposed designs to the Heritage proposed design.

15. Each of the Applicants proposed design decentralizes nursing functions and promotes a more homelike environment, consistent with the purposes of Policy NH-8. The Agency therefore did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule, and when it found that all Applicants were properly conforming with Policy NH-8.

16. The Agency has adopted performance standards applicable to nursing home reviews to assist in the application of Criteria 3 and 6 to individual applications and reviews. 10A NCAC 14C.1102. The performance standards do not require any applicant who proposes a new nursing facility with new nursing beds to address past utilization for any nursing facility, nor do they require the projection of future utilization for any nursing facility other than the proposed new facility. 10A NCAC 14C.1102(a), (b).

17. Petitioners do not challenge the appropriateness of the performance standards, and indeed they cannot do so in these contested cases. *See* 10A NCAC 14C.0402 (stating that in an

appeal from a CON decision, "[t]he correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing").

18. With respect to Criterion 3, the Agency properly found Britthaven conforming, in part based on Britthaven's meeting the performance standard promulgated in 10A NCAC 14C.1102(b). Further, the Agency properly determined that neither the utilization level at Tower nor the status of the relocation of 90 beds to Holly Springs would have any effect on utilization of 120 new beds at a new building in the Brier Creek area. The Agency did not err in finding Britthaven conforming with Criterion 3.

19. With respect to Criterion 4, utilization of the existing Tower facility and the status of the relocation of 90 beds to Holly Springs are irrelevant. Criterion 4 requires an applicant to address alternative methods of meeting the needs of the proposed project, which in this case was for new nursing home beds in Wake County. Britthaven adequately addressed alternatives for meeting this need, and the Agency did not err in finding Britthaven conforming with Criterion 4.

20. With respect to Criterion 6, the Agency properly found Britthaven conforming, in part based on Britthaven's meeting the performance standard promulgated in 10A NCAC 14C.1102(b). Further, the Agency properly determined that there was no unnecessary duplication of existing or approved health service capabilities or facilities because there was a need for 240 additional nursing beds in Wake County, and Britthaven proposed a facility in an area of Wake County with a shortage of nursing beds.

21. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by finding Britthaven conforming with Criteria 3, 4 and 6.

22. Because the CON Section found that The Heritage's Application conformed with Criterion 5, BellaRose has the burden of demonstrating that the Agency violated the standards of N.C.G.S. § 150B-23(a) when it found The Heritage conforming with Criterion 5. BellaRose did not meet its burden of showing by a preponderance of the evidence that The Heritage failed to conform with Criterion 5.

23. The Agency did not act erroneously or violate any of the other standards of N.C.G.S. § 150B-23 in determining that The Heritage's Application conformed with Criterion 5.

24. The Agency erred and acted in contradiction of law by limiting the geographic scope of Criterion 20 to facilities located in the county where the proposed project was to be located in determining conformity with Criterion 20.

25. In considering the geographic scope of Criterion 20, the first step is to review the plain language of the statute to determine if it explicitly supports the Agency's interpretation. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 274-75, 573 S.E.2d 118, 121 (2002).

26. Nothing in the plain language of Criterion 20 suggests that the General Assembly intended the Agency to limit its review of past quality of care provided by existing providers to facilities located in the county where the proposed facility would be located. Moreover, the

language of Criterion 20 does not support a reading of the statute that allows the Agency to ignore existing health service providers on the basis that the services are provided outside the county where the proposed project is to be located. Instead, the plain language of Criterion 20 very explicitly states, without qualification, that if the applicant is an existing provider of health service, that provider must demonstrate that it has provided quality of care in the past. N.C.G.S. § 131E-183(a)(20).

27. The Agency and Britthaven contend that since the service area for the need allocation is Wake County, Criterion 20 should be interpreted to limit quality of care review to Wake County. However, one bedrock principle of statutory construction is that the court must consider a statute as a whole and presume that the legislature understood its choice of words when drafting the statute. *Housing Auth. of Greensboro v. Farabee*, 284 N.C. 242, 245, 200 S.E.2d 12, 15 (1973); *see also N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. 763, 768, 675 S.E.2d 709, 711 (2009) (if legislation includes particular language in one section but omits it in another, it is presumed the legislature acted intentionally).

28. Unlike Criterion 20, in enacting Criterion 13(a), the General Assembly limited the use of the comparison to be made by the Agency to the "applicant's service area". N.C.G.S. § 131-183(a)(13)(a). Similarly in Criterion 18, the applicant must only demonstrate the effects on competition in the proposed "service area". N.C.G.S. § 131-183(a)(18). If the General Assembly had intended to limit the Agency's consideration of quality to only the proposed "service area", which in this case is Wake County, it would have included such language in Criterion 20 as it did in Criteria 13(a) and 18. *Farabee*, 284 N.C. at 245, 200 S.E.2d at 15; *N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. at 768, 675 S.E.2d at 711.

29. In interpreting a statute, a court should also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute. *O & M Industries v. Smith Engineering Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 349 (2006).

30. The General Assembly has unambiguously determined that the general welfare and protection of lives and health of the citizens of North Carolina require that proposed health services be reviewed and evaluated as to quality of care. N.C.G.S. § 131E-175(7). Criterion 20 further makes clear the General Assembly's intent that an existing provider's past quality of care should be considered. N.C.G.S. § 131E-183(a)(20). The CON Section's interpretation of Criterion 20 impairs the purpose of the statute by restricting the Agency's quality review to such a limited and arbitrary geographic area.

31. While traditionally the interpretation of a statute by an agency created to administer the statute is accorded some deference, "those interpretations are not binding, and the weight of such an interpretation in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Total Renal Care Of North Carolina, LLC v. North Carolina Dept. of Health and Human Services, Div. of Facility Services, Certificate of Need Section*, 171 N.C. App. 734, 615 S.E.2d 81 (2005). The Agency's interpretation of the geographic scope of Criterion 20 is not based on thorough consideration or valid reasoning.

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32. The nursing facility application form requires applicants to provide state-wide quality of care information. N.C.G.S. § 131E-182(b) requires that applicants "be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. § 131E-183 and with duly adopted standards, plans and criteria." By creating a policy that ignores and treats as irrelevant the state-wide quality of care information that has been requested in the application form, the Agency has erred and acted contrary to N.C.G.S. § 131E-182(b).

33. A state-wide review of all of the nursing facilities operated by an applicant is consistent with the importance that the General Assembly placed on awarding CONs to quality providers when it created the CON statute. (*See* N.C.G.S. § 131E-175(7); *see also* Agency Ex. 818, p. 2, CON Basis Principle No. 1).

34. The Agency's policy of ignoring quality issues that exist outside the county under review is inconsistent with the importance that the General Assembly has placed on quality in the CON statute and is not in the best interest of future nursing home patients.

35. N.C.G.S. § 131E-182(b) and the CON Section's Nursing Facility Application provides an additional justification for finding that the Agency was required to conduct a state-wide review of quality in this case.

36. N.C.G.S. § 131E-182(b) requires that the Agency only request information in its application form that is necessary to determine whether the proposed project is consistent with the review criteria.

37. The nursing facility application created by the CON Section specifically requires applicants to provide quality information for all facilities the applicant owns or operates in North Carolina and does not limit its request only to the county where the proposed project will be located. (Joint. Ex. 6).

38. Based on the language of N.C.G.S. § 131E-182(b), by requesting survey history for all facilities in the state, the Agency has determined that state-wide information is necessary to determine conformity with Criterion 20. It is unreasonable and contrary to N.C.G.S. § 131E-182(b) for the Agency to request information from applicants and ignore that information.

39. Based on the above, the Agency was required to consider quality information on a statewide basis. The Agency failed to meet this requirement by only considering quality information relating to Wake County facilities.

40. The Heritage and Hillcrest provided quality care in the past in their existing North Carolina facilities. They each established that their individual applications conformed to Criterion 20. It was error for the Agency to find that Criterion 20 (N.C. Gen. Stat. § 131E-183(20)), which requires that "[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past," was inapplicable to them.

41. The plain language of the phrase "in the past" in N.C. Gen. Stat. § 131E-183(20) coupled with 10A N.C. Admin. Code 14C.0204's prohibition against amending applications

leads the Undersigned to the conclusion that the relevant look-back period under Criterion 20 is the eighteen (18) months prior to the application date.

42. The Agency's creation of an application form that requires an applicant to disclose its history of providing quality care during the eighteen (18) months immediately preceding the submittal of the application mandates the conclusion that the appropriate Criterion 20 look-back period is the eighteen (18) months immediately preceding the submittal of the application, since N.C. Gen. Stat. § 131E-182(2) prohibits the Agency from creating an application form that requires the applicant to furnish anything more than that which is necessary to a determination of whether the application is consistent with the applicable standards, plans and criteria.

43. The Agency therefore acted erroneously and contrary to the law by creating a policy by which it ignores and treats as unnecessary information that is specifically requested in its application form. It is erroneous and in contradiction of the law for the Agency to implement review policies which serve to make irrelevant information specifically requested in the application form.

44. In regard to the Agency's review of quality information that arises after the application is filed but before the decision is made, it is well-settled law that the Agency is permitted to consider information not contained in the application, but nevertheless available to the Agency at the time it made its decision. *In re Wake Kidney Clinic, P.A,* 85 N.C.App. 639, 643355, S.E.2d 788, 791 (1987).

45. Criterion 20 and N.C.G.S. § 131E-182(b) do not restrict in any way the Agency's ability to consider information made available after the application is submitted but before the decision has been made. (Agency Ex. 11). The Agency's policy of reviewing quality information made available to it after the application is submitted but before the decision is made does not violate any of the standards of N.C.G.S. § 150B-23(b). It is reasonable and consistent with the requirements of the CON law for the Agency to consider also quality information for the time period between the filing of the application and the date the decision is issued.

46. Based on the above, the relevant time for the Agency's Criterion 20 review in this case should extend from eighteen months prior to the submission of the applications until the Agency issues its decision.

47. In order to fulfill its obligation of determining whether applications are consistent with statutory review criteria, the Agency must perform a meaningful analysis.

48. To perform a meaningful analysis of whether an application conforms to Criterion 20, the Agency must analyze and give due regard to the information available to it that is reasonably related to an applicant's history of providing quality care.

49. In this case, the Agency did not analyze or give due regard to the substantial information available to it that was reasonably related to the applicants' history of providing quality care. Specifically, the Agency did not analyze or give due regard to the public comments regarding the quality issues at Britthaven facilities or any of the other Applicants across the

State. Likewise the Agency did not analyze information available to it related to any of the Petitioners' histories of providing quality of care throughout the State.

50. By failing to analyze or give due regard to the substantial information available to the Agency that was reasonably related to the applicants' history of providing quality care, the Agency failed to perform a meaningful analysis of whether the applications conformed to Criterion 20.

51. By failing to perform a meaningful analysis of whether the applications conformed to Criterion 20, the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20.

52. Since the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20, the Agency substantially prejudiced Liberty's, The Heritage's, and Hillcrest's rights and (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; (d) acted arbitrarily and capriciously; and (e) failed to act as required by law or rule.

53. Given the vast disparity between providers in the size of their operations and numbers of facilities, a statewide "zero-tolerance" policy – in which a single substandard quality of care citation would result in nonconformity – would set a much higher bar for larger providers such as Britthaven and Liberty than it would for a provider like Hillcrest or The Heritage. Such an approach would set the bar for conformity unreasonably high, significantly reduce the pool of approvable applicants, and prevent good providers from serving the State.

54. The Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule by not applying either of Heritage's and Hillcrest's proposed "zero tolerance" standards under Criterion 20, under which an applicant would be found nonconforming if any facility owned, operated or managed by the applicant or a related entity received a "substandard quality of care" and/or an "immediate jeopardy" citation anywhere in North Carolina.

55. The plain language of Criterion 20 does not require any such zero-tolerance standard, and nothing in the text or legislative findings of the CON Act, or any other statute suggests that the General Assembly intended for the Agency's inquiry under Criterion 20 to function in such a manner. Further, no rule requires the interpretation advocated by The Heritage and Hillcrest.

56. Since a statewide "zero-tolerance" interpretation is unreasonable, inequitable, inconsistent with Agency practice, and would not effectively achieve the purposes of the CON Act, the agency acted properly and within its discretion in not adopting such interpretation.

57. Liberty identified and addressed the issues of substandard quality of care at its facilities and took steps to prevent similar problems in the future. The events constituting substandard quality of care at Liberty facilities were isolated and unrelated.

58. Since the two Forsyth County facilities acquired by Liberty did not experience any quality-related events after Liberty's acquisition of the facilities, they are not relevant to the

Criterion 20 analysis in this case and Liberty's inadvertent exclusion of them from Table 6 was harmless error. Since Liberty's Johnston County facility did not experience any quality-related events in the eighteen (18) months prior to the filing of the Liberty Application, it is not relevant to the Criterion 20 analysis in this case and Liberty's inadvertent exclusion of it from Table 6 was harmless error.

59. Liberty's erroneous statement that it was awaiting an Informal Dispute resolution for the appeal from the findings of the survey at Liberty's Rowan County facility was inadvertent and harmless error because Liberty fully disclosed in the Liberty Application the circumstances surrounding the survey.

60. Liberty met its burden at the hearing of establishing that it had provided quality care in the past in its existing North Carolina facilities. Liberty met its burden of establishing that the Liberty Application conformed to Criterion 20. Because Liberty's Application was conforming to Criterion 20, it was also conforming to Criteria 1, 4 and 18a.

61. By finding the Liberty Application nonconforming to Criteria 1, 4, 18a and 20, the Agency substantially prejudiced Liberty's rights and (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; (d) acted arbitrarily and capriciously; and (e) failed to act as required by law or rule.

62. Britthaven had an obligation under the CON law and Agency regulations, as well as a responsibility to the citizens of this State, to fully, completely and truthfully fill out Table 6 of the CON application form. Britthaven's intentional failure to fully, completely and truthfully fill out Table 6 of the CON application form was misleading and contrary to its legal requirements.

63. Even if the Agency's traditional Criterion 20 analysis was limited to the county at issue in the review, Britthaven was not excused of its obligation to fully, completely and truthfully fill out Table 6 of the CON application form.

64. By failing to fully, completely and truthfully fill out Table 6 of the CON application form, Britthaven failed to meet its burden of proving that it provided quality care in the past under Criterion 20.

65. The Agency must conduct an assessment of all relevant information in support of and indeed in opposition to an application. To do so the Agency must be able to rely on all information requested within the application. Britthaven's intentional omissions regarding quality of care prevents the Agency from conducting that independent evaluation that it must to assure itself and indeed the public of a fair and honest judgment on the issue. The failure to provide that information necessarily prevents the required evaluation and necessarily makes the Agency's decision regarding Britthaven's past quality of care arbitrary and capricious.

66. Britthaven's failure to meet its requirement of proving that it provided quality care in the past under Criterion 20 renders the Britthaven Application nonconforming and therefore unapprovable.

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67. By finding the Britthaven Application conforming to Criterion 20, the Agency substantially prejudiced Liberty's, The Heritage's, and Hillcrest's rights and (a) exceeded its authority or jurisdiction; (b) acted erroneously; (c) failed to use proper procedure; (d)acted arbitrarily and capriciously; and (e) failed to act as required by law or rule.

68. Testimony by Agency witnesses that the Agency's computation of the county average service to Medicaid for purposes of determining conformity of Criterion 13(c) may depend upon whether a hospital-affiliated nursing facility applies is contrary to the requirement that applications must be reviewed individually against each of the statutory and regulatory review criterion as set forth in *Britthaven*.

69. Applying the requirements of Criterion 13(c) in a different manner, depending upon whether or not a hospital-affiliated applicant is involved, is arbitrary and capricious and contrary to the plain language of Criterion 13(c).

70. The Agency acted erroneously, failed to act as required by law and acted arbitrarily and capriciously in determining that The Heritage Application failed to conform with Criterion 13(c). N.C.G.S. § 131E-183(a)(13)(c). In applying this criterion to The Heritage Application, the CON Section acted erroneously and arbitrarily in excluding nursing facility beds in hospital-affiliated nursing facilities to calculate the county average and using that average to find The Heritage nonconforming with the criterion. The Heritage's calculation of service to Medicaid at 55.4% conforms with Criterion 13(c).

71. The only reason that The Heritage Application was found nonconforming with Criteria 1 (Policy GEN-3), 4, and 18(a) was the Agency's determination under Criterion 13(c) that The Heritage did not project sufficient Medicaid access. (Joint Ex. 1). Because The Heritage projected sufficient Medicaid access and conforms with Criterion 13(c), The Heritage also conforms with Policy GEN-3 and statutory Criteria 1, 4, and 18(a).

72. Hillcrest, projecting that its service to Medicaid will be less than 50%, did not demonstrate that it would provide adequate access to the medically underserved Medicaid population of Wake County. The CON Section did not err in determining that the Hillcrest Application failed to conform with Criterion 13(c). N.C.G.S. § 131E-183(a)(13)(c). Because the Hillcrest Application was properly found nonconforming to Criteria 1, 4, 13(c), and 18(a), the Agency did not err in failing to award Hillcrest a CON.

73. In a Certificate of Need review involving more than one applicant, each applicant must be reviewed individually against each of the applicable statutory and regulatory review criterion before a comparative review is conducted. *Britthaven v. NC DHHS*, 118 N.C. App. 379, 385, 456 S.E.2d 455, 460 (1993).

74. The particular factors used to compare applications in any given review are within the Agency's discretion. *Craven Reg'l Med. Aut. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006) ("There is no statute or rule which requires the Agency to utilize certain comparative factors.") *see also Total Renal Care of N.C. v. N.C. Dep't of Health & Human Servs.*, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005) (affirming

Agency's use of a comparative factor because it was within the established criteria and not inconsistent with the legislative findings in the CON law).

75. The comparative factors chosen by the Agency, in its discretion, were appropriate, consistent with Agency practice, and were consistent with the language and the legislative findings of the CON law. The Agency was not required to use any additional factors, and the Agency did not err in electing not to use such factors in this Review.

76. Based on the Findings of Fact above, particularly the testimony of experts, the Liberty Application was a more effective alternative than The Heritage Application on more comparative factors, and therefore as between the Liberty Application and The Heritage Application, the Liberty Application was comparatively superior. Though The Heritage was conforming with Criteria 13(c), the stark comparison of service to Medicaid (demonstrating adequate access to the medically underserved) between it and Liberty is a determining factor in the comparatively superior finding for the Liberty Application.

77. Based on the Findings of Fact above, particularly the testimony of experts, the Britthaven Application was a more effective alternative than The Heritage Application therefore as between the Britthaven Application and The Heritage Application, the Britthaven Application was comparatively superior. Though The Heritage was conforming with Criteria 13(c), the stark comparison of service to Medicaid (demonstrating adequate access to the medically underserved) between it and Britthaven is a determining factor in the comparatively superior finding for the Britthaven Application.

78. Based on the Findings of Fact above, particularly the testimony of experts, the BellaRose Application was a more effective alternative than The Heritage Application therefore as between the BellaRose Application and The Heritage Application, the BellaRose Application was comparatively superior. Though The Heritage was conforming with Criteria 13(c), the stark comparison of service to Medicaid (demonstrating adequate access to the medically underserved) between it and BellaRose is a determining factor in the comparatively superior finding for the BellaRose Application.

79. Because the Heritage Application was conforming with all applicable review criteria, it was an approvable application in the Review. However, applying the factors used by the Agency, the Heritage Application is not one of the three most effective applications in the Review. As a result, the Agency did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in in denying the Heritage Application.

80. Although the Agency approved three applicants, Liberty appealed only the approval of Britthaven, alleging in its petition for contested case hearing that the approval of Britthaven, and no other applicant, was error and substantially prejudiced Liberty's rights. (Liberty Re-Filed Pet. for Contested Case Hearing pp. 4-5 stating that the petition "specifically challenges the CON Section's decision to approve the Britthaven-Brier Creek Application and to deny the Liberty-North Raleigh Application" and that "Liberty-North Raleigh is not appealing or

otherwise challenging the CON Section's decisions to conditionally approve the BellaRose and Universal Applications").

81. Liberty failed to put on evidence to show how Liberty would have fared in the comparative analysis if it were compared against all approvable applicants. Liberty put on testimony comparing Liberty against Britthaven, but omitted any comparison with the other approved applicants, BellaRose and Universal.

82. Since the Agency does not rank applicants as part of the comparative analysis, comparing Liberty against Britthaven does not indicate how either of them would compare with any other approvable applicant. Therefore, even if Liberty's application were comparatively superior to Britthaven's, Britthaven could still be approved if it were one of the most effective applications in the Review.

83. The evidence presented shows that a comparison between Britthaven and Liberty was and is extremely close and that Liberty, as the party with the burden of proof, did not show that it was comparatively superior to Britthaven. Unless Liberty proves that Britthaven would not have been approved, the Undersigned cannot reverse the award of a CON to Britthaven.

84. Britthaven had an obligation to fully fill out Table 6 of the CON application form. By failing to make a serious effort in completely and truthfully filling out Table 6 of the CON application form (and in fact intentionally omitting information partly under the belief the Agency would not review information outside of Wake County), Britthaven prevented the Agency from evaluating its care to patients; and as such, Britthaven failed to meet its burden of proving that it provided quality care in the past under Criterion 20. Britthaven's failures in this renders the Britthaven Application nonconforming and therefore unapprovable.

85. On multiple occasions witnesses in this hearing and counsel in argument invited the Undersigned to find another way or ways of evaluating Criteria 20. That is not the role of the Office of Administrative Hearings (OAH) or the purposes of a contested case hearing, and thus the Undersigned declines to offer specific methods for the Agency. That is the role of rulemaking and this hearing brings forth the importance of rulemaking in offering fair and consistent evaluations in these type of Certificate of Need cases. Indeed, the manner in which the Agency determines to define a county Medicaid average for purposes of applying Criterion 13(c) was also an issue in these cases and one in which no rules were in place.

86. Like most jurisdictions, North Carolina and indeed the OAH must look to protect the integrity of its APA procedures, by not permitting "an agency to rely on its unexpressed intentions to trump the ordinary import of its regulatory language." *Safe Air for Everyone v. U.S. E.P.A.*, 475 F.3d 1096 (9th Circuit, 2007). The Court in *Safe Air* goes on to state:

> . Courts' reliance on the "plain meaning" rule in this setting [of interpreting regulations] is not a product of some fetishistic attraction to legal "formalism." In order to infuse a measure of public accountability into administrative practices, the APA mandates that agencies provide interested parties notice and an opportunity for comment before promulgating rules of general applicability.

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> This right to participate in the rulemaking process can be meaningfully exercised, however, only if the public can understand proposed rules as meaning what they appear to say. Moreover, if permitted to adopt unforeseen interpretations, agencies could constructively amend their regulations while evading their duty to engage in notice and comment procedures.

Safe Air for Everyone v. U.S. E.P.A., 475 F.3d 1096, 1106 (9th Circuit, 2007)

87. Regardless of long standing interpretations of relevant statutes or administrative rules, where the reasons for some are lost in time and the ramifications of following them are contrary to the language of the applicable statutes, stakeholders must look to restore the true purposes behind those statutes. The promulgation of rules that are truly called for in these cases in certain areas would not only allow the Agency to logically set forth consistent standards but would allow the interested private parties the opportunity to comment on and assist in formulating those eventual methods by which the Agency knows, and all parties understand, future requirements that they face in applying for a Certificate of Need.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned enters the following Final Decision pursuant to N.C. Gen. Stat. § 150B-34 and N.C. Gen. Stat. § 131E-188, based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on those conclusions and the facts in these consolidated cases, the Undersigned holds that the Petitioners, The Heritage and Hillcrest failed to carry their burden of proof by a greater weight of the evidence that each of their denial of a Certificate of Need was in error.

The Agency did not err when it approved the application filed by BellaRose to develop a 100-bed nursing facility in Wake County; and determined that a written statement describing the project's plans to assure water conservation deficiency could be conditioned. The Agency finding that BellaRose was approved subject to the condition that it submit documentation that meets the requirements of Policy GEN-4 was proper, within the Agency's authority, and in accordance with appropriate law.

Based on the evidence and Conclusions of Law in these consolidated cases, the Undersigned holds that the Petitioner, Liberty did carry their burden of proof by a greater weight of the evidence that their denial of a Certificate of Need was in error. In denying the Liberty

Application in Project I.D. No. J-8727-11, the Respondent substantially prejudiced Liberty's rights and acted erroneously, acted arbitrarily or capriciously and failed to act as required by rule or law. In approving the Britthaven Application for a Certificate of Need, the Respondent substantially prejudiced Liberty's rights and acted erroneously, acted arbitrarily or capriciously and failed to act as required by rule or law.

Reversal of the decision by the Respondent to award a Certificate of Need to Britthaven, and award a Certificate of Need to Liberty is proper and correct as set forth in the Findings of Fact and Conclusions of Law above.

NOTICE

Under the provisions of North Carolina General Statute § 131E-188(b): "Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal of the final decision shall be taken within 30 days of the receipt of the written notice of final decision, and notice of appeal shall be filed with the Office of Administrative Hearings and served on the Department [North Carolina Department of Health and Human Services] and all other affected persons who were parties to the contested hearing."

Pursuant to N.C. Gen. Stat. § 131E-188(b1): "Before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. The bond requirements of this subsection shall not apply to any appeal filed by the Department."

In conformity with the Office of Administrative Hearings' Rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 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.

IT IS SO ORDERED.

This is the 20th day of June, 2013.

Augustus B. Elkins II
Administrative Law Judge

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